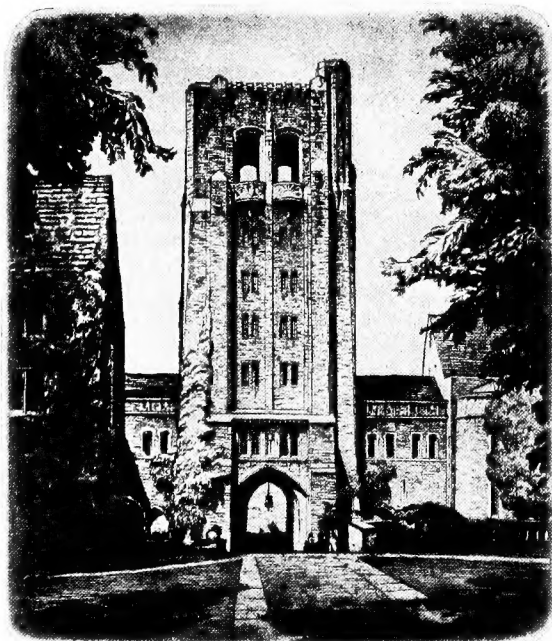


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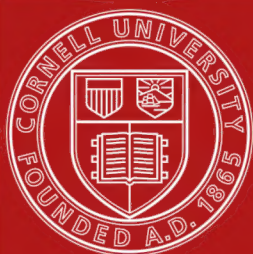
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BLASHFIELD'S
INSTRUCTIONS TO JURIES

CIVIL AND CRIMINAL CASES

INCLUDING

TRIAL PRACTICE

**RELATING TO INSTRUCTIONS AND FORMS OF APPROVED
INSTRUCTIONS ON ALL BRANCHES OF THE LAW**

SECOND EDITION

By The Publishers' Editorial Staff

IN THREE VOLUMES

VOLUME I

CHICAGO
CALLAGHAN AND COMPANY .
1916

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PREFACE TO SECOND EDITION

The first edition of this work was published in 1902. Its success is probably best evidenced by the fact that so many reprints were necessary that the original plates have long been worn out.'

The Law of Instructions, while not a changing subject of jurisprudence, is a constantly developing branch, for the reason that the instructions given by the court to the jury most frequently are the means through which existing principles of law, as applied to changing conditions following the progress of civilization, are presented to the reviewing courts, thus becoming part of the great body of common-law.

The purpose of the present edition is to trace the various developments in the Law of Instructions down to the present time. The original work has been largely rewritten and improved. Over a hundred new chapters have been added.

While the rules governing instructions contained in the first volume are of the greatest value in framing correct instructions and in detecting error in those given for the adverse party, probably the most valuable feature for the practical, busy lawyer is the complete collection of forms. These are grouped under appropriate heads, which are arranged alphabetically, the forms under the various chapters being preceded by a copious index to each chapter as well as being thoroughly indexed in the general index appearing in the third volume. These forms cover practically all branches of the law, including such new features as Automobiles, the Federal Employers' Liability Act, and the Workmen's Compensation Acts. The collection of forms upon the various branches of Criminal Law is especially complete.

The advisability of using instructions which have received judicial sanction has been repeated over and over by the courts, for the reason, as was said by the Court in *Minich v. People*, 8 Colo. 440, that it is "the safe practice and obviates the necessity of a consideration of instructions on the subject differently worded." To the same effect is *State v. Allen*, 34 Mont. 403, where the court says: "It is far safer for the trial court to make use of instructions generally approved by the courts, rather than to risk the danger of invading the province of the jury by formulating new ones."

On the other hand the practice of framing instructions from the

language of judicial opinions and text books, has met with constant condemnation. "It is not always safe," says the Missouri Supreme Court, "to take an excerpt from an opinion and embody it in an instruction, because the opinion is addressed to lawyers, while the instruction is addressed to laymen." *Magrane v. St. Louis & S. R. Co.*, 183 Mo. 119. Similarly the Supreme Court of Alabama says: "It often happens that judges in writing opinions, and authors of legal text-books in discussing or defining propositions of law, express themselves in language wholly unsuited for the purpose of instructions to juries." *McGee v. State*, 117 Ala. 229. To the same effect are *Meighan v. Birmingham Terminal Co.*, 165 Ala. 591; *Birmingham Ry. Light & Power Co. v. Barrett*, 4 Ala. App. 347; *Savannah F. & W. Ry. Co. v. Evans*, 115 Ga. 315; *Atlanta & W. P. R. Co. v. Hudson*, 123 Ga. 108; *Macon Ry. & Light Co. v. Vining*, 123 Ga. 770; *Shannon v. Swanson*, 109 Ill. App. 274; *Sciurba v. Metropolitan St. R. Co.*, 73 App. Div. (N. Y.) 170.

These references merely serve to emphasize the value of the collection of some 12,000 approved forms which appear in this edition.

In presenting the work to the profession, the publishers feel confident that it will invoke the same response as that received by the earlier edition.

CALLAGHAN AND COMPANY.

March, 1916.

PREFACE TO FIRST EDITION

The subject of instructions to juries has heretofore received but meager attention, although it is one of the most important phases of a trial. The subject is essentially a practical one, and an attempt has been made in this work to treat it in the most practical manner. It is believed that the profession will prefer well-approved precedents, rather than deductions of the author. Therefore, discussion of theories has been avoided, save those which have received the commendations of the courts; and that the atmosphere of the court room may be more nearly approached, the exact words of the judges are set forth whenever practicable.

Special attention is called to the chapters on the practice in criminal prosecutions, particularly those dealing with cautionary instructions upon "alibi" and "reasonable doubt." The history of the doctrine that the jury may judge both law and fact in criminal cases is exhaustively treated, and the statutory limitations placed upon the judge's power to comment on the evidence are fully worked out.

In connection with every rule or principle stated, exhaustive citations of forms are given. This method has resulted in enormous saving of space for the almost endless and useless repetition of merely formal parts of instructions, and restatement of perfectly familiar propositions of substantive law have thus been avoided. By no other means could the same number of forms be included in a single volume.

DE WITT C. BLASHFIELD.

June 27, 1902.

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INSTRUCTIONS TO JURIES

CHAPTER I.

DEFINITIONS AND DISTINCTIONS.

§ 1. Instructions defined.

§ 2. Distinctions.

§ 3. Equity cases—Declarations of law in cases tried without a jury.

§ 1. Instructions defined.

Instructions have been defined to be announcements to the jury of rules of law to be applied to the facts found,¹ or directions in regard to the law of the case.²

The definition is given more fully by the supreme court of one state which defines instructions as “directions with reference to the law of the case, enabling the jury to better understand their duty and preventing them from arriving at erroneous and wrong conclusions.”³

In another state an instruction has been defined as “an exposition of the principles of the law applicable to the case, or some branch or phase of the case, which the jury are bound to apply in order to render a verdict establishing the rights of the parties in accordance with the facts proven.”⁴

1—Illinois Cent. R. Co. v. Wheeler, 50 Ill. App. 205.

2—Ellis v. People, 159 Ill. 337; Lawler v. McPheeters, 73 Ind. 579; Jenkins v. Wilmington & W. R. Co., 110 N. C. 438.

3—Hanson v. Kent & Purdy Paint Co., 36 Okla. 583; Butler v. Gill, 34 Okla. 814; Leavitt v. Deichmann, 30 Okla. 423.

4—Lehman v. Hawks, 121 Ind. 541. The essential idea involved in the

Statements of rules of law governing the matter in issue or the amount of recovery are instructions.⁵

The instructions, taken as a whole, are frequently spoken of as the "charge to the jury," and in many instances the word "charge" is used as a synonym for the word "instruction."

§ 2. Distinctions.

Literally, the word "instruction" may apply to any direction given to the jury by the court,⁶ but the word is usually more restricted in meaning in those states where statutory requirements exist requiring instructions to be given in writing.⁷

In such states an instruction is usually held to be a positive direction to the jury as to the principles of law applicable to the case on trial,⁸ and not every direction or remark addressed by the court to the jury is an instruction.⁹

§ 3. Equity cases—Declarations of law in cases tried without a jury.

As a general rule, where a case is submitted to the trial court without a jury, instructions count for nothing more than to show the theory on which the court proceeded,¹⁰ and instructions have no place in equity cases, the appellate court not being bound thereby.¹¹

However, in a number of jurisdictions, where an action at law is tried before the court without a jury, the practice

term "instruction" "is that it is authoritative as an exposition of the law, which the jury are bound * * * to obey." Bouvier Law Dict. 310, cited with approval in *Dodd v. Moore*, 91 Ind. 523.

5—*Bradway v. Waddell*, 95 Ind. 170; *Stanley v. Sutherland*, 54 Ind. 339.

6—*Lehman v. Hawks*, 121 Ind. 541.

7—See ch. VI, *post*, "Necessity of Instructing in Writing."

8—See § 44, *post*.

9—*Hinckley v. Horazdowsky*, 133 Ill. 359, 14 Am. Neg. Cas. 312, 8 L. R. A. 490n, 23 Am. St. Rep. 618; *McCallister v. Mount*, 73 Ind. 559; *McCormick v. Ketchum*, 48 Wis. 643.

10—*Butts v. Gunby & West*, 135 Mo. App. 28.

11—*Shelton v. Franklin*, 224 Mo. 342, 135 Am. St. Rep. 537.

But see ch. XXIII, *post*, "Issues out of Chancery."

prevails of presenting to the court propositions of law which the court is requested to declare as legal principles applicable to the facts of the case, and in accordance with which its decision is rendered. Such declarations of law are in some respects quite analogous to the instructions in jury cases, but there are obvious differences. The object of such declarations of law is to enable the reviewing court to see upon what theory or principle the lower court based its judgment.¹²

This practice does not obtain in chancery cases, because in such cases, upon appeal, the case is tried *de novo* upon the pleadings and proofs, and it is therefore immaterial upon what theory the lower court proceeded.¹³

This subject is not regarded as being within the scope of this work, and therefore will receive no further consideration.

12—See, generally, upon this subject, the following cases:

Illinois. Allman v. Lumsden, 159 Ill. 219; Christy v. Stafford, 123 Ill. 464; Loudon v. Mullins, 52 Ill. App. 410; Kraemer v. Leister, 35 Ill. App. 391.

Maryland. Cook v. Gill, 83 Md. 177; Lyon v. George, 44 Md. 295.

Missouri. Rogers v. Johnson, 125 Mo. 202; Dollarhide v. Mabary, 125 Mo. 197; Daudt v. Keen, 124 Mo. 105; Suddarth v. Robertson, 118 Mo. 286; Mayor of Liberty v. Burns, 114 Mo. 426; Krider v. Milner, 99 Mo. 145, 17 Am. St. Rep. 549; Stocker v. Green, 94 Mo. 280, 4 Am. St. Rep. 382n; Mead v. Spalding, 94 Mo. 43; Fairbanks v. Long, 91 Mo. 628; Hisey v. Goodwin, 90 Mo. 366; Harrington v. Minor, 80 Mo. 270; Cooper v. Ord, 60 Mo. 420; Cape Girardeau County v. Harbison, 58 Mo. 90; Weiland v.

Lemuel, 47 Mo. 322; Conran v. Sellew, 28 Mo. 320; Davis v. Scripps, 2 Mo. 187; Blanke v. Dunnerman, 67 Mo. App. 591; Perkins v. School Dist. No. 2, Greene Co., 61 Mo. App. 512; Gage v. Averill, 57 Mo. App. 111; King v. Allemania Fire Ins. Co., 37 Mo. App. 102; Stone v. Pennock, 31 Mo. App. 544; Gaty v. Clark, 28 Mo. App. 332; Lee v. Porter, 18 Mo. App. 377; Gaff v. Stern, 12 Mo. App. 115; Methudy v. Ross, 10 Mo. App. 106; De Laoreal v. Kemper, 9 Mo. App. 77.

13—Wendover v. Baker, 121 Mo. 273; Durfee v. Moran, 57 Mo. 377; Gill v. Clark, 54 Mo. 415; Moore v. Wingate, 53 Mo. 398; Freeman v. Wilkerson, 50 Mo. 554; Hunter v. Miller, 36 Mo. 143; Clouse v. Maguire, 17 Mo. 158; Smith v. St. Louis Beef Canning Co., 14 Mo. App. 526.

CHAPTER II.

NECESSITY AND OFFICE OF INSTRUCTIONS.

§ 4. Object and purpose of instructions.

§ 5. Right to instructions—Duty of court.

§ 4. Object and purpose of instructions.

It is the object and office of instructions to define for the jury and to direct their attention to the legal principles which apply to and govern the facts proved or presumed in the case.¹

It will be noted in a later chapter that the determination of all questions of fact is a matter exclusively for the deter-

1—State v. Clark, 64 W. Va. 625; State v. Dodds, 54 W. Va. 289.

The proper office of an instruction is to lay down the law applicable to a state of facts which the proof tends to establish. Chicago Union Traction Co. v. O'Brien, 219 Ill. 303; Chicago & J. Elec. Ry. Co. v. Spence, 115 Ill. App. 465; Weller Mfg. Co. v. Krumholz, 102 Ill. App. 284.

The office of an instruction is to state the rule of law applicable and pertinent to the matter to be determined. Kelly v. Chicago, R. I. & P. R. Co., 138 Iowa 273, 128 Am. St. Rep. 195.

The purpose of instructions is to guide the jury in the application of right principles to the facts of the case. Terry v. Davenport, 170 Ind. 74.

It is the office of a charge to in-

form the jury plainly and intelligibly as to the rules of law applicable to the issues and evidence and necessary to guide them to a just verdict. Com. v. Dow, 217 Mass. 473.

The most important function of instructions is to declare what rules of law will apply to any state of facts which may be found in the case and to assist the jury in correctly applying these rules to the facts:

Arkansas. Pleasant v. State, 15 Ark. 625.

Illinois. Keeler v. Stuppe, 86 Ill. 309; Hamilton v. Hunt, 14 Ill. 472; Baxter v. People, 8 Ill. 368; First Nat. Bank of Lanark v. Eitemiller, 14 Ill. App. 22.

Kansas. Sawyer v. Sauer, 10 Kan. 466.

Michigan. Lendberg v. Brother-ton Iron Min. Co., 75 Mich. 84; Sou-

mination of the jury, while, on the other hand, the decision of all questions of law arising in a case is a matter exclusively within the province of the court.² Jurors have no knowledge of law and are even unfamiliar with the language in which it is expressed. Accordingly, the purpose of instructions is to enlighten the jury,³ and to submit the questions of fact for their determination.⁴

In this connection it may also be stated that it is the office of instructions to suggest, so far as necessary, the principles of evidence and their application.⁵

A statement of the rules for testing the credibility of witnesses, and estimating the probative force of the various kinds of evidence, is very essential to a correct conclusion, especially where there is considerable conflict in the evidence, and the evidence is nearly in equilibrium.

In submitting questions of fact it is necessary that the issues involved in the case should be stated to the jury, and what issues are raised by the pleadings is a question of law which it is the exclusive province of the court to determine.⁶

To have the jury determine what the issues are would necessarily be productive of great confusion and uncertainty, especially since it is a well known fact that even judges, whose lives have been devoted to a study of the law, frequently find some difficulty in defining the issues. Accordingly, it is the office of instructions to explain to

vais v. Leavitt, 50 Mich. 108; Welch v. Ware, 32 Mich. 77.

Nevada. State v. Lévigne, 17 Nev. 435.

Texas. St. Louis Southwestern R. Co. of Texas v. Cleland, 50 Tex. Civ. App. 499.

Wisconsin. Hasbrouck v. City of Milwaukee, 21 Wis. 219.

2—See ch. VII, *post*.

3—Rio Grande Southern R. Co. v. Campbell, 44 Colo. 1, 96 Pac. 986.

4—The proper province of an instruction is to submit questions of fact, not propositions of law. Barton v. City of Odessa, 109 Mo. App. 76.

It is the province of instructions to tell the jury what facts are necessary to be found in order to decide an issue submitted. Commerce Trust Co. v. White, 172 Mo. App. 537.

5—Souvais v. Leavitt, 50 Mich. 108. See also, Welch v. Ware, 32 Mich. 77.

6—See ch. IX, § 92, *post*.

the jury what the issues in the cause are,⁷ to present such issues in the form most intelligible to the jury,⁸ and to confine the jury to a determination of such issues, excluding from their consideration all irrelevant matters.⁹ "The principal benefit to be derived from a charge to the jury is not the statement of propositions of law but the elimination of irrelevant matters and cause of action or allegations as to which no evidence has been offered, and thereby let the jury understand and appreciate the precise facts that are material and determinative."^{9a}

The instructions must be predicated upon the pleadings and evidence,¹⁰ but it is not the function of the charge to review the pleadings as to the fulness of the allegations.¹¹

Another office which instructions serve is to show the reviewing court on what theory the trial court decided in cases tried without a jury.¹²

In this connection it may be remarked that instructions are frequently used to correct errors which occur at the trial. This subject will, however, be considered in a separate chapter.¹³

§ 5. Right to instructions—Duty of court.

At common law, and unless prohibited by statute, the court has the right to give the jury correct instructions applicable to the law and facts of the case,¹⁴ irrespective of whether any instructions have been requested by the

7—Forbes v. Jason, 6 Ill. App. 395; Souvais v. Leavitt, 50 Mich. 108; St. Louis Southwestern R. Co. of Texas v. Cleland, 50 Tex. Civ. App. 499.

8—Louisville & N. R. Co. v. King's Adm'r, 131 Ky. 347.

9—Newell v. St. Louis Bolt & Iron Co., 5 Mo. App. 253.

9a—Irvin v. Southern R. Co., 164 N. C. 5.

10—See ch. VIII, *post*.

11—Neal v. Davis Foundry & Machine Works, 131 Ga. 701.

12—Harrison v. Bartlett, 51 Mo.

170; Ford v. City of Cameron, 19 Mo. App. 467. See also, Butts v. Gunby & West, 135 Mo. App. 28; Spurgeon v. West, 23 Mo. App. 42.

13—See ch. 33, *post*.

14—City of Chicago v. Keefe, 114 Ill. 222, 55 Am. Rep. 860n; Brown v. People, 9 Ill. 439; State v. Burns, 8 Nev. 251; Gwatkin v. Com., 9 Leigh (Va.) 678; Blunt v. Com., 4 Leigh (Va.) 689.

A justice of the peace has no authority to instruct a jury in the absence of a statute expressly conferring

parties or not, although in a number of states the rule is established that a party desiring to have instructions given must make a proper request for such charge.¹⁵

Each party is entitled to have the jury clearly and accurately instructed as to the law of the case,¹⁶ and, as will be noted further on, it is regarded as the duty of the court to state the claims of both parties upon all questions of fact that arise in the case.¹⁷

The jury should have the benefit of every principle of law which may elucidate the facts.¹⁸

It is the duty of the court to state the law applicable to the facts and it is also the duty of the jury to accept the instructions as the law.¹⁹

The court may volunteer an instruction embracing its views of the law,²⁰ and indeed it is the duty of the court to do so where the justice of the case seems to require it.²¹

One of the very objects of having a judge is to instruct the jury on the law applicable to the case. Hence, it is rather a duty than error for the court, on its own motion, to instruct the jury, where it seems to be required by the justice of the case.²²

It has been held the duty of the court to instruct the jury to disregard improper remarks of counsel.²³

such power. *St. Joseph Mfg. Co. v. Harrington*, 53 Iowa 380.

15—See ch. XV, *post*, "Requests for Instructions."

16—*Illinois Cent. R. Co. v. Maffit*, 67 Ill. 431.

17—See ch. XIII, § 143, *post*.

18—*United States Exp. Co. v. Hutchins*, 58 Ill. 44.

19—*City of Jacksonville v. Loar*, 65 Ill. App. 218.

The court should instruct the jury as to the law on the facts which the evidence tends to prove. *Mitchell v. Town of Fond du Lac*, 61 Ill. 174; *Ambrose v. Angus*, 61 Ill. App. 304.

20—*Thistle v. Frostburg Coal Co.*, 10 Md. 129.

The court has the right to volunteer an additional charge on the general rule as to finding according to a preponderance of the evidence. *Parker v. Georgia Pac. R. Co.*, 83 Ga. 539.

21—*Gwatkin v. Com.*, 9 Leigh (Va.) 678. But see ch. XV, § 156, *post*, as to necessity of requesting instructions.

22—*Stumps v. Kelly*, 22 Ill. 140.

23—*Ohio & M. R. Co. v. Cullison*, 40 Ill. App. 67. See also, ch. XXV, § 252, *post*.

It has also been held bad practice for the court to give instructions of its own motion and inform the jury that the instruction was of the court's own motion.²⁴

²⁴—*Beggs v. Postal Tel.-Cable Co.*,
159 Ill. App. 247.

CHAPTER III.

NECESSITY OR PROPRIETY OF DEFINITION BY COURT OF TERMS USED, AND CORRECTNESS OF SUCH DEFINITION.

- § 6. Scope of chapter.
- § 7. Words and terms of ordinary meaning.
- § 8. Legal terms or words of technical meaning.
- § 9. "Negligence," "carelessness" and similar terms.
- § 10. Statutory words.
- § 11. Defining offense alleged against defendant in criminal prosecution.

§ 6. Scope of chapter.

Before proceeding to a consideration of the general requisites of instructions,¹ or their form,² it is not inappropriate to consider the terms used by courts in such instructions as well as the necessity or propriety of defining such terms, and the correctness of definitions.

The question as to the effect of verbal inaccuracies, is however, treated in a subsequent chapter.³

§ 7. Words and terms of ordinary meaning.

As a general rule it may be stated that it is not necessary to explain or define the meaning of ordinary words and phrases when used in their customary and conventional sense.⁴

1—See ch. IV, *post*.

2—See ch. V, *post*.

3—See ch. V, § 32, *post*.

4—Illinois. *Henderson v. People*,
124 Ill. 607, 7 Am. St. Rep. 391.

Iowa. *Iowa State Sav. Bank v.*
Black, 91 Iowa 490; *Rogers v. Mil-*
lard, 44 Iowa 466.

Maine. *Berry v. Billings*, 47 Me.
328.

Missouri. *State v. Sattley*, 131 Mo.
464; *State v. Cantlin*, 118 Mo. 100;
Holland v. McCarty, 24 Mo. App. 113.

Texas. *Humphreys v. State*, 34
Tex. Cr. App. 434.

Vermont. *Eastman v. Curtis*, 67
Vt. 432.

The jury are presumed to possess ordinary intelligence, and to understand the meaning of words in common and ordinary use,⁵ and frequently the attempt to define a word or phrase in common use would merely confuse the jury.⁶

A number of cases illustrative of this principle will be found in the notes, where the particular words and phrases considered have been arranged alphabetically.⁷ Such cases

5—*Rogers v. Millard*, 44 Iowa 466; *Berry v. Billings*, 47 Me. 328; *A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co.*, 23 Tex. Civ. App. 328.

6—*State v. Davidson*, 172 Mo. App. 356.

7—"Acquiescence" is a word of ordinary meaning which need not be defined. *Iowa State Sav. Bank v. Black*, 91 Iowa 490.

"Actual danger" in an instruction as to self-defense, is not a technical term and need not be defined. *Danford v. State*, 53 Fla. 4.

"Adoption" need not be defined. *Iowa State Sav. Bank v. Black*, 91 Iowa 490.

"Anger" need not be defined. *Robinson v. State* (Tex. Cr. App.), 63 S. W. 869.

"Assault" need not be defined in a prosecution for procuring an abortion where the charge correctly states what the jury is required to find before they can convict. *Link v. State*, — Tex. Cr. App. —, 164 S. W. 987.

"Authority" need not be explained when used in an instruction in an action to recover for extra work, where the question was as to the authority of an architect to order extra work. *Holland v. McCarty*, 24 Mo. App. 112.

"Boarded" in action to recover for board it is not necessary to define boarded. *Rogers v. Millard*, 44 Iowa 466.

"Cohabit" is a word in general

use which presumptively would be understood by a jury, and it is not error not to define it. *State v. Knost*, 207 Mo. 18.

"Compel" need not be defined. *St. Clair v. Missouri Pac. R. Co.*, 29 Mo. App. 76.

"Consignee" is a word which has a well-understood meaning and it need not be defined in a prosecution for embezzlement where no instruction requesting such definition is asked. *Pope v. State*, 71 Tex. Cr. App. 261.

"Contributed" need not be defined. See *Bunyan v. Loftus*, 90 Iowa 122, in which the court said that to presume that the jury did not understand this word "would be equivalent to holding that their ignorance was so dense as to unfit them for jury service."

"Corroborated" is a word the meaning of which is generally understood, and it need not be defined. *Moore v. State*, — Tex. Cr. App. —, 144 S. W. 598. But see § 8, *post*, where "corroborated" was held to be a word which should be explained.

"Corroboration" is a word of ordinary use which need not be defined when used in an instruction in a prosecution for rape. *Austin v. State*, 51 Tex. Cr. App. 327.

"Countenance" need not be defined. *Cooper v. Johnson*, 81 Mo. 483.

"Credible" is an ordinary good English word which need not be ex-

frequently declare that the failure of a court to define a term of common use is not prejudicial error. And in some

plained or defined. *Barber v. State*, 64 Tex. Cr. App. 96.

"Diligent inquiry." The phrase "by diligent inquiry" need not be explained. *Cottrill v. Krum*, 100 Mo. 397.

"Exhibit" as used in instruction that defendant did exhibit in a rude, angry and threatening manner, a certain pistol, held a word of plain English in common usage which was not required to be defined. *State v. Nichols*, — Mo. —, 170 S. W. 1110.

"Feloniously" need not be defined. *State v. Penney*, 113 Iowa 691; *State v. Weber*, 156 Mo. 249; *State v. Cantlin*, 118 Mo. 100. Failure to define "feloniously" is not prejudicial error. *Collier v. Commonwealth*, 160 Ky. 338.

"Good and workmanlike manner" is a phrase employed in every building contract and is so well understood that any attempt to define it would merely confuse the jury. *Kleiderer & Son v. Aldridge's Ex'x*, 160 Ky. 638.

"Guarantee" need not be defined. *Reeds v. Lee*, 64 Mo. App. 686.

"Holding up" a train is an expression which need not be explained. See *Territory v. McGinnis*, 10 N. M. 269, 61 Pac. 208, holding that the words are universally understood to mean an assault on a train with intent to commit murder or some other felony.

"Imminently" with the average man needs no detailed definition, and if it does, an instruction defining the word should be requested. *Great Western Coal & Coke Co. v. Malone*, 39 Okla. 693, 136 Pac. 403.

"Lucid interval" has a well-un-

derstood meaning and need not be defined in the absence of request. *Montgomery v. State*, — Tex. Cr. App. —, 151 S. W. 813.

"Malice aforethought." Failure to define "malice aforethought" is not reversible error. *Collier v. Commonwealth*, 160 Ky. 338.

"Maliciously" need not be defined. *State v. Harkins*, 100 Mo. 666.

"Material facts" is not a term of technical meaning and requires no definition, and an attempt to define such term would merely confuse the jury. *State v. Davidson*, 172 Mo. App. 356.

"Net to him," as used in an instruction as to the price of goods need not be explained. *Schramm v. Wolff*, — Tex. Civ. App. —, 126 S. W. 1185.

"Permit" need not be explained. *Humphreys v. State*, 34 Tex. Cr. App. 434.

"Procure" in an instruction in a prosecution for pandering, need not be defined, being a word of common use. *Currington v. State*, 72 Tex. Cr. App. 143.

"Prostitution" need not be defined. *Tores v. State* (Tex. Cr. App.) 63 S. W. 880.

"Ratify" and **"ratification"** need not be defined. *Young v. Crawford*, 23 Mo. App. 432. Such words are not purely technical, legal expressions. *Iowa State Sav. Bank v. Black*, 91 Iowa 490.

"Reasonable" held not a word which was required to be defined. *York v. City of Everton*, 121 Mo. App. 640.

"Reasonable time" is an expression which need not be defined, as the

states it is said that it is not incumbent upon the court to explain the meaning of words which are well understood unless requested to do so.⁸ The mere fact that, under certain circumstances, courts of law have been called upon to determine the meaning of such words, does not destroy the popular character of the words.⁹

§ 8. Legal terms or words of technical meaning.

When legal or technical terms, or terms not in common use and having a special meaning are used in instructing the jury, the court should explain such terms or define them.¹⁰

In some states, statutory provisions require the court

average juror is supposed to know what is meant by the same. *Houston & T. C. Ry. Co. v. Roberts*, 50 Tex. Civ. App. 69.

“**Remotely**” need not be defined. *Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332.

“**Repudiation**” need not be defined. *Iowa State Sav. Bank v. Black*, 91 Iowa 490.

“**Substantial compliance**” with the terms of a contract is a term of ordinary meaning which need not be defined. *Linch v. Paris Lumber & Grain Elevator Co.*, 80 Tex. 36; *A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co.*, 23 Tex. Civ. App. 328. But see *Johnson v. White* (Tex. Civ. App.) 27 S. W. 177, wherein the court inclined to the view that the term ought to be defined, but overruled an assignment of error upon the authority of the preceding case.

“**Suddenly**,” “**unexpectedly**,” and “**impulse of the moment**,” when used in a charge as to acts of a deceased who was killed by being caught between railroad cars, are words of common use which need not be ex-

plained. *Trinity & B. Val. Ry. Co. v. Elgin*, 56 Tex. Civ. App. 573.

“**Unfaithfulness**” need not be defined. *Berry v. Billings*, 47 Me. 328.

“**Wantonly**” when used as meaning maliciously, and when it could not have been otherwise understood need not be specifically defined. *Cody v. Gremmler*, 121 Mo. App. 359.

“**Wilfully**” used in its ordinary and popular sense need not be defined. *Morris v. St. Louis & S. F. R. Co.*, 184 Mo. App. 65; *State v. Harkins*, 100 Mo. 666.

“**Would hold water**” as used in a contract to construct a dam, are words of common use which need not be defined. *Lattimore v. Puckett & Wear*, — Tex. Civ. App. —, 161 S. W. 951.

8—*Montgomery v. State*, — Tex. Cr. App. —, 151 S. W. 813.

9—*Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 506.

10—*Arizona. Rush v. French*, 1 Ariz. 99, 25 Pac. 530.

California. People v. Byrnes, 30 Cal. 207.

Mississippi. Jarnigan v. Fleming,

to submit such explanations and definitions of legal terms as shall be necessary,¹¹ and some decisions hold that it is indispensable that legal and technical terms should be defined and explained,¹² especially when requested,¹³ but ordinarily the failure of the trial court to define legal phrases or give definitions is not error unless the party objecting has requested a charge, giving such definition in the lower court.¹⁴ And it has been held that the unexplained use, in an instruction, of a word having a technical legal meaning, which is not essentially different from the meaning in common use, is not ground for reversing a judgment.¹⁵

43 Miss. 710, 5 Am. Rep. 514; *Mullins v. Cottrell*, 41 Miss. 291.

Missouri. *Stewart v. City of Clinton*, 79 Mo. 603; *Flint-Walling Mfg. Co. v. Ball*, 43 Mo. App. 504; *Digby v. American Cent. Ins. Co.*, 3 Mo. App. 603; *Dyer v. Brannock*, 2 Mo. App. 432.

Tennessee. *Rollings v. Cate*, 1 Heisk. (Tenn.) 97.

Texas. *Wheeler v. State*, 23 Tex. App. 598.

It is always proper to explain the meaning of legal or technical terms, differing in meaning from their popular use, or not generally known. *Cobb v. Covenant Mut. Benev. Ass'n*, 153 Mass. 176, 10 L. R. A. 66n, 25 Am. St. Rep. 619; *Gibson v. Cincinnati Enquirer*, 5 Cent. Law J. 380, Fed. Cas. No. 5, 392.

It is proper to instruct as to the meaning of words in the pleadings. *Smith v. Plant*, 216 Mass. 91.

Technical terms or terms not in common use and having special meaning should be explained. *Schramm v. Wolff*, — Tex. Civ. App. —, 126 S. W. 1185.

11—Under Acts Texas 33 Leg., p. 113, art. 1984a, amending R. S. tit. 37, ch. 14, the court in submitting

special issues shall submit such explanations and definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict. *St. Louis, S. F. & T. R. Co. v. Wall*, — Tex. Civ. App. —, 165 S. W. 527.

12—*Schmidt v. Sinnott*, 103 Ill. 160; *De Los Santos v. State* (Tex. Cr. App.) 31 S. W. 395.

13—*City of Junction City v. Blades*, 1 Kan. App. 85.

14—*Johnson v. Missouri Pac. R. Co.*, 96 Mo. 340, 9 Am. St. Rep. 351; *Schneider v. Hosier*, 21 Ohio St. 98; *Lagow v. Glover*, 77 Tex. 448; *Ellerd v. Campfield*, — Tex. Civ. App. —, 161 S. W. 392. In the *Johnson* case *supra* the court said: "As to the failure of the court to go further and define the meaning of the words 'reasonable care and diligence,' we have not been cited to, nor have found, any authority going to the extent of saying that the mere omission to give an instruction defining the above terms, where none is asked, is reversible error."

15—*Miller v. Woolman-Todd Boot & Shoe Co.*, 26 Mo. App. 57; *Murphy v. Creath*, 26 Mo. App. 581.

Where a word is used in an instruction which might be taken in different senses, and the jury follows the instruction in the sense in which it was intended, a judgment on the verdict will not be reversed because the jury might have followed it in the sense in which it was not intended.¹⁶

The failure to define a legal term may, however, render an instruction misleading,¹⁷ and requested instructions which contain technical terms needing explanation may be refused.¹⁸ Where an instruction is given on the request of a party, he cannot complain that it is insufficient in definition or explanation of terms used therein. If he desires a correct definition of the terms used, he must ask for it.¹⁹

If the court is led into error by a defendant, in modifying an instruction, by using a word without defining it, the defendant cannot complain, especially where another of the defendant's instructions contains a word which is synonymous with the word used by the court.²⁰

A number of cases illustrative of the foregoing principles will be found in the notes. As in the case of words or terms of ordinary meaning,²¹ the various phrases and words have been arranged alphabetically.²²

16—Parkhurst v. Masteller, 57 Iowa 474.

17—See Policemen's Benev. Ass'n of Chicago v. Ryce, 213 Ill. 9, aff'g 115 Ill. App. 95, 104 Am. St. Rep. 190n.

18—Boogher v. Neece, 75 Mo. 383; Fletcher v. Milburn Mfg. Co., 35 Mo. App. 321.

19—Kelley v. Cable Co., 7 Mont. 70, 14 Pac. 633.

20—Julian v. Pierson, 182 Ill. App. 400.

21—See *ante*, § 7.

22—"Accident" as used in instruction stating that defendant was not liable if death was caused solely by accident, held to render the charge misleading, since there was no explanation or definition of the word

accident. Ebert v. Metropolitan St. R. Co., 174 Mo. App. 45.

"Adverse possession" should be defined. Dyer v. Bannock, 2 Mo. App. 432.

"Aggravated assault," when submitted in a prosecution for assault with intent to rape, should be defined. Scott v. State, — Tex. Cr. App. —, 166 S. W. 729.

"Autoptic preference." A charge that evidence may be "autoptic preference," a phrase used in place of "real evidence," is not misleading or incorrect, where the expression is clearly made known to the jury in plain, understandable language. Morse v. State, 10 Ga. App. 61.

"Bad place." In an action for the death of a person killed, while

It will be noted that in some cases words of ordinary meaning have been held to require an explanation when

working in a mine, by falling slate, an instruction as to the roof being a "bad place" was erroneous because the quoted word was not defined. *Duncan Coal Co. v. Thompson's Adm'r*, 157 Ky. 304.

"**Burden of proof**," when used in a sense different from its common meaning should be explained. *Chicago Union Traction Co. v. Myers*, 134 Ill. App. 61.

"**Burden of proof**," when used in a requested instruction without definition or explanation, will warrant a refusal of such charge, although the giving of an instruction containing such phrase is not prejudicial error. *Berger v. St. Louis Storage & Commission Co.*, 136 Mo. App. 36. See also, *Cramer v. Nelson*, 128 Mo. App. 393.

"**Color of title**" is a term which should be explained. *Boogher v. Neece*, 75 Mo. 383.

"**Corroborated**" should be explained. *State v. McLain*, 159 Mo. 340.

"**Evidence in the case and the circumstances surrounding the same**" is a phrase which should be explained. *Derham v. Derham*, 125 Mich. 109.

"**Exciting state of fear**," where used in an instruction that, if plaintiff took Confederate money in payment of a note, under an exciting state of fear, the payment would not constitute a legal payment, should be defined. *Rollings v. Cate*, 1 Heisk. (Tenn.) 97.

"**Exemplary damages**" should be defined. *Hayes v. St. Louis R. Co.*, 15 Mo. App. 584.

It is error to instruct that a plaintiff is entitled to exemplary damages,

without explaining what is meant by the term. *Hink v. Sherman*, 164 Mich. 352.

"**Extraordinary floods**." Requested charges held subject to refusal because calculated to mislead the jury in not defining "extraordinary floods." *Sloss-Sheffield Steel & Iron Co. v. Mitchell*, 167 Ala. 226.

"**Fixtures**" should be defined. *Grand Lodge of Masons v. Knox*, 27 Mo. 315.

"**Fraud**." An instruction that a jury cannot find against an interpleader unless a sale of goods was made in fraud, is erroneous when it does not tell the jury what character of fraud defeats a sale. *Keet-Rountree Dry Goods Co. v. Hodges*, 175 Mo. App. 484.

"**Inherent vice**" of cattle should be explained as it is probable that the jury would not understand the legal significance of the expression. *Ft. Worth & Denver City Ry. Co. v. Berry*, — Tex. Civ. App. —, 170 S. W. 125.

"**Insane delusion**." On the trial of an issue *devisavit vel non*, involving the insanity of the testator, the term "insane delusion" should be defined. *Mullins v. Cottrell*, 41 Miss. 291.

But see "lucid interval", *ante*, § 7, which has been held a term in common use.

"**Malice**" is a word which should be defined. *Morgan v. Durfee*, 69 Mo. 469; 33 Am. Rep. 508.

"**Material allegations**." An instruction that the withdrawal of the general issue admits the material allegations of the declaration, must state what the material allegations

used in a sense different from the ordinary meaning. The

are. *Geringer v. Novak*, 117 Ill. App. 160.

"Material facts" is a phrase which should be explained. *Digby v. American Cent. Ins. Co.*, 3 Mo. App. 603.

"Material to the issues" should be explained. *State v. McLain*, 159 Mo. 340.

"Penetration." Where no request is made for an instruction defining penetration in a prosecution for rape, no error can be predicated upon the failure of the court to define such term. *State v. Oden*, 69 Ore. 385, 138 Pac. 1083.

"Preponderance of the evidence." Failure of the court to define "preponderance of the evidence" held not error. *Chicago City Ry. Co. v. Kaszewska*, 141 Ill. App. 10; *Cramer v. Nelson*, 128 Mo. App. 393.

"Preponderance of evidence" is a term having a peculiar meaning in law, and a requested instruction using such words without definition may be refused, although the giving of an instruction containing such term is not prejudicial error. *Berger v. St. Louis Storage & Commission Co.*, 136 Mo. App. 36; *Berry v. Wilson*, 64 Mo. 164; *Steinwender v. Creath*, 44 Mo. App. 360; *Hill v. Scott*, 38 Mo. App. 370. And instructions using the term without explanation may be properly refused. *Clarke v. Kitchen*, 52 Mo. 316; *Mackin v. People's St. Ry. & E. L. & P. Co.*, 45 Mo. App. 82.

In Texas it has been held unnecessary to define the term, upon the ground that it has a well-known popular meaning. *Gulf, C. & S. F. Ry. Co. v. Reagan* (Tex. Civ. App.) 34 S. W. 798. Where one witness is opposed by three, an instruction is er-

roneous, as amounting to a comment on the weight of the evidence, that "you will decide all issues submitted to you by this charge by a preponderance of the evidence. By the term 'preponderance of the evidence' is meant not necessarily the greater number of witnesses, but only the facts shall appear by the greater weight of testimony, as may seem to you most worthy of credit, under all the facts and circumstances of the case." *St. Louis S. W. Ry. Co. v. Smith* (Tex. Civ. App.) 63 S. W. 1064; *Dallas Cotton Mills v. Ashley* (Tex. Civ. App.) 63 S. W. 160.

See also, *Noyes v. Pugin*, 2 Wash. St. 653, 27 Pac. 548, where it was held that an instruction that plaintiff must establish the material allegations of his complaint by a preponderance of testimony was not erroneous, the court saying that it would be presumed that the jury understood the word "testimony" as referring to all the evidence.

"Probable profits." A judgment will not be reversed for the failure to define "probable profits" where no instruction defining such term is requested. *Ramsay v. Meade*, 37 Colo. 465, 86 Pac. 1018.

"Prompt and proper treatment," as used in an instruction without being defined in an action against a physician who was conducting a hospital, leaving it to the jury to determine what was proper treatment, held improper. *Dunnagan v. Briggs*, 170 Mo. App. 691.

"Punitive damages." It is proper to instruct as to punitive damages, but it is also to be presumed that a jury understands what is meant, and the defendant should request a

cases consequently should be considered in connection with the cases mentioned in the notes to the previous section.

charge defining such term. *St. Louis & S. F. R. Co. v. Moore*, 101 Miss. 768, 39 L. R. A. (N. S.) 978n, 1914 B 597n.

"Requirements of the law." An instruction using the term "requirements of the law" is improper when it does not specify what the requirements are. *City of Chicago v. Fields*, 139 Ill. App. 250.

"Satisfactory evidence" should be defined and an instruction containing such phrase without being defined is misleading. *Policemen's Benev. Ass'n of Chicago v. Ryce*, 213 Ill. 9, aff'g 115 Ill. App. 95, 104 Am. St. Rep. 190n.

"Served with process" is in some circumstances a technical phrase which should be explained, but where it is manifest that such words were understood, it is not reversible error to use the term without explanation. *Miller v. Barnett*, 124 Mo. App. 53.

"To dispose of property with the intent to defraud creditors" should be defined. *Matthews v. Boydston* (Tex. Civ. App.) 31 S. W. 814.

"Under the direction." An instruction directing a verdict for a defendant mining company if the jury believed from the evidence that the injured employee was engaged in timbering an entry under the direction of the defendant's mine manager held properly refused where no attempt was made in such instruction or in any other charge to explain the meaning of the words "under the direction" of the mine manager. *Wilson v. Danville Collieries Coal Co.*, 264 Ill. 143.

"Unlawfully" as applicable to a homicide or a murder trial should be

explained. *People v. Byrnes*, 30 Cal. 207.

"Wantonly and maliciously" in an instruction as to assault should be defined as meaning an evil or unlawful purpose, as distinguished from that of promoting the justice of the law. *Romans v. McGinnis*, 156 Ky. 205.

"Warranty" should be explained. *Flint-Walling Mfg. Co. v. Ball*, 43 Mo. App. 504.

"Wilfully" should be defined. *Sparks v. State*, 23 Tex. App. 447; *Wheeler v. State*, 23 Tex. App. 598; *Trice v. State*, 17 Tex. App. 43; *Thomas v. State*, 14 Tex. App. 200; *Dyrley v. State* (Tex. Cr. App.) 63 S. W. 631. An instruction defining the term "wilful" as "without reasonable ground for believing the act to be lawful, or a reckless disregard of the rights of others," has been held to give a correct definition. *Finney v. State*, 29 Tex. App. 184. Where a penal statute makes intent to defraud one of the elements of the forbidden act, and the court, in a prosecution for a violation of the statute, explains to the jury that the act alleged to constitute a violation must have been committed with intent to defraud, it is not necessary for the court to explain the term "wilfully," also used in the statute, as wilfulness is necessarily implied in intent to defraud. *Wheeler v. State*, 23 Tex. App. 598.

"Wrongful conduct." A failure to instruct as to what facts would, in law, constitute wrongful conduct, is erroneous, as it submits to the jury questions both of law and fact.

§ 9. "Negligence," "carelessness" and similar terms.

It has been held unnecessary to define or explain the meaning of ordinary words such as "care,"²³ "carelessly,"²⁴ "ordinary care,"²⁵ "prudence,"²⁶ "reasonable diligence,"²⁷ and "contributory negligence."²⁸

As to the term "negligence," it has been said that it would be better for the court to tell the jury what constitutes negligence or carelessness,²⁹ and in certain cases,³⁰ the failure to define such term may render an instruction erroneous.³¹

That duty is often omitted, however, and on appeal it is usually held that a definition is not necessary in all cases for the reason that a jury of ordinary intelligence under-

Lesser v. St. Louis & Suburban Ry. Co., 85 Mo. App. 326.

23—Muehlhausen v. St. Louis R. Co., 91 Mo. 332.

24—"Carelessly" need not be defined in some cases, being a word of well-understood meaning. Mather v. Metropolitan St. R. Co., 166 Mo. App. 142.

"Carelessly," when used in an action by a landlord against his tenant for carelessly permitting stock to go into an orchard and destroy fruit trees, need not be defined. Warder v. Henry, 117 Mo. 531.

25—"Ordinary care" need not be defined in the absence of a requested charge, the term being self-explanatory. Western U. Tel. Co. v. Ford, 10 Ga. App. 606.

Contra, "ordinary care" should be defined. Cleburne Electric & Gas Co. v. McCoy, — Tex. Civ. App. —, 149 S. W. 534.

26—Muehlhausen v. St. Louis R. Co., 91 Mo. 332.

27—"Reasonable diligence" are not words of technical meaning, but

are well understood by the average jurymen, and need not be defined. Texas Midland R. R. v. Ritchey, 49 Tex. Civ. App. 409.

28—"Contributory negligence" need not be defined where the phrase is not used in the instructions dealing with such subject and in such case a definition would only confuse the jury. Galveston, H. & H. R. Co. v. Alberti, 47 Tex. Civ. App. 32.

29—Rippetoe v. Missouri, K. & T. R. Co., 138 Mo. App. 402.

30—It is only in certain instances that the term "negligence" should be defined. Richmond v. Missouri Pac. R. Co., 162 Mo. App. 422.

31—"Negligence" should be defined. It is erroneous to submit the question of negligence to the jury unless such term is defined. Dunningan v. Briggs, 170 Mo. App. 691.

"Negligent" renders an instruction erroneous when such charge merely directs a verdict on the finding that the injury was negligently inflicted. Mather v. Metropolitan St. R. Co., 166 Mo. App. 142.

stands the meaning well enough,³² and if a party desires a specific instruction as to such subject, it should be requested.³³

"Negligently," when used in an instruction without being defined is not reversible error, when such instruction requires the jury to find certain facts which in the absence of explanation the law itself pronounces negligent.³⁴ And it has also been held that the failure to define "negligent" when used merely to characterize acts stated in a given hypothesis, does not render the instruction so erroneous as to warrant reversal.³⁵

The rule that the term "negligence" must be defined does not refer so much to a mere law dictionary definition as to a definition by the statement of facts or acts from which the inference of negligence would have to be implied.³⁶

Terms such as "gross negligence,"³⁷ "concurrent negligence,"³⁸ and "negligence *per se*,"³⁹ should be explained.

§ 10. Statutory words.

It is unnecessary and not error not to define words in the Codes which are ordinary English words and which are commonly and ordinarily understood by people generally.⁴⁰

32—Rippetoe v. Missouri, K. & T. R. Co., 138 Mo. App. 402.

33—"Negligence" need not be defined. Edelmann v. St. Louis Transfer Co., 3 Mo. App. 506.

34—Rippetoe v. Missouri, K. & T. R. Co., 138 Mo. App. 402.

35—Burns v. United Rys. of St. Louis, 176 Mo. App. 330.

36—Mather v. Metropolitan St. R. Co., 166 Mo. App. 142.

37—Mather v. Metropolitan St. R. Co., 166 Mo. App. 142.

38—The phrase "gross negligence" should be defined. Warder v. Henry, 117 Mo. 530; Wiser v. Chesley, 53 Mo. 547.

38—"Concurrent negligence" is a term which a jury would not understand unless they were lawyers. Gardner v. Metropolitan St. R. Co., — Mo. App. —, 152 S. W. 98.

39—"Negligence *per se*" should properly be explained, but the failure to do so is not reversible error where the phrase was used by counsel on both sides and was probably understood by the jury. O'Connor v. United Rys. of San Francisco, 168 Cal. 43, 141 Pac. 809.

40—Blackburn v. State, 71 Tex. Cr. App. 625.

§ 11. Defining offense alleged against defendant in criminal prosecution.

The duty of the court to instruct as to the law of a case on trial includes a definition of the offense sufficient to inform the jury what facts are necessary for the proof to establish in order to justify them in finding a verdict of guilty.⁴¹

But the court is not compelled to define the offense in the words of elementary text writers. A correct definition in the language of the court's own choosing is sufficient.⁴²

If the offense is statutory, it may be defined in the exact language of the statute,⁴³ and it has been said to be the better practice to do so.⁴⁴ Nevertheless, the use of other language conveying the same meaning, and not liable to misconstruction by the jury, is not erroneous,⁴⁵ but no element of the offense should be overlooked.⁴⁶

Where the charge taken as a whole substantially defines the offense and whatever words therein are necessary to be defined, it is all that is required.⁴⁷

In stating the statutory definition of a crime, it is unnecessary to state the penalty.⁴⁸

It has been held not improper for the court to give the

41—*Brook v. State*, — Okla. —, 115 Pac. 1026.

42—*State v. Clary*, 24 S. C. 116. See also, ch. XV, § 189, as to using the words of a requested instruction in charging the jury.

43—*Duncan v. People*, 134 Ill. 110.

An instruction, in a prosecution of a bank president for receiving deposits, knowing that the bank was insolvent, that "a crime consists in the violation of a public law, in the commission of which there shall be a union, or joint operation, of act and intention, or criminal negligence," being the exact language of the statute, is correct. *McClure v. People*, 27 Colo. 358, 61 Pac. 612.

44—*State v. O'Brien*, 18 Mont. 1, 44 Pac. 399, 43 Pac. 1091; *Long v. State*, 23 Neb. 33.

45—*Long v. State*, 23 Neb. 33. It is not necessary to copy the statute into the instructions, where the charge, as given, submitted all the constituent elements of the offense. *Adkins v. State*, 41 Tex. Cr. App. 577.

46—*Hix v. People*, 157 Ill. 382; *Adkins v. State*, 41 Tex. Cr. App. 577.

47—*Blackburn v. State*, 71 Tex. Cr. App. 625.

48—*Currier v. State*, 157 Ind. 114.

jury a general description of the offense, although embracing modes of commission not pertinent to the case, provided a definition is subsequently given applicable to the pleadings and evidence.⁴⁹

It has been held better practice not to attempt to define technical terms such as "alibi," as a definition is often unintelligible to the jury,⁵⁰ but words such as "deliberate,"⁵¹ or "wilfully,"⁵² have been held words of legal meaning which should be defined.

Where a "premeditated design" is an essential element of the offense charged it is not ordinarily necessary to define such phrase, as it is presumed that the jury will understand such words.⁵³

In the ordinary case of murder in the first degree, malice aforethought and premeditation are constituent elements of the crime which should be defined.⁵⁴

But in a case where poison is deliberately administered in the perpetration of a robbery, and death ensues, the killing is murder in the first degree, and malice aforethought and premeditation are not elements of the offense and such terms need not be defined.⁵⁵

In a homicide case where it is necessary to charge on "cooling time," the court should define such term.⁵⁶

49—State v. Anderson, 10 Ore. 448.

50—Tinsley v. State, 52 Tex. Cr. App. 91.

51—"Deliberate" in an instruction on a trial for perjury should be defined. Windon v. State, 56 Tex. Cr. App. 198.

Where a charge in a prosecution for false swearing, failing to define "deliberately" is properly excepted to, an accused is entitled to a reversal. Knight v. State, 71 Tex. Civ. App. 36.

52—"Wilful," when used in an instruction in a perjury case, is a

word of legal meaning which should be defined. Windon v. State, 56 Tex. Cr. App. 198.

Where a charge in a prosecution for false swearing fails to define "wilfully" and is properly excepted to, an accused is entitled to a reversal. Knight v. State, 71 Tex. Civ. App. 36.

53—McDonald v. State, 55 Fla. 134.

54—State v. Daly, 210 Mo. 664.

55—State v. Daly, 210 Mo. 664.

56—Kannmacher v. State, 51 Tex. Cr. App. 118.

“Provoked the difficulty or began the quarrel,” when used in an instruction in a homicide case is self-explanatory and an explanation of such language would only confuse the jury.⁵⁷

“Occupation” or “business,” need not be defined in a prosecution for selling malt liquor or beer without a license as dealer, when neither of such words are used in the statute under which the prosecution was had.⁵⁸

When a word or phrase is correctly defined, the definition need not be repeated.⁵⁹

57—State v. Long, 201 Mo. 664.

58—Figueroa v. State, 71 Tex. Cr. App. 371.

59—“Felony” being defined, no further definition of the term is required. O’Pry v. State, 142 Ga. 600.

“Mitigating circumstances” when defined in a charge on manslaughter need not be further defined. Holt v. State, 51 Tex. Cr. App. 15.

“Wilfully” when defined in a general charge in a prosecution for disturbing an assemblage need not

be defined in a special charge, or in each paragraph of the charge wherein the word is used. Haynes v. State, 71 Tex. Cr. App. 31.

Where deadly weapons are sufficiently defined in a portion of a charge, such definition need not be repeated, and in any event the character of weapons such as a shotgun or a six-shooter of 45 caliber would hardly need defining. Wheeler v. State, 56 Tex. Cr. App. 547.

CHAPTER IV.

GENERAL REQUISITES.

- § 12. Necessity of covering whole case.
- § 13. Completeness.
- § 14. Qualifications or limitations of general rules.
- § 15. Length and number of instructions.
- § 16. Requests for long and numerous instructions.
- § 17. Repetition.
- § 18. Argumentative instructions.
- § 19. Same—What are argumentative instructions.
- § 20. Same—Argumentativeness as ground for reversal.
- § 21. Contradictory instructions.
- § 22. Same—Instructions held bad as being contradictory.
- § 23. Same—Instructions held not contradictory.
- § 24. Same—Incorrect instructions not cured by inconsistent correct instructions.
- § 24a. Same—Contradictory charges as grounds for reversal.

§ 12. Necessity of covering whole case.

Each instruction given need not embrace all the issues, or the whole case, or the whole of any branch of the case.¹

1—Alabama. *Hawkins v. Hudson*, 45 Ala. 482.

Arkansas. *St. Louis, I. M. & S. Ry. Co. v. Baker*, 67 Ark. 531.

California. *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *People v. Tamkin*, 62 Cal. 468.

Illinois. *City of Rock Island v. Starkey*, 189 Ill. 515.

Indiana. *Bundy v. McKnight*, 48 Ind. 502; *Hayes v. West*, 37 Ind. 21.

Iowa. *Munger v. City of Waterloo*, 83 Iowa 559; *Deere v. Wolf*, 77 Iowa 115.

Kansas. *State v. Kyne*, 10 Kan. App. 277, 62 Pac. 728.

Michigan. *Anderson v. Walter*, 34 Mich. 113.

Minnesota. *Peterson v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 511.

Mississippi. *Clisby v. Mobile & O. R. Co.*, 78 Miss. 937.

Missouri. *Schroeder v. Michel*, 98 Mo. 43; *Dougherty v. Missouri R. Co.*, 97 Mo. 647; *Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332.

North Carolina. *Barringer v. Burns*, 108 N. C. 606.

Ohio. *Ohliger v. City of Toledo*, 20 Ohio Cir. Ct. R. 142.

Oregon. *Smitson v. Southern Pac. Co.*, 37 Ore. 74, 60 Pac. 907.

Texas. *Freiberg v. Johnson*, 71 Tex. 558.

The entire law of the case need not be stated in a single instruction.

It is a general rule that instructions will be considered and construed as a whole,² and, as was well said in one case: "It is not required that the entire law of the case shall be stated in a single instruction, and it is therefore, not improper to state the law, as applicable to particular questions or particular parts of the case, in separate instructions; and if there is no conflict in the law as stated in different instructions, and all the instructions considered as a series present the law applicable to the case fully and accurately, it is sufficient."³

§ 13. Completeness.

In so far as an instruction undertakes to state a proposition of law, it must do so completely and correctly,⁴ but

Peoria & P. Terminal Ry. v. Schantz, 226 Ill. 506, aff'g 130 Ill. App. 141; *Trubey v. Richardson*, 224 Ill. 136; *Chicago, R. I. & P. R. Co. v. Turek*, 131 Ill. App. 128; *Masonic Fraternity Temple Ass'n v. Collins*, 110 Ill. App. 504, aff'd 210 Ill. 482.

It is not necessary that every instruction should have embodied in it every fact or element essential to sustain the action, or that it should negative matters of defense. A single instruction need not cover the entire case.

Illinois. Village of Sheridan v. Hibbard, 119 Ill. 307.

Indiana. Colee v. State, 75 Ind. 511.

Missouri. Swan v. Lullman, 12 Mo. App. 584.

Oklahoma. Grant v. Milam, 20 Okla. 672, 95 Pac. 424.

Virginia. Greever v. Bank of Graham, 99 Va. 547.

In a criminal case it is not necessary "to state in connection with each legal proposition * * * that it must appear that the offense

was committed in the county" named in the indictment. *Keys v. State*, 112 Ga. 392, 81 Am. St. Rep. 63.

2—See ch. XVI, *post*.

3—*Chicago & E. I. R. Co. v. Hines*, 132 Ill. 161, 22 Am. St. Rep. 515, aff'g 33 Ill. App. 271. Quoted in *Grant v. Milam*, 20 Okla. 672, 95 Pac. 424.

4—*Forsyth v. Bower*, 54 Cal. 639; *Ohio, I. & W. R. Co. v. Kleinsmith*, 38 Ill. App. 45; *Sweet v. Leach*, 6 Ill. App. 212; *Gale v. Rector*, 5 Ill. App. 481; *Ottawa, O. & F. R. Val. R. Co. v. McMath*, 4 Ill. App. 356. But see *Schroeder v. Michel*, 98 Mo. 43.

Everything that is essential to the expression of a single rule should be expressed in a single instruction. *Worden v. Humeston & S. Ry. Co.*, 72 Iowa 201; *Thomas v. Babb*, 45 Mo. 384. See also, *Chicago & A. R. Co. v. McDonnell*, 91 Ill. App. 488.

Instructions ignoring duty of mine operator not to permit work while dangerous conditions existed, held

when an instruction is given which states a "complete, accurate and pertinent proposition," it is not erroneous because it fails to embrace another proposition which would be appropriate in that connection.⁵ So, also, an instruction which correctly states the law of the case is sufficient though it does not refer to exceptions applicable to another state of facts.⁶

All the qualifications and conditions necessary to render an instruction correct and applicable to the case at bar need not be contained in such charge.⁷ The proper qualification may be made in separate instructions.⁸ The trial judge cannot be expected to reiterate every qualification and condition with every clause of the charge.⁹

erroneous. *Mengelkamp v. Consolidated Coal Co.*, 259 Ill. 305.

A requested instruction which leaves it to the jury to determine what are the material points in the case from the declaration, and without any other instructions to guide them, held properly refused. *Shewbridge v. Chicago City Ry. Co.*, 188 Ill. App. 454.

5—*Lucas v. State*, 110 Ga. 756.

6—*Gilbert v. Watts-de Golyer Co.*, 169 Ill. 129, 61 Am. St. Rep. 154, aff'g 66 Ill. App. 625.

7—*California*. *People v. Etting*, 99 Cal. 577, 34 Pac. 237; *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *People v. Hurtado*, 63 Cal. 288; *People v. Welch*, 49 Cal. 174; *People v. Doyell*, 48 Cal. 85.

Indiana. *Taylor v. Wootan*, 1 Ind. App. 188, 50 Am. St. Rep. 200.

Iowa. *Rice v. City of Des Moines*, 40 Iowa 638.

Minnesota. *Gates v. Manny*, 14 Minn. 21.

Missouri. *Perrette v. City of Kansas City*, 162 Mo. 238.

New York. *Hickenbottom v. Delaware, L. & W. R. Co.*, 122 N. Y. 91.

Oregon. *Farmers' & Traders' Nat. Bank v. Woodell*, 38 Ore. 294, 65 Pac. 520, 61 Pac. 837.

8—*California*. *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *Davis v. Button*, 78 Cal. 247, 20 Pac. 545, 18 Pac. 133; *Bradley v. Lee*, 38 Cal. 362.

Colorado. *De St. Aubin v. Marshall Field & Co.*, 27 Colo. 414, 62 Pac. 199.

Florida. *Keech v. Enriquez*, 28 Fla. 597.

Illinois. *West Chicago St. R. Co. v. Kromshinsky*, 185 Ill. 92, aff'g 86 Ill. App. 17.

Iowa. *Allen v. Burlington, C. R. & N. R. Co.*, 57 Iowa 623; *Lombard v. Chicago, R. I. & P. R. Co.*, 47 Iowa 494; *Steer v. City of Oskaloosa*, 41 Iowa 353.

Missouri. *Meyer v. Southern Ry. Co. (Mo.)* 36 S. W. 367.

Oregon. *Smitson v. Southern Pac. Co.*, 37 Ore. 74, 60 Pac. 907.

South Carolina. *Fletcher v. South Carolina & G. E. R. Co.*, 57 S. C. 205; *Thackston v. Port Royal & W. C. Ry. Co.*, 40 S. C. 80.

9—*Watson v. Watson*, 58 Mich. 507.

“If an instruction contains a complete statement of a proposition of law applicable to the facts in a given case it will be held good as part of a series containing the entire law of the case.”¹⁰

It is improper to give an instruction dealing with but one fact in the evidence,¹¹ or to give instructions ignoring material evidence, issues and theories.¹²

An instruction intended to cover the whole case, and upon which, if met by the evidence, the jury are told to find in a certain way, should include all the elements necessarily involved in the case and within the evidence.¹³

§ 14. Qualifications or limitations of general rules.

It has been noted in the previous section that exceptions and qualifications necessary to make an instruction correct

10—Yundt v. Hartrunft, 41 Ill. 9; Walker v. Collier, 37 Ill. 362; Taylor v. Wootan, 1 Ind. App. 188, 50 Am. St. Rep. 200.

11—Instruction that the mere fact that the wheel came off is not of itself evidence of negligence, held properly refused since similar instructions as to every essential fact might otherwise be given. Hoffman v. Ernest Tosetti Brewing Co., 257 Ill. 185, rev'g 167 Ill. App. 291.

12—See ch. X, *post*.

13—Illinois. McNulta v. Jenkins, 91 Ill. App. 309.

Missouri. Boothe v. Loy, 83 Mo. App. 601.

Nebraska. McAleer v. State, 46 Neb. 116; Bowie v. Spaid, 26 Neb. 635; Nelson v. Johansen, 18 Neb. 180, 53 Am. St. Rep. 806.

West Virginia. Ward v. Ward, 47 W. Va. 766.

An instruction which on an assumed hypothesis directs a verdict for the plaintiff to be free from criticism should contain all the ingredi-

ents essential to the right to a recovery under the pleadings and evidence. Percell v. Metropolitan St. Ry. Co., 126 Mo. App. 43.

When a verdict for either party is hypothesized upon the finding by the jury of a certain state of facts, it is essential that the jury shall find all the facts to exist as hypothesized in the charge, in order to truthfully rest their verdict on such charge. Tennessee Coal, Iron & Railroad Co. v. Barker, 6 Ala. App. 413.

When an instruction undertakes to cover the whole case and authorizes a finding for one party or the other, according as the jury may determine certain facts, it is error to omit any material issue, and such error is not cured by another instruction properly submitting the omitted issue:

Illinois. McNulta v. Jenkins, 91 Ill. App. 309; Grieb v. Caraker, 57 Ill. App. 678.

Missouri. Desnoyers Shoe Co. v. Lisman & Ramsey, 85 Mo. App. 340;

and applicable may be given in separate charges.¹⁴ So, also, exceptions to a general rule of law may be given in paragraphs separated from the one limited.¹⁵

It is not improper for the court, when it lays down a general rule, to notice exceptions to it, or such circumstances as will prevent its operation;¹⁶ but usually, if a party desires that the exceptions should be stated in the instruction, he should ask the court to state them.¹⁷ However, it has been held in one case that if it was manifest that the jury erred for want of an instruction stating qualifications of a general rule, the judgment should be reversed.¹⁸ Also where the court assumes to state the exceptions to a general rule, and omits an important exception to which the evidence is applicable, the charge is erroneous, and a ground for reversal.¹⁹

§ 15. Length and number of instructions.

Instructions should be as few and short and pointed as may be consistent with the object of giving clear ideas to the jury of the main points of law governing the case as applied to the facts.²⁰

State v. Davies, 80 Mo. App. 239;
Hohstadt v. Daggs, 50 Mo. App.
240.

Virginia. Norfolk & W. R. Co.
v. Mann, 99 Va. 180.

West Virginia. McVey v. St. Clair
Co., 49 W. Va. 412.

14—See § 13, *ante*.

15—International & G. N. Ry. Co.
v. Brazzil, 78 Tex. 314.

16—Van Valkenburg v. Huff, 1
Nev. 142.

17—Wells v. Morrison, 91 Ind. 51;
White v. Thomas, 12 Ohio St. 317.

18—White v. Thomas, 12 Ohio St.
317.

19—Wells v. Morrison, 91 Ind. 51.

20—**Arkansas.** Hanger v. Evins,
38 Ark. 338.

California. People v. Ah Fung,
17 Cal. 377; People v. Gibson, 17 Cal.
283.

Iowa. Murphy v. Chicago, R. I.
& P. R. Co., 38 Iowa 539.

Nebraska. Parrish v. State, 14
Neb. 60.

Where the controlling facts and circumstances are few and two or three instructions limited and directed to the material questions presented are ample to properly submit the case to the jury, it is unnecessary to multiply the instructions. Southern R. Co. v. Hansbrough's Adm'x, 107 Va. 733.

It is preferable that the instructions be few in number, plain and forcible, and so drafted that there

The practice of requesting long and numerous instructions, or giving them, is universally condemned as a reprehensible one,²¹ because it tends to convey the impression that the court is instructing in favor of one party,²² and also because it tends to confuse the jury²³ and introduce

can be no doubt as to their meaning. *Talbot's Ex'r v. Mearns*, 21 Mo. 427.

21—Arkansas. *Haney v. Caldwell*, 43 Ark. 184; *Hanger v. Evins*, 38 Ark. 334; *Sweeney v. State*, 35 Ark. 585.

Illinois. *Brant v. Gallup*, 111 Ill. 487, 53 Am. Rep. 638; *Adams v. Smith*, 58 Ill. 418; *Roe v. Taylor*, 45 Ill. 485; *Chicago & A. R. Co. v. Kelly*, 25 Ill. App. 19.

Kentucky. *Steamboat Blue Wing v. Buckner*, 12 B. Mon. 246.

Maryland. *Cumberland Coal & Iron Co. v. Scally*, 27 Md. 603.

Mississippi. *Mabry v. State*, 71 Miss. 716; *Ingram v. State*, 62 Miss. 142; *Clarke v. Edwards*, 44 Miss. 778.

Missouri. *Crawshaw v. Sumner*, 56 Mo. 521; *State v. Mix*, 15 Mo. 159; *Doan v. St. Louis, K. & N. W. Ry. Co.*, 43 Mo. App. 450; *Flynn v. St. Louis & S. F. Ry. Co.*, 43 Mo. App. 424.

Nebraska. *Parrish v. State*, 14 Neb. 62.

Nevada. *State v. Ward*, 19 Nev. 297, 10 Pac. 133.

Ohio. *Mutual Ben. Life Ins. Co. v. French*, 2 Cin. R. 321.

The practice of submitting a large number of instructions is vicious. *Casey v. J. W. Reedy Elevator Mfg. Co.*, 166 Ill. App. 595.

Courts are very severe in their strictures upon instructions which are drawn out to a great length, and are intended to convey an argu-

ment. *Roe v. Taylor*, 45 Ill. 485; *Merritt v. Merritt*, 20 Ill. 65.

22—See § 17, "Repetition," and ch. XIV, § 152, *post*, "unduly emphasizing matters."

The giving of a large number of instructions is apt to impress the jury that the court is instructing in favor of the party in whose favor they are given. *Bartholomew v. Illinois Val. Ry. Co.*, 154 Ill. App. 512.

23—The practice of requesting an unnecessarily large number of instructions is not approved, as it tends to create the risk of error, to confuse and mislead the jury and imposes upon the reviewing court an unnecessary burden. *Gracy v. Atlantic Coast Line R. Co.*, 51 Fla. 651.

The giving of a great number of instructions does not enlighten the minds of the jury on the issues submitted to them, but rather tends to introduce confusion:

Arkansas. *Haney v. Caldwell*, 43 Ark. 184; *Hanger v. Evins*, 38 Ark. 338.

Illinois. *Rockford Ins. Co. v. Nelson*, 75 Ill. 548; *Adams v. Smith*, 58 Ill. 418; *Chicago & A. R. Co. v. Kelly*, 25 Ill. App. 19; *Citizens' Gas-light & Heating Co. v. O'Brien*, 19 Ill. App. 234.

Missouri. *State v. Ott*, 49 Mo. 326; *Norton v. St. Louis & H. Ry. Co.*, 40 Mo. App. 646; *Desberger v. Harrington*, 28 Mo. App. 636.

error into the record.²⁴ A few short instructions embodying the law of the case will always be better understood and will have more effect upon the triers of fact than a long list of instructions loaded with words generally so involved that it tends to confuse rather than to conduct the jury to a proper conclusion.²⁵ However, it has been held that a number of clear, concise instructions is preferable to one long complicated charge.²⁶

Whether the giving of a large number of instructions constitutes error warranting reversal depends upon the facts of the case and whether the jury were misled.²⁷ As has been noted in a previous section, exceptions and qualifications of general rules may be given in separate charges,²⁸ and it has been held that the giving of three separate charges was not reversible error, though the facts embraced

24—The almost invariable effect of a multitude of instructions is to introduce error into the record, and to confuse rather than enlighten the minds of the jury. *Adams v. Smith*, 58 Ill. 418; *Deering v. Collins*, 38 Mo. App. 73.

In one case it was said that long and numerous requests for instructions were generally made with the real if not avowed purpose of getting error into the record, and entangling the court into some technical contradiction that might be used in a higher court. *Citizens' Gaslight & Heating Co. v. O'Brien*, 19 Ill. App. 234.

25—*State v. Floyd*, 15 Mo. 355; *State v. Mix*, 15 Mo. 159; *State v. Ward*, 19 Nev. 297, 10 Pac. 133.

26—*Chicago City Ry. Co. v. Sandusky*, 198 Ill. 400, aff'g 99 Ill. App. 164.

27—The failure to use as concise and perspicuous language as possible is not error if the jury are not mis-

led. *Renner v. Thornburg*, 111 Iowa 515.

In an action by a steamship company to recover over sums which it was required to pay in settlement of damages for injuries to employees, the giving of forty instructions was not error sufficient to reverse the judgment, although the law could have been properly presented to the jury in less than half of that number. *Alaska S. S. Co. v. Pacific Coast Gypsum Co.*, 78 Wash. 247, 138 Pac. 875.

The giving of instructions which, when printed, covered nine and one-half pages, held ground for reversal, as the necessary effect was not to instruct but to confuse and mislead, and make the verdict mere guesswork. *Sidway v. Missouri Land & Live Stock Co.*, 163 Mo. 342.

The giving of thirty-nine instructions in a personal injury case held prejudicial. *Kravitz v. Chicago City Ry. Co.*, 174 Ill. App. 182.

28—See § 14, *ante*.

in such charges could have been grouped disjunctively in one charge, where each fact stated would have constituted a proper basis for the jury's verdict.²⁹

§ 16. Requests for long and numerous instructions.

The mere fact that long and numerous instructions are requested does not authorize the court to leave the jury uninstructed,³⁰ but in such case the court may refuse the requested charges and give instructions of its own,³¹ which

29—*Sanders v. St. Louis South-western Ry. Co. of Texas*, — Tex. Civ. App. —, 135 S. W. 718.

30—*Andrews v. Runyon*, 65 Cal. 629; *Chicago West Division Ry. Co. v. Haviland*, 12 Ill. App. 561; *Lowry v. Beckner*, 5 B. Mon. (Ky.) 41; *Mabry v. State*, 71 Miss. 716.

The practice of refusing to give instructions, or even to read them, because they are unnecessarily lengthy and numerous would be a most dangerous one, and ought not to receive the sanction of an appellate tribunal. *McCaleb v. Smith*, 22 Iowa 244.

In Missouri there are many cases containing expressions from which it might be inferred that the court would be justified in refusing to give any instructions when the requests for instructions are too lengthy and numerous. An examination of these decisions shows, however, that the jury were nevertheless sufficiently instructed on all the points necessary to a proper determination of the case. *Doan v. St. Louis, K. & N. W. Ry. Co.*, 43 Mo. App. 450; *Norton v. St. Louis & H. Ry. Co.*, 40 Mo. App. 642; *McAllister v. Barnes*, 35 Mo. App. 668; *Kinney v. City of Springfield*, 35 Mo. App. 97; *City of Hannibal v. Richards*,

35 Mo. App. 15; *Renshaw v. Fireman's Ins. Co.*, 33 Mo. App. 394; *Desberger v. Harrington*, 28 Mo. App. 636.

31—When instructions asked are too lengthy and numerous, the court may properly refuse the requested instructions and give instructions of its own:

Arkansas. *Hanger v. Evins*, 38 Ark. 338.

Illinois. *Citizens Gaslight & Heating Co. v. O'Brien*, 19 Ill. App. 231; *Chicago West Division Ry. Co. v. Haviland*, 12 Ill. App. 561.

Kentucky. *Lowry v. Beckner*, 5 B. Mon. 41.

Mississippi. *Moriarty v. State*, 62 Miss. 661. •

Missouri. *Crawshaw v. Sumner*, 56 Mo. 517; *State v. Ott*, 49 Mo. 326; *Flynn v. St. Louis & S. F. Ry. Co.*, 43 Mo. App. 424; *Gelvin v. Kansas City, St. J. & C. B. Ry. Co.*, 21 Mo. App. 273.

"The remedy for this evil is for the several district judges to take the 'lengthy and numerous instructions' asked by counsel, and embody the law contained in them, and applicable to the case, in a concise, perspicuous charge." *McCaleb v. Smith*, 22 Iowa 244.

contain the same principles of law,³² or the court may give as many of the charges as the party is entitled to.³³

It is also proper for the court to limit the number of instructions.³⁴

§ 17. Repetition.

In a previous section it was stated that it was improper to give numerous instructions because it tended to convey the impression that the court was instructing in favor of one party.³⁵

A like objection applies to the continual repetition of facts or propositions in the instructions.³⁶

Accordingly, it is held that it is not proper to repeat the

32—All the principles of law embraced in the instructions asked which should be given must be embraced in the instructions given by the court. *Lowry v. Beckner*, 5 B. Mon. (Ky.) 41.

33—When the instructions asked are too numerous, the court may give as many of them as the party asking them is reasonably entitled to. *Dunn v. People*, 109 Ill. 635; *Chicago West Division Ry. Co. v. Haviland*, 12 Ill. App. 561; *Mabry v. State*, 71 Miss. 716.

34—Courts have just as much right to limit the instructions to a proper number as they have to confine argument within the proper limit. *Mabry v. State*, 71 Miss. 716.

“The law designs that instructions shall be so accurate and appropriate as to aid the jury in reaching a proper verdict. It was not designed that a party, by asking an unreasonable number, might compel the court either to pass upon them

without due consideration, or suspend the trial until such consideration could be had. To prevent abuse of this right, and perversion of the law, the court may, in its discretion, place a limit upon the number it will consider, as it may upon the number and length of addresses to the jury, and upon the number of witnesses to be heard, and the extent of their examination upon each branch of the case, and as it may, in general, make such rules and limitations as are necessary to the proper and orderly dispatch of business. What that limit shall be must depend upon circumstances. It should not be unreasonable nor without due notice. We cannot say the discretion was improperly exercised in the present instance.” *Chicago & A. R. Co. v. Kelly*, 25 Ill. App. 17.

35—See § 15, *ante*.

36—See § 152, “Unduly emphasizing matters,” *post*.

same proposition over and over,³⁷ and when a proper instruction is given, it is not necessary to repeat it.³⁸

Such repetition will warrant reversal when issues or phrases of the law are made unduly prominent.³⁹ It has been held, however, that an instruction applying a principle of law to the facts as found is not a repetition of another instruction announcing the same principle in the abstract.⁴⁰

To avoid repetition, it is proper to refer to other instructions which are given.⁴¹

§ 18. Argumentative instructions.

As a general rule the giving of argumentative instructions is considered improper. The charge should consist of concise propositions of law applicable to the facts as

37—*Grace & Hyde Co. v. Strong*, 224 Ill. 630, aff'g 127 Ill. App. 336; *Nelson v. Chicago City Ry. Co.*, 163 Ill. App. 98.

38—On a prosecution for unlawfully carrying a pistol, where the court instructed that if it was broken and could not be fired the defendant should be acquitted, it was not necessary to repeat such charge. *Rasberry v. State*, — Tex. Cr. App. —, 160 S. W. 682.

39—The fact that the instructions contain repeated statements of the same rule of law clothed in somewhat different language does not warrant a reversal, unless the repetitions are of such a nature as to emphasize and make some one phase of the law unduly prominent to the injury of one of the parties. *Alaska S. S. Co. v. Pacific Coast Gypsum Co.*, 78 Wash. 247, 138 Pac. 875.

Repeated reference to issues to be settled by the jury, when persisted in to such degree as to create the impression that such issues are controlling, will constitute reversible

error. *Cook v. Urban*, — Tex. Civ. App. —, 167 S. W. 251.

Where the court, inadvertently, instructed the jury at eleven places in the main charge that they must believe "from a preponderance of the evidence" the facts alleged, and in addition repeated the instruction in a separate paragraph at the conclusion of the charge, the error was probably harmful. *Cook v. Urban*, — Tex. Civ. App. —, 167 S. W. 251.

Repetition of instructions will not reverse where it is not shown that harm has been done. *Young v. City of Fairfield*, 173 Ill. App. 311.

40—*Mallen v. Waldowski*, 203 Ill. 87, rev'g 101 Ill. App. 367.

41—*State v. Haines*, 160 Mo. 555; *McElya v. Hill*, 105 Tenn. 319. See *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, wherein it was held that the language used sufficiently indicated that three instructions were to be taken together in arriving at the meaning of the court.

developed by the evidence,⁴² and the instructions should not be drawn out at great length for the purpose of injecting into them a condensed argument or speech.⁴³

Requested instructions which are argumentative should be refused.⁴⁴

§ 19. Same—What are argumentative instructions.

In an action for libel, the giving of an instruction containing an argumentative discussion by the supreme court of a

42—**Alabama.** Fuller v. Gray, 124 Ala. 388.

Illinois. Ludwig v. Sager, 84 Ill. 99; Chapman v. Cawrey, 50 Ill. 512; Merritt v. Merritt, 20 Ill. 80.

Minnesota. State v. Yates, 99 Minn. 461.

It is the duty of the presiding judge to instruct the jury as to the substantial law of the case and not to select certain features and give argumentative charges in regard to them. Georgia Ry. & Elec. Co. v. Gatlen, — Ga. —, 82 S. E. 888.

Contra, Casure v. State, 1 Tex. App. 19.

It is within the sound discretion of the court to give argumentative instructions. Karr v. State, 106 Ala. 1; Bray v. Ely, 105 Ala. 553.

43—**Alabama.** Bray v. Ely, 105 Ala. 553.

Illinois. Weyrich v. People, 89 Ill. 90; Keeler v. Stuppe, 86 Ill. 309; Chicago, B & Q. R. Co. v. Griffin, 68 Ill. 499; Thompson v. Force, 65 Ill. 370; Chittenden v. Evans, 48 Ill. 52; Merrick v. Wallace, 19 Ill. 486.

Michigan. People v. Hull, 86 Mich. 449; People v. Crawford, 48 Mich. 498.

Ohio. Bates v. Benninger, 2 Cin. R. 568; Mutual Ben. Life Ins. Co. v. French, 2 Cin. R. 321.

44—**Alabama.** Johnson v. Colvin
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(Ala.), 65 So. 328; Clayton v. State, 185 Ala. 13; Fowler v. State, 170 Ala. 65.

Arkansas. Bolling v. State, 54 Ark. 588.

California. People v. McNamara, 94 Cal. 509, 29 Pac. 953.

Georgia. Miles v. State, 93 Ga. 117, 44 Am. St. Rep. 140; Beck v. State, 76 Ga. 452.

Illinois. Jacksonville & St. L. R. Co. v. Wilhite, 209 Ill. 84; Pyle v. Pyle, 158 Ill. 289; Dickey v. Ghery, 163 Ill. App. 641; Schmalfeld v. Peoria & E. Ry. Co., 158 Ill. App. 335; Ranney v. Chicago & A. R. Co., 158 Ill. App. 104; Randall v. Sterling, D. & E. Elec. Ry. Co., 158 Ill. App. 56; Willison v. Dering Coal Co., 156 Ill. App. 209; Ventriess v. Pana Coal Co., 155 Ill. App. 152.

Massachusetts. Wyman v. Whicher, 179 Mass. 276.

Minnesota. Reem v. St. Paul City Ry. Co., 82 Minn. 98.

Missouri. State v. Orr, 64 Mo. 339; Flannery v. St. Louis, I. M. & S. Ry. Co., 44 Mo. App. 396.

Nebraska. Chapman v. State, 61 Neb. 888.

Ohio. Mutual Ben. Life Ins. Co. v. French, 2 Cin. R. 321.

Texas. Gulf, C. & S. F. R. Co. v. Farmer, 102 Tex. 235; Kansas City, M. & O. Ry. Co. of Texas v. Tread-

question not in the case at all is improper,⁴⁵ and a charge that "an accusation of slander is easy to be brought and hard to be defended against, though the defendant be ever so innocent," is mere argument.⁴⁶ Also an instruction that "in determining the question as to whether the slanderous words charged were spoken about or concerning the plaintiff, it is proper for you to consider whether, at this time, when these words were alleged to have been spoken, L. knew the person of the plaintiff or not, and, if he did not know the person of the plaintiff at this time, how could he have referred to her? And how could he have pointed her out as the subject of his accusation?" is argumentative.⁴⁷

The following charges have also been held argumentative: That "positive fraud or undue influence is hard to prove, is generally done by proving facts and circumstances to which the jury may look to infer fraud or undue influence;"⁴⁸ that contracts are presumed fair, and not unlawful or fraudulent, and that the party who attacks them as fraudulent has the burden of proving the fraud by positive or circumstantial evidence.⁴⁹ The following language in an instruction was held bad for a similar reason, "although the

well & Wilkison, — Tex. Civ. App. —, 164 S. W. 1089; *Glover v. Houston Belt & Terminal Ry. Co.*, — Tex. Civ. App. —, 163 S. W. 1063; *Bomar v. Munn*, — Tex. Civ. App. —, 158 S. W. 1186.

Wisconsin. *Wieting v. Town of Millston*, 77 Wis. 523.

If a requested instruction partakes of the nature of an argument, it is not error to refuse it. The practice of fighting battles over again in the instructions needs no encouragement, but should be checked, as tending to confuse the jury and protract the trial. *State v. Turner*, 19 Iowa 149.

In speaking of requests for instructions subject to this vice, it was said: "It seems as if this ob-

jectionable practice has arisen from two purposes on the part of those who adopt it: First, a determination to lose the cause before the jury, and, next, to reverse the result. The first always succeeds; the other rarely." *Bates v. Benninger*, 2 Cin. R. (Ohio) 568.

45—*Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530.

46—*McLaughlin v. Beyers*, 177 Ala. 672.

47—*Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799.

48—*Johnson v. Armstrong*, 97 Ala. 731.

49—*Underwood v. Jordan*, — Tex. Civ. App. —, 166 S. W. 88.

presumption is that the written request was received * * * if it was delivered to the mail, * * * that presumption is rebutted by the evidence of the defendants that they did not receive the request, unless the jury shall refuse to believe that evidence," and, "if the defendants have sworn that they did not receive a written request * * * the fact that such a request * * * was placed in the post office or mail * * * is not of itself sufficient to show that the defendants did receive it, unless the jury believe that what they have so sworn to is not worthy of credit." ⁵⁰

The following excerpts further illustrate the defect, "if two witnesses testify about a transaction, and one of the said witnesses was immediately at the scene of the transaction, and the other witness was some distance off, then the jury may look to this in determining which witness they will believe;" ⁵¹ "that defendant is authorized, under the statute, to testify in his own behalf, and the jury have a right to give full credit to his statements;" ⁵² that "when a plaintiff comes into court and undertakes to sustain his case by oral admissions * * * by his adversary after the lawsuit has been commenced, such testimony should be received with great caution, because of the improbability that a party * * * would make statements prejudicial to his own case, and because of the frailty of memory * * * of witnesses, * * * and their liability to misunderstand what was really said." ⁵³ Similarly instructions that "an opprobrious epithet conveying the idea of a lack of chastity would to a wanton cause no pain, while, applied to a pure and gentle wife, no tongue can tell the anguish, the shame, the sense of humiliation it would bring;" ⁵⁴ or that the law recognizes that wills are often

50—Steiner v. Ellis (Ala.), 7 So. 803.

51—Jones v. Alabama Mineral R. Co., 107 Ala. 400.

52—Horn v. State, 102 Ala. 144.

53—Riddle v. Webb, 110 Ala. 599.

54—Hanna v. Hanna, 3 Tex. Civ. App. 51.

made *in extremis* and when the bodily powers are broken and mental faculties enfeebled, are argumentative.⁵⁵

In actions for personal injuries, it has been held argumentative to give charges, in substance, as follows: That the conduct of children of tender years is not to be measured by the same standard as that of persons of mature years, and stating that "this is a reasonable and humane rule and through all the branches of the law, whether contract or tort, there runs a line distinguishing children of years too few to have judgment of discretion from those old enough to possess and exercise these faculties. This is a doctrine taught by every man's experience and sanctioned by the law;⁵⁶ that, "in this case, there is no complaint that any of the crew on the train were incompetent or unfit for the positions they occupied; and the jury cannot consider any testimony, or any arguments of counsel, bearing on that matter."⁵⁷ Also, in an action for injuries caused by a defective sidewalk, an instruction on the subject of contributory negligence, that the jury should take into consideration "the familiarity of the plaintiff with the sidewalk, and the time of day and condition of the weather at the time he was injured," is argumentative.⁵⁸

In criminal cases, the following instructions have been held argumentative: That "the law is as much vindicated by the acquittal of an innocent person as by the conviction of a guilty one;"⁵⁹ that "it is as much their [the jury's] duty as jurors to acquit the defendant, if from the evidence they have a reasonable doubt of his guilt, as it would be to convict him if they believe, to a moral certainty, that he is guilty;"⁶⁰ that "it is the duty of each juror to decide

55—Huffman v. Graves, 245 Ill. 440.

56—Chicago & E. I. R. Co. v. Mitchell, — Ind. App. —, 105 N. E. 396.

57—Georgia Pac. Ry. Co. v. Propst, 90 Ala. 1.

58—City of Bonham v. Crider (Tex. Civ. App.), 27 S. W. 419.

59—Parker v. State, 165 Ala. 1.

60—Cooper v. State, 88 Ala. 107.

the issue for himself, and if there is any juror who has a reasonable doubt of the guilt of defendant, it is his duty to stand by his convictions, and he should not yield simply because every other juror may disagree with him;"⁶¹ that "the jury may look upon the affidavit upon which the warrant for defendant's arrest was issued, which showed that the prosecutor came to town and swore to it the second day after the alleged assault, as throwing light on whether or not they believed he was struck with an ax, as alleged."⁶²

An instruction containing a general dissertation upon the rights of the defendants to life and liberty, upon the duty of jurors and upon the importance of convicting the guilty, and stating the method by which the jurors were chosen, the reason for which they were impaneled and that they were selected as intelligent and qualified jurors, has also been held argumentative.⁶³ And on a trial for keeping intoxicating liquors, an instruction that "there is no proof that a partnership existed between defendant and R, and the fact that R had been charged with selling whisky should not be construed against defendant," was properly refused as argumentative and abstract.⁶⁴

§ 20. Same—Argumentativeness as ground for reversal.

Ordinarily, the giving of argumentative instructions is not error sufficient to warrant the reversal of a judgment,⁶⁵ unless the party complaining is injured,⁶⁶ although there are decisions to the contrary.⁶⁷

61—Phillips v. State, 11 Ala. App. 15.

62—Little v. State, 89 Ala. 99.

63—People v. Davidson, 240 Ill. 191.

64—Kinsaul v. State, 8 Ala. App. 405.

65—If the instructions, although argumentative, correctly state the law, when taken as a whole, the judgment should not be reversed. Baldwin v. State, 111 Ala. 11; Karr

v. State, 106 Ala. 1; Bray v. Ely, 105 Ala. 553; Hurley v. State, 29 Ark. 17.

66—The giving of argumentative instructions is not ground for reversal unless they were likely to injure the party complaining. Payne v. Crawford, 102 Ala. 388; Trufant v. White, 99 Ala. 526; McQueen v. State, 94 Ala. 50; Jones v. State, 65 Ga. 621.

67—Judgment reversed because of

There are other decisions holding that the judgment should not be reversed where the instructions are argumentative, if such charges state correct propositions of law and the party aggrieved did not ask that the erroneous charges be modified or qualified.⁶⁸

§ 21. Contradictory instructions.

Instructions should be harmonious and consistent,⁶⁹ and it is improper to give contradictory instructions upon a vital point.⁷⁰

argumentative instructions. *Gulf, C. & S. F. Ry. Co. v. Harriett*, 80 Tex. 73; *Lee v. Yandell*, 69 Tex. 34; *Chisum v. Chesnutt* (Tex. Civ. App.), 36 S. W. 760.

Judgments reversed because of argumentative instructions coupled with other errors. *Ludwig v. Sager*, 84 Ill. 99; *Young v. Merkel*, 163 Pa. 513; *Cowie v. City of Seattle*, 22 Wash. 659, 62 Pac. 121.

68—*Wilhoite v. Udell* (Ala.), 9 So. 550; *Birmingham Fire Brick Works v. Allen*, 86 Ala. 185.

69—*Illinois Match Co. v. Chicago, R. I. & P. Ry. Co.*, 250 Ill. 396.

Instructions as a whole must be consistent, and not misleading. *Hoben v. Burlington & M. River R. Co.*, 20 Iowa 562.

70—*Gilmore v. Fuller*, 198 Ill. 130, 60 L. R. A. 286; *Pendleton v. Chicago City Ry. Co.*, 120 Ill. App. 405.

It is erroneous to give instructions which are contradictory and irreconcilable.

California. *Lemasters v. Southern Pac. Co.*, 131 Cal. 105, 63 Pac. 128.

Illinois. *McLean County Bank v. Mitchell*, 88 Ill. 52; *Quinn v. Donovan*, 85 Ill. 196.

Indiana. *Blume v. State*, 154 Ind. 343; *Anderson v. Oscamp* (Ind. App.), 35 N. E. 707.

Iowa. *Pumphrey v. Walker*, 75 Iowa 408.

Michigan. *Comstock v. Smith*, 26 Mich. 306.

Mississippi. *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360n; *Chapman v. Copeland*, 55 Miss. 476.

Missouri. *Bluedorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 32 Am. St. Rep. 615; *Seymour v. Seymour*, 67 Mo. 303; *Henschen v. O'Bannon*, 56 Mo. 289; *Straat v. Hayward*, 37 Mo. App. 585.

Montana. *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633.

Texas. *Kraus v. Haas*, 6 Tex. Civ. App. 665.

Utah. *Konold v. Rio Grande Western Ry. Co.*, 21 Utah 379, 81 Am. St. Rep. 693, 60 Pac. 1021.

West Virginia. *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682n; *Baltimore & O. R. Co. v. Lafferty*, 2 W. Va. 104.

United States. *Deserant v. Cerillos Coal R. Co.*, 178 U. S. 409, 44 L. Ed. 1127, rev'g 9 N. M. 495, 55 Pac. 290.

Inconsistent charges that affirmatively mislead the jury should not

The objections to such charges are that they tend to mislead the jury,⁷¹ render it impossible to determine what rule the jury adopted in giving their verdict,⁷² and leave the jury free to follow either instruction, as their personal wishes or private feelings may dictate.⁷³

"It is the right of every party to insist that the law applicable to his case shall be fairly and distinctly stated in

be given. *Florida East Coast R. Co. v. Jones*, 66 Fla. 51.

71—*McCole v. Loeher*, 79 Ind. 430.

"A jury cannot be required to harmonize conflicting charges." *Trinity & B. Val. Ry. Co. v. Lunsford*, — Tex. Civ. App. —, 160 S. W. 677.

Instructions should be so framed that they will not only state the law correctly, but will not, by reason of even apparent contradictions and inconsistencies, confuse and mislead the jury. *Hoben v. Burlington & M. River R. Co.*, 20 Iowa 562.

Where the instructions set up for the jury contradictory rules for their guidance, which are unexplained, and following either of which would or might lead to different results, then the instructions are inherently defective and calculated to confuse and mislead the jury. *Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 1.

72—Where it is sought to review the verdict, it is impossible to tell which of the inconsistent instructions the jury adopted and followed. One of such instructions must be erroneous, and *non constat* they may have followed that one.

Arkansas. *St. Louis, I. M. & S. Ry. Co. v. Beecher*, 65 Ark. 64.

California. *Sappenfield v. Main St. & A. P. R. Co.*, 91 Cal. 48, 27 Pac. 590; *Haight v. Vallet*, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac.

897; *Black v. Sprague*, 54 Cal. 266; *Chidester v. Consolidated People's Ditch Co.*, 53 Cal. 56; *McCreery v. Everding*, 44 Cal. 246; *Brown v. McAllister*, 39 Cal. 573; *People v. Campbell*, 30 Cal. 312.

Colorado. *City of Boulder v. Niles*, 9 Colo. 415, 12 Pac. 632; *Clare v. People*, 9 Colo. 122, 10 Pac. 799.

Illinois. *Wilbur v. Wilbur*, 129 Ill. 392; *Quinn v. Donovan*, 85 Ill. 196; *Leyenberger v. Paul*, 12 Ill. App. 635.

Indiana. *Fowler v. Wallace*, 131 Ind. 347; *McCole v. Loeher*, 79 Ind. 430.

Iowa. *State v. Keasling*, 74 Iowa 528; *Hawes v. Burlington, C. R. & N. Ry. Co.*, 64 Iowa 315; *Conway v. Illinois Cent. R. Co.*, 50 Iowa 465.

Missouri. *State v. Herrell*, 97 Mo. 105, 10 Am. St. Rep. 289; *Henschen v. O'Bannon*, 56 Mo. 289.

Montana. *Keene v. Welsh*, 8 Mont. 305, 21 Pac. 25.

Nebraska. *School Dist. of Chadron v. Foster*, 31 Neb. 501; *Ballard v. State*, 19 Neb. 610; *Wasson v. Palmer*, 13 Neb. 376.

Oregon. *Kelly v. Lewis Inv. Co.*, 66 Ore. 1, Ann. Cas. 1915 B 568n, 133 Pac. 826.

West Virginia. *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682n.

73—*Baker v. Ashe*, 80 Tex. 356.

the instructions, and it is not sufficient that a part of the instructions contain a correct exposition of the law, if it is incorrectly announced in others.”⁷⁴

The refusal of contradictory instructions is proper, whether they be contradictory to those previously granted at the same party's request, or to those given at the request of the opposite party.⁷⁵

In one case it was held that where an instruction contains two wholly inconsistent propositions and is well calculated to mislead the jury, no special objection is required to present the error because it is not a mere defect in verbiage and form, but one of substance to which a general objection will be sufficient.⁷⁶

§ 22. Same—Instructions held bad as being contradictory.

An instruction stating that the jury should find the market value of lumber at the nearest market “where same could be obtained,” and then following with the words “or the market where the same could be obtained upon the most advantageous terms,” is contradictory and misleading.⁷⁷ And where two instructions are given, one declaring that knowledge of the plaintiff, at the time of the purchase, of the intent of the party from whom he bought to defraud his creditors would render the sale void, and the other declaring that the plaintiff ought to recover unless he bought the

74—Chicago, B. & Q. R. Co. v. Payne, 49 Ill. 499.

75—Cumberland Coal & Iron Co. v. Tilghman, 13 Md. 74; St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company, 160 Mo. 396; Straat v. Hayward, 37 Mo. App. 585; Baltimore & O. R. Co. v. Lafferty, 2 W. Va. 104.

But see Fessenden v. Doane, 89 Ill. App. 229, aff'd 188 Ill. 228, wherein it was held not to be error that the instructions given at the request of the defendant were

inconsistent with those given at the request of the plaintiff, upon the ground that each party is entitled to instructions presenting the law applicable to the evidence supporting his theory of the case. It seems that there should be no difficulty in doing this without giving inconsistent and contradictory instructions.

76—St. Louis, I. M. & S. R. Co. v. Bright, 109 Ark. 4.

77—Gourley v. American Hardwood Lumber Co., 185 Mo. App. 360.

goods with the intent to defraud the creditors of the vendor of the goods, such instructions are clearly repugnant.⁷⁸

In an action for an indebtedness due for certain cotton sold to a defendant where an instruction was given that the plaintiff must prove the allegations of his petition by a preponderance of the evidence, to recover, and another instruction charged that the jury should find for plaintiff if the defendant did not establish his plea of estoppel, it could not be determined on which theory the verdict was rendered, and the charges were erroneous.⁷⁹ So, in an action for malicious prosecution, an instruction that, if one, actuated by a real sincere design to bring about a reformation of manners, in pursuing that design, wilfully inflicts a wrong not warranted by law, such wrong is malicious, is contradictory. In other words, the instruction says that if one designs to do right and designs to do wrong his act is malicious.⁸⁰

In a contest over a strip of land between adjoining land-owners, growing out of a dispute as to the true line dividing the two tracts, in which the defendant relied upon the statute of limitations, the court, at the request of plaintiff, instructed the jury that, if defendant occupied the land up to his fence, because he believed it to be the true line, without intent to claim to the fence if it should not be the line, then an element of adverse possession was wanting. This instruction was held contradictory.⁸¹

An instruction that it was not negligence as a matter of law for a person to go upon a street car track without looking and listening, but concluding with the proposition that the law requires that such person must use due care and that ordinary care means that he must look and listen, etc., is self-contradictory and is properly refused.⁸²

78—Frederick v. Allgaier, 88 Mo. 598.

79—Weld-Neville Cotton Co. v. Lewis, — Tex. Civ. App —, 163 S. W. 667.

80—Whitfield v. Westbrook, 40 Miss. 311.

81—Grim v. Murphy, 110 Ill. 271.

82—Roanoke Ry. & Elec. Co. v. Carroll, 112 Va. 598.

In an action for injuries to a passenger carried beyond her destination and compelled to walk back to station, a part of an instruction stating that she had a right to walk back without assuming the risk incident to taking such walk was wholly inconsistent with another part of such charge leaving it to the jury to determine whether the "circumstances justified her in electing to walk."⁸³

In an action for being ejected from a sleeping car, an instruction that blankets were not baggage because they were being taken home for use as portières was inconsistent with another instruction leaving the question to the jury along with a question as to whether the bundles were bulky.⁸⁴

In an action for the death of a person who was killed at a railroad crossing, an instruction that the burden was upon the defendant to prove by a preponderance of the evidence the facts submitted as material to its defense, following a charge that the burden was on the plaintiff to prove by a preponderance of evidence the facts material to the right to recover, was erroneous as being contradictory and as leading the jury to believe that the burden was on the defendant to establish the negative of the issue of negligence.⁸⁵

Where the court charged that the defendant was not liable for an accident causing death, unless its negligence was wilful and wanton, and also charged that if the defendant failed to keep a proper lookout in order to prevent a collision, and by reason of such negligence the deceased was killed, the verdict should be for the plaintiff, the two instructions were directly contradictory, and therefore erroneous.⁸⁶

An instruction that it was a servant's duty to inspect the

83—St. Louis, I. M. & S. R. Co. v. Bright, 109 Ark. 4.

84—Pullman Co. v. Custer, — Tex. Civ. App. —, 140 S. W. 847.

85—Galveston, H. & S. A. Ry. Co.

v. Dozier, — Tex. Civ. App. —, 162 S. W. 1019.

86—Lemasters v. Southern Pac. Co., 131 Cal. 105, 63 Pac. 128.

roof of his working place was erroneous, where the evidence as to such duty was conflicting and where another instruction directly stated that it was the master's duty to inspect the roof of the servant's working place.⁸⁷

In an action for injuries to a servant caused by the fall of an elevator, where one instruction submitted the question of whether the plaintiff assumed the risk of the elevator cable being defective, and another instruction told the jury that if the defendant was negligent and the injury therefrom resulted without fault on the plaintiff's part, he was entitled to recover unless there had been a settlement, the instructions were erroneous as contradictory.⁸⁸

An instruction, in an action for personal injuries, that in assessing damages the jury should consider the interest which the sum awarded would produce annually, is inconsistent with an instruction that plaintiff could not be awarded, as damages, a sum that would, by way of interest, earn an equivalent to plaintiff's annual losses.⁸⁹

On a prosecution for selling intoxicating liquors, an instruction directing a verdict of guilty if a sale was made at any date within a year prior to filing the information, and an instruction directing an acquittal unless the sale was made on one certain date as testified to by a witness for the state, were erroneous as contradictory.⁹⁰

In such a prosecution, an instruction that though the jury believe that one drank whisky in defendant's store, as charged in the indictment, yet, if they believe that such person drank the whisky without the knowledge or consent of the defendant, they would find the defendant not guilty, is absurd, where the indictment charges that the liquor was drunk with the knowledge and consent of defendant.⁹¹

87—*Eagle Coal Co. v. Patrick's Adm'r*, 161 Ky. 333.

88—*Brusseau v. Lower Brick Co.*, 133 Iowa 245.

89—*Ramsey v. National Contracting Co.*, 49 App. Div. (N. Y.) 11.

90—*State v. Fellers*, 140 Mo. App. 723.

91—*May v. State*, 35 Tex. 650.

An instruction that "it is a rule universally observed that men in business, social, and ordinary affairs of life, as well as in the commission of crime, act from motive," and that if the jury believe that the defendant had no motive for the commission of the crime, it is for them to say whether the absence of motive "is not a persuasive circumstance in favor of the defendant's plea of unsoundness of mind," is self-contradictory.⁹²

§ 23. Same—Instructions held not contradictory.

Instructions based upon two different allegations of fact are not contradictory, it appearing that the jury could, under the proof, have consistently found for the defendant, though not for the plaintiff under both aspects presented by the instructions.⁹³

In an action on a promissory note, there was no conflict between an instruction placing the burden of proof on defendants to establish payment as pleaded, and one telling the jury that a receipt was prima facie evidence of payment.⁹⁴

In an action to recover for goods sold to an infant, an instruction that says, when a person arrives at mature age and is of sound mind, he is presumed to know the law, does not contradict an instruction that an infant, to ratify his contract after he becomes of age, must know that he is not bound by an alleged contract made during infancy.⁹⁵

In an action of replevin, where an instruction made essential to a verdict for plaintiff the finding of a purchase in good faith, and such requirement was emphasized in the next instruction in which such change of possession as would afford third parties notice of change of ownership was declared essential to a sale in good faith, there was no inconsistency.⁹⁶

92—Blume v. State, 154 Ind. 343.

93—Western U. Tel. Co. v. Reed,
158 Ky. 552.

94—Richards v. Osborne, — Tex.
Civ. App. —, 164 S. W. 392.

95—Ogborn v. Hoffman, 52 Ind.
439.

96—Sheeler v. Porter Hardware
Co., 162 Iowa 6.

Where a cause of action alleged involves a violation of an ordinance, an instruction that such ordinance "existed at the time of the accident," and also that "this ordinance would not bind the defendant * * * unless it had been published," is not conflicting or misleading, as both stating that the ordinance existed and did not exist.⁹⁷

In an action for injuries caused by being struck by an automobile, an instruction that if defendant was running on the left side of the street plaintiff was entitled to recover, was not inconsistent with a charge that defendant might pass around an obstruction in the street to the left side thereof.⁹⁸

Where an instruction declared that a railroad was bound to maintain "sufficient light" at its stations and also stated that the company was required to keep its stations "properly lighted," it was not contradictory.⁹⁹

In an action for death by wrongful act, an instruction that it was the duty of the deceased to exercise the care and prudence of an ordinarily careful and prudent person of his age (ten years) and intelligence, is not inconsistent with an instruction that if the deceased saw and heard, or by looking and listening could have seen and heard, defendant's engine approaching, then the plaintiff could not recover.¹

An instruction authorizing the jury to disregard a release of damages if obtained by fraud, is not inconsistent with another instruction authorizing a deduction from the damages of the sum paid for release.²

An instruction on self-defense given by the court is not inconsistent with an instruction on self-defense given at the request of the accused, where the only difference between

97—*Larkin v. Burlington, C. R. & N. Ry. Co.*, 91 Iowa 654.

98—*Clark v. Van Vleck*, 135 Iowa 194.

99—*Teale v. Southern Pac. Co.*, 20 Cal. App. 570, 129 Pac. 949.

1—*Schmitt v. Missouri Pac. Ry. Co.*, 160 Mo. 43.

2—*Savage v. Chicago & J. Elec. R. Co.*, 238 Ill. 392, aff'g 142 Ill. App. 342.

them is that one contains a definition of "reasonable doubt" and the other does not.³

§ 24. Same—Incorrect instructions not cured by inconsistent correct instructions.

Error committed in the giving of an incorrect instruction is not cured or rendered harmless by the giving of a correct instruction on the same subject. Such instructions would be misleading and erroneous,⁴ and it would be impossible to say which instruction the jury followed. The only remedy for an error of this sort is by an express withdrawal of the erroneous instructions, in addition to the giving of other instructions which are correct.⁵

3—State v. Moore, 156 Mo. 204.

4—**Illinois.** Kankakee Stone & Lime Co. v. City of Kankakee, 128 Ill. 173; Wabash, St. L. & P. Ry. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Illinois Linen Co. v. Hough, 91 Ill. 63; Counselman v. Collins, 35 Ill. App. 68.

Indiana. Pittsburgh, C. & St. L. Ry. Co. v. Noftsgar, 148 Ind. 101; Heyl v. State, 109 Ind. 589; McDougal v. State, 88 Ind. 24; McEntire v. Brown, 28 Ind. 347.

Iowa. State v. Keasling, 74 Iowa 528.

Kentucky. Clay's Heirs v. Miller, 3 T. B. Mon. 146.

Mississippi. Herndon v. Henderson, 41 Miss. 584; Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332; Mississippi Cent. R. Co. v. Miller, 40 Miss. 45.

Missouri. Flynn v. Union Bridge Co., 42 Mo. App. 529; George v. Wabash Western Ry. Co., 40 Mo. App. 433; State v. Clevenger, 25 Mo. App. 653; Fink v. Algermissen, 25 Mo. App. 186; Safety Fund Nat. Bank v. Westlake, 21 Mo. App. 565;

Welch v. Hannibal & St. J. Ry. Co., 20 Mo. App. 477.

Nebraska. Thompson v. State, 61 Neb. 210, 87 Am. St. Rep. 453.

Pennsylvania. Gearing v. Lacher, 146 Pa. 397.

Tennessee. Bruce v. Beall, 99 Tenn. 303.

Texas. Baker v. Ashe, 80 Tex. 356.

Vermont. State v. Fitzgerald, 72 Vt. 142.

Wisconsin. Imhoff v. Chicago & M. Ry. Co., 20 Wis. 344.

An instruction attempting to cover the whole case but which omits an essential element is erroneous, and such error is not cured by another instruction covering the omitted point. Dobson v. State, 61 Neb. 584. But see Parsons v. State, 61 Neb. 244.

5—**Idaho.** Lufkins v. Collins, 2 Idaho 135, 7 Pac. 95.

Indiana. Heyl v. State, 109 Ind. 589; McCole v. Loehr, 79 Ind. 432.

Missouri. Jones v. Talbot, 4 Mo. 279.

Texas. Baker v. Ashe, 80 Tex. 361.

When an erroneous instruction is withdrawn or corrected, it should be by a qualification referring expressly to it.⁶

§ 24a. Same—Contradictory charges as ground for reversal.

Where a charge is so contradictory as to leave the minds of the jury in an unsettled state, and it cannot be said on what rule of law the verdict is based, the error is of sufficient gravity to require a reversal of the judgment.⁷ And it has been held that a judgment of conviction will be reversed, even though the appellate court may be satisfied from the evidence that the jury ought to have found

Vermont. *State v. Fitzgerald*, 72 Vt. 142.

Wisconsin. *Imhoff v. Chicago & M. Ry. Co.*, 20 Wis. 344.

6—*Baker v. Ashe*, 80 Tex. 356.

7—**California.** *People v. Elliott*, 90 Cal. 586, 27 Pac. 433; *Haight v. Vallet*, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897; *People v. Higgins* (Cal.), 12 Pac. 301; *Harrison v. Spring Valley Hydraulic Gold Co.*, 65 Cal. 376, 4 Pac. 381; *Aguirre v. Alexander*, 58 Cal. 21; *Black v. Sprague*, 54 Cal. 266; *Chidester v. Consolidated People's Ditch Co.*, 53 Cal. 56; *In re Cunningham's Estate*, 52 Cal. 465; *Brown v. McAllister*, 39 Cal. 573; *Clark v. McElvy*, 11 Cal. 154.

Colorado. *City of Boulder v. Niles*, 9 Colo. 415, 12 Pac. 632; *City of Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62.

Idaho. *Holt v. Spokane & P. Ry. Co.*, 3 Idaho 703, 35 Pac. 39.

Illinois. *Illinois Linen Co. v. Hough*, 91 Ill. 63; *City of Litchfield v. Ward*, 32 Ill. App. 392; *Knowlton v. Fritz*, 5 Ill. App. 217.

Indiana. *Wenning v. Teeple*, 144 Ind. 189; *Summerlot v. Hamilton*,

121 Ind. 87; *State v. Sutton*, 99 Ind. 300; *Kirland v. State*, 43 Ind. 146, 13 Am. Rep. 386; *Somers v. Pumphrey*, 24 Ind. 231; *Watts v. Chicago & E. I. R. Co.*, — Ind. App. —, 104 N. E. 42; *Smith v. Rodecap*, 5 Ind. App. 78.

Iowa. *Moore v. Des Moines & Ft. D. Ry. Co.*, 69 Iowa 491; *State v. Shelton*, 64 Iowa 333; *Hawes v. Burlington, C. R. & N. Ry. Co.*, 64 Iowa 315; *State v. Hartzell*, 58 Iowa 520; *Vanslyck v. Mills*, 34 Iowa 375; *Davis v. Stroh*, 17 Iowa 421.

Kentucky. *Hawkins v. Robinson*, 3 T. B. Mon. 143.

Minnesota. *McCormick v. Kelly*, 28 Minn. 135.

Mississippi. *Solomon v. City Compress Co.*, 69 Miss. 319.

Missouri. *Hickman v. Link*, 116 Mo. 123; *Spillane v. Missouri Pac. Ry. Co.*, 111 Mo. 555; *Otto v. Bent*, 48 Mo. 23; *Buel v. St. Louis Transfer Co.*, 45 Mo. 562; *Wood v. Steamboat Fleetwood*, 19 Mo. 529; *Pond v. Wyman*, 15 Mo. 175; *Allen v. Quercus Lumber Co.*, 171 Mo. App. 492; *Union Bank of Trenton v. First Nat. Bank of Milan*, 64 Mo. App.

defendant guilty.⁸ The general rule is that the fact that other instructions, to some extent, lay down the law correctly, is not material. It cannot be determined by which instruction the jury was governed, and the possibility that error may have intervened is enough to warrant a reversal.⁹ It has been said that the rule may not apply

253; *Jones v. Chicago, B. & K. C. Ry. Co.*, 59 Mo. App. 137; *Frank v. Grand Tower & C. Ry. Co.*, 57 Mo. App. 181; *Martinowsky v. City of Hannibal*, 35 Mo. App. 70; *Carder v. Primm*, 1 Mo. App. 167.

Montana. *Keene v. Welsh*, 8 Mont. 305, 21 Pac. 25; *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633; *Territory v. Owings*, 3 Mont. 137.

Nebraska. *School Dist. of Chadron v. Foster*, 31 Neb. 501.

New York. *Clarke v. Schmidt*, 210 N. Y. 211.

Pennsylvania. *Sellers v. Stevenson*, 163 Pa. 262; *Wolf v. Wolf*, 158 Pa. 621; *Selin v. Snyder*, 11 Serg. & R. 319.

Texas. *San Antonio & A. P. Ry. Co. v. Robinson*, 73 Tex. 277; *Gulf, C. & S. F. Ry. Co. v. White*, — Tex. Civ. App. —, 32 S. W. 322.

Vermont. *Bovee v. Town of Danville*, 53 Vt. 183.

Virginia. *Powhatan Lime Co. v. Affleck's Adm'r*, 115 Va. 643.

Wisconsin. *Sears v. Loy*, 19 Wis. 96.

United States. *Bank of Metropolis v. New England Bank*, 6 How. 212, 12 L. Ed. 409.

An instruction is to be considered harmful where it is contradictory of other instructions on a material point. *Southern R. Co. v. Hansbrough's Adm'r*, 107 Va. 733.

When contradictory charges are given which may be material, the case will be reversed. *Trinity & B.*

Val. Ry. Co. v. Lunsford, — Tex. Civ. App. —, 160 S. W. 677.

Where instructions given at the request of plaintiff and of defendant are conflicting, the rendition of a verdict in conformity with either of the instructions necessarily implies a disregard of principles prescribed by the other, and the court cannot refuse to reverse if the record does not show that no injury resulted from the contradictory instructions. *Adams v. Capron*, 21 Md. 186, 83 Am. Dec. 566.

The giving of contradictory instructions is reversible error where the substantial rights of the plaintiff are affected. *Ranney v. Lewis*, 182 Mo. App. 58.

8—*People v. Valencia*, 43 Cal. 552.

9—*City of Boulder v. Niles*, 9 Colo. 415, 12 Pac. 632.

But see *Nuckolls v. Gaut*, 12 Colo. 361, 21 Pac. 41, where it was held that in order for a conflict between instructions to be a ground for reversal it must appear that such conflict may have injured the party complaining.

This decision is not, however, in accord with the cases cited in support of the proposition hereinbefore stated.

In another decision it was said that if two contradictory instructions are given, a new trial will ordinarily be granted, unless it plainly appears that the jury have not

where it is clear to the court that the erroneous instructions did not mislead the jury,¹⁰ but this view is not supported by the weight of authority, and it has been well said in one case that it will not do to hope or conjecture that a false rule will do no evil because a correct one was also given.¹¹

The rule that a judgment must be reversed where instructions on a material point are contradictory is not an absolute and unqualified rule,¹² and if one of the contradictory instructions which is erroneous is in favor of the party complaining, the cause, for obvious reasons, will not be reversed.¹³ Also where an instruction given at the request of a party is erroneous, and is inconsistent with all the other instructions, such party cannot allege error.¹⁴

been misled thereby. *Union Pac. Ry. Co. v. Milliken*, 8 Kan. 647.

10—*Imhoff v. Chicago & M. Ry. Co.*, 20 Wis. 362. If an improper instruction, given at the request of a party, conflicts with other correct instructions, given by the court of its own motion, but does not mislead the jury, as shown by the fact that the jury find for the other party, under the instructions given by the court on its own motion, it is no cause for reversal. *Farmers' &*

Traders' Nat. Bank v. Woodell, 38 Ore. 294, 65 Pac. 520, 61 Pac. 837.

11—*Catawissa R. Co. v. Armstrong*, 49 Pa. St. 193.

12—*Lobdell v. Hall*, 3 Nev. 507.

13—*Williams v. Southern Pac. R. Co.*, 110 Cal. 457, 42 Pac. 974; *Carroll v. People*, 136 Ill. 456; *St. Joseph & D. C. R. Co. v. Grover*, 11 Kan. 302.

14—*Reardon v. Missouri Pac. Ry. Co.*, 114 Mo. 384.

CHAPTER V.

FORM OF INSTRUCTIONS.

- § 25. Scope of chapter.
- § 26. Necessity of adhering to well-settled precedents.
- § 27. Instructions in form of questions.
- § 28. Style and spirit of instructions.
- § 29. Arrangement.
- § 30. Language.
- § 31. Use of words of statute.
- § 32. Verbal or technical inaccuracies.
- § 33. Omissions.
- § 34. Abbreviations.
- § 35. Punctuation.
- § 36. Brevity and clearness.
- § 37. Accuracy, directness and certainty.
- § 38. Ambiguous instructions.
- § 39. Vague, involved and obscure instructions.
- § 40. Predicating instructions on belief from evidence.
- § 41. Necessity of hypothesizing facts.

§ 25. Scope of chapter.

A discussion as to the form of instructions necessarily involves the question whether they should be oral or written,¹ as well as questions concerning what reference may be made to the pleading and evidence.²

These matters will be treated in the following chapters, and the more general matters, such as style and arrangement, the words used, and similar questions, are discussed in this chapter.

§ 26. Necessity of adhering to well-settled precedents.

It is the safer and better practice in drafting instructions to use language universally adopted and approved than to

1—See ch. VI, *post*, “Necessity of
Instructing in Writing.”

2—See chapters VIII, IX, X, *et*
seq., *post*.

undertake to give a new version in more doubtful language,³ and on well-known subjects, such as reasonable doubt, it is advisable to follow an approved instruction, not only because it is a safe practice, but because it obviates the necessity of considering instructions on the same subject which are differently worded, on appeal.⁴

In general, it is well for the trial judge to adhere strictly to the old and well-settled formulas of the law. Any departure from the beaten track will lead to doubt and uncertainty.⁵

§ 27. Instructions in form of questions.

There is no error in presenting some of the facts in the form of questions. It is well calculated to present to the jury the precise points in controversy.⁶

§ 28. Style and spirit of instructions.

The style and diction of a charge must necessarily be left to the discretion of the trial court,⁷ but it is not good practice to underscore portions of an instruction,⁸ or to give a charge containing italicized words,⁹ or words printed in

3—**Colorado.** *McQueary v. People*, 48 Colo. 214, 21 Ann. Cas. 560, 110 Pac. 210.

Missouri. *State v. Murray*, 91 Mo. 95; *State v. Stein*, 79 Mo. 330; *State v. Kilgore*, 70 Mo. 557.

Tennessee. *Turner v. State*, 4 Lea 206; *Lawless v. State*, 4 Lea 173; *Smith v. State*, 2 Leg. R. 56.

4—*McQueary v. People*, 48 Colo. 214, 21 Ann. Cas. 560, 110 Pac. 210.

5—*Lawless v. State*, 4 Lea (Tenn.), 179.

6—*McLain v. Com.*, 99 Pa. 86.

7—*Kersten v. Great Northern R. Co.*, 28 N. D. 3.

The trial judge is necessarily vested with a large discretion as to

the style and form of the charge. *Mawich v. Elsey*, 47 Mich. 10; *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403.

8—*Wright v. Brosseau*, 73 Ill. 381.

While the practice of underscoring instructions is subject to criticism, and display type or italics should not be employed to call the attention of the jury to any fact which may be contested, the use of display type in merely ordinary and general instructions, which do not involve special facts, will not be cause for reversal. *Hagenow v. People*, 188 Ill. 545.

9—*Mitchell v. Hindman*, 47 Ill. App. 431, aff'd 150 Ill. 538.

larger letters than other parts of the charge.¹⁰ A charge is legally sufficient if it is correct in substance and commits fairly to the jury the determination of the disputed facts.¹¹ So far as practicable the instructions should be given in a concrete form,¹² and the facts which there is evidence to prove should be grouped together and the jury told the legal effect of such facts, if they are found to exist. This form of an instruction is preferable to one dealing in generalities.¹³

In negligence cases, however, it is common practice to preface an instruction with a general statement of the duty of the operator of machinery, etc., to those using it or likely to come in contact therewith, and to follow the same with a specific application of the doctrine to the particular facts in issue.¹⁴

Charges which refer to links and chains in the testimony are frequently condemned, it being the rule that cases should be tried on facts and not theories.¹⁵

The style and spirit of a charge are not open to criticism by the reviewing court if the charge be correct and not liable to mislead the jury;¹⁶ and an instruction which is correct as applied to the merits of the controversy will not be declared erroneous because it was inartificially drawn.¹⁷

10—*Elwood v. Chicago City Ry. Co.*, 90 Ill. App. 397.

Charge held properly refused when containing words "not guilty" in larger type. *McCormick Harvesting Mach. Co. v. Sendzikowski*, 72 Ill. App. 402.

11—*Fessenden v. Doane*, 188 Ill. 228, aff'g 89 Ill. App. 229; *Carman v. Central R. Co.*, 195 Pa. 440.

Instructions should be so drawn as to apply to the case. *Illinois Match Co. v. Chicago, R. I. & P. R. Co.*, 250 Ill. 396.

12—Instructions should be sufficiently concrete to bring the minds

of the jury intelligently to the law of the case. *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609.

13—*Gaffney v. St. Paul City Ry. Co.*, 81 Minn. 459; *Zimmerman v. Hannibal & St. J. R. Co.*, 71 Mo. 476.

14—*Johnson v. Springfield Traction Co.*, 176 Mo. App. 174.

15—*Pope v. State*, 168 Ala. 33.

16—*Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Keator v. People*, 32 Mich. 484.

17—*Sherer v. Rischert*, 23 Mo. App. 275.

§ 29. Arrangement.

It is the better practice to bring together all the instructions bearing on the same question, whether given on the request of either party, or on the court's own motion, in order that the jury may not be misled;¹⁸ but a mere lack of orderly and logical arrangement of the propositions of law involved in the charge is not assignable as error, if the jury are fully informed as to the rules of law by which they are to be guided and are not misled.¹⁹

§ 30. Language.

Instructions should use plain and simple language,²⁰ and should be limited to the facts in evidence. It is improper to use words which lead the jury into the realm of speculation and which are indefinite.²¹

The charge should be conceived in terms as direct, distinct, and explicit as the circumstances will permit, and should be framed, as far as practicable, in popular language. If the instruction is clear, and can be readily understood by laymen acting as jurors, the circumstance that a subtle

18—Harrington v. People, 90 Ill. App. 456, holding that it is not error for the court to refuse to read last the instructions given at the request of the defendant.

19—Atchison, T. & S. F. R. Co. v. Calvert, 52 Kan. 547, 34 Pac. 976.

If the instructions as a whole correctly state the law, the judgment will not be reversed because of illogical arrangement of the several instructions, it appearing that the jury were not misled. Bigley v. National Fidelity & Casualty Co., 94 Neb. 813, 50 L. R. A. (N. S.) 1040n.

It is not a ground of reversal that a more orderly arrangement might have been adopted. Gulf, C. & S. F.

Ry. Co. v. Dunlap (Tex. Civ. App.), 26 S. W. 655.

20—Parrish v. State, 14 Neb. 60.

21—A charge that if a person was compelled "by fear or otherwise" to sign a document is improper, in that the word "otherwise" is calculated to mislead the jury and cause them to speculate as to what motive induced the person to sign. Hazard v. Western Commercial Travelers' Ass'n, 54 Tex. Civ. App. 110.

A charge should be limited to the facts in evidence and not leave the jury to speculate as to causes that actuate a party about which there is no testimony. Hazard v. Western Commercial Travelers' Ass'n, 54 Tex. Civ. App. 110.

criticism, technically just, can be leveled against it, will not affect a reviewing court.²²

A charge is not a pleading, and words which when used in pleading may have a well-defined meaning if used by a court in giving a case in charge to a jury may well be received by the jury as meaning an entirely different thing, and the jury may thereby be misled as to the true meaning of the court.²³

The use of Latin words may not mislead when the charge as a whole is considered.²⁴

A charge which deals largely in superlatives is objectionable, but is not ground for reversal if it is not calculated to mislead.²⁵

Each sentence of the charge is not required to contain all the conditions and limitations which are to be gathered from the entire text.²⁶

It is not improper to refer in one paragraph of an instruction to the preceding paragraphs,²⁷ and the words "as above stated" have been held not misleading in making such reference.²⁸

22—Aikin v. Weckerly, 19 Mich. 482; Chappell v. Allen, 38 Mo. 213.

An instruction is intended not for lawyers, who are accustomed to drawing nice distinctions, but for laymen, who are not. Tennessee Coal, Iron & Railroad Co. v. Barker, 6 Ala. App. 413.

23—Use of words "to wit" held to justify court in refusing a charge, since such words might have been received as meaning "namely." J. R. Kilgore & Son v. Shannon & Co., 6 Ala. App. 537.

The phrase "to wit" in pleading is employed to state time, place, numbers or manner, which are not of the essence of the matter in issue so that they may not be proved as strictly as laid. J. R. Kilgore &

Son v. Shannon & Co., 6 Ala. App. 537.

24—In a libel case the use of the Latin words "*per se*" was held not misleading when the charge as a whole was considered. Bigley v. National Fidelity & Casualty Co., 94 Neb. 813, 50 L. R. A. (N. S.) 1040n.

25—McFarland v. Wofford, 16 Tex. 602.

26—People v. Stevens, 15 Cal. App. 294, 114 Pac. 800.

27—See § 17, *ante*.

28—The words "as above stated" in the second paragraph of an instruction as to self-defense, held to refer to the preceding paragraph, and such instruction was not misleading. Cooper v. State, 123 Tenn. 37.

Usually a difference in phraseology will not render an instruction erroneous.²⁹

§ 31. Use of words of statute.

Instructions given in the language of the statute are usually held sufficient,³⁰ and in criminal cases it is generally considered proper to describe the offense in the language of the statute.³¹

When such language is once used and thereafter there is a slight departure from the literal words of the statute, but the obvious equivalent of the same are used by the court, the error is not prejudicial.³²

§ 32. Verbal or technical inaccuracies.

Slight verbal or technical inaccuracies in instructions will not operate as a ground for reversal, if the jury are not misled by the charge.³³ The instructions will be construed

29—An instruction with the words, "the court instructs the jury," held not objectionable, although other instructions commenced with "if the jury find." *People v. Duncan*, 261 Ill. 339.

An instruction that "of its own motion the court instructs the jury," etc., does not by the quoted words add to or detract from the force and effect of the instruction. *Coulter v. Illinois Cent. R. Co.*, 264 Ill. 414.

30—*Sommer v. Carbon Hill Coal Co.*, 46 C. C. A. 255, 107 Fed. 230; *Mt. Olive & S. Coal Co. v. Rademacher*, 190 Ill. 538, aff'g 92 Ill. App. 442.

31—*Alt v. State*, 88 Neb. 259, 35 L. R. A. (N. S.) 1212n; *Ward v. State*, 59 Tex. Cr. App. 62.

To quote from the statute under which a defendant is being prosecuted is not necessarily erroneous.

Alt v. State, 88 Neb. 259, 35 L. R. A. (N. S.) 1212n.

32—*Ward v. State*, 59 Tex. Cr. App. 62.

33—*California*. *People v. Carroll*, 92 Cal. 563, 28 Pac. 600; *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269.

Georgia. *Huffman v. State*, 95 Ga. 469; *City of Atlanta v. Champe*, 66 Ga. 659.

Illinois. *McKenzie v. Remington*, 79 Ill. 388; *Nichols v. Mercer*, 44 Ill. 250; *Green v. Lewis*, 13 Ill. 642.

Iowa. *Galpin v. Wilson*, 40 Iowa 90.

Michigan. *Davidson v. Kolb*, 95 Mich. 469.

Missouri. *Lucas Market Sav. Bank v. Goldsoll*, 8 Mo. App. 596.

New York. *Smedis v. Brooklyn & R. B. R. Co.*, 88 N. Y. 13.

Washington. *Alaska S. S. Co. v.*

according to their essential meaning.³⁴ Thus, it has been held not misleading to refer to "horses" as "cattle,"³⁵ to speak of a "plank" as a "platform,"³⁶ to refer to a "lot" as "property,"³⁷ to speak of an "expulsion" as an "arrest,"³⁸ or to use unnecessary words.³⁹

In a criminal case it is not error to refer to the defendant

Pacific Coast Gypsum Co., 78 Wash. 247, 138 Pac. 875.

United States. Chicago & N. W. Ry. Co. v. Whitton's Adm'r, 13 Wall. 270, 20 L. Ed. 571.

34—Galpin v. Wilson, 40 Iowa 90. In Green v. Lewis, 13 Ill. 642, it was said that when it appears that the jury were not misled by an inaccuracy in some wording of an instruction otherwise proper, there can be no error; that jurors are not in the habit of taking dictionaries with them in retiring to consider their verdict to detect inaccuracies of expression.

The requirements of justice should not be strained by requiring instructions to be drawn with such technical nicety as to be entirely free from criticism, but the test should be whether the jury would get from the instructions a correct understanding of the rules by which they are to determine the issues involved. Torreyson v. United Rys. Co. of St. Louis, 144 Mo. App. 626.

35—Referring to a shipment of horses as a shipment of "cattle," held not misleading. Texas & P. Ry. Co. v. Browder, — Tex. Civ. App. —, 144 S. W. 1042.

36—In an action for injuries to a servant caused by falling between a plank and a tightener, while loosening a belt in a planing mill, an instruction referring to the plank as a "platform" was not mislead-

ing. Lee v. Wild Rice Lumber Co., 102 Minn. 74.

37—In an action to recover damages for injuries to a plaintiff's storehouse, and consequent diminution of the market value of the storehouse and lot whereon it was situated, it was not error for the court to refer to the lot as "property." City of Americus v. Phillips, 13 Ga. App. 321.

38—Though putting one out of a schoolhouse for misbehavior is not an arrest, where the misbehavior amounted to a penal offense, it was merely a verbal inaccuracy for the court to denominate the expulsion as an "arrest," and instruct the jury that a private person could arrest one committing an offense in his presence. Huffman v. State, 95 Ga. 469.

39—An instruction that if you find for the plaintiff "at all," held not misleading when contended that it was erroneous as reminding the jury that in the opinion of the court it was doubtful whether they should find for the plaintiff, though the quoted words should have been omitted, being unnecessary. Stubblefield v. Smith, 146 Mo. App. 316.

Use of word "not" in instruction that before jury "could not convict defendant," held not misleading. McWhirter v. State, — Tex. Cr. App. —, 146 S. W. 189.

as the "prisoner,"⁴⁰ or as the "defendant,"⁴¹ and a slight variance in the name of the deceased, on a trial for murder, has been held harmless.⁴²

An instruction that the presumption that a wife does not commit suicide may be overcome by facts which "establish" the contrary, is improper in that the quoted word is equivalent to saying that the fact must be made to appear beyond a reasonable doubt, but the error is not reversible.⁴³

In a negligence case it has been held not misleading to use the word "accident,"⁴⁴ and the word "anguish" in an instruction as to damages has been held not misleading when it did not tend to convey the impression that the jury were to give damages for humiliation or mental annoyance.⁴⁵

Frequently a wrong word will be used in place of a right one, but such errors are usually held harmless if the jury were not misled. A number of cases illustrating this rule will be found in the notes.⁴⁶

40—*Dinsmore v. State*, 61 Neb. 418.

41—An objection to an instruction using the defendant's name at the beginning and later on referring to him as "the defendant," held frivolous. *State v. Wilson*, 152 Mo. App. 61. •

42—On a trial for the murder of John A. Blue, an instruction that defendant was indicted for the alleged murder of "J. A. (Archie) Blue" was not prejudicial error, there being no suggestion of variance, or question as to the identity of the deceased. *State v. Cameron*, 166 N. C. 379.

43—*Fisher v. Travelers' Ins. Co.*, 124 Tenn. 450, Ann. Cas. 1912 D 1246n.

44—Use of word "accident" in instruction held not misleading as tending to cause the jury to believe

that the injuries were not the result of the defendant's negligence. *Rambie v. San Antonio & G. R. Co.*, 45 Tex. Civ. App. 422.

45—*City of Evanston v. Richards*, 224 Ill. 444.

46—**Verbal inaccuracies held not ground for reversal.** The following verbal inaccuracies have all been held insufficient ground for reversal, because of the rule that under the issues of the case and the language of other instructions it was improbable that the jury could have been misled.

"All" used for "any." *Holt v. State*, 51 Tex. Cr. App. 15.

"Approximately" used for "proximately." *Brooks v. Muncie & P. Traction Co.*, 176 Ind. 298; *Choctaw, O. & T. R. Co. v. McLaughlin*, 43 Tex. Civ. App. 523.

"Defendant" used for "plain-

It is reversible error to misstate the contentions of a

tiff." *Becker v. Donalson*, 138 Ga. 634; *Galveston, H. & S. A. Ry. Co. v. Word*, — Tex. Civ. App. —, 124 S. W. 478.

"**Directly**" used for "**proximately**," in instruction as to whether plaintiff "directly contributed to his own hurt," held not misleading. *Ruffin v. Atlantic & N. C. R. Co.*, 142 N. C. 120.

"**Disaster**" used for "**accident**," *Colorado Springs Elec. Co. v. Soper*, 38 Colo. 126, 88 Pac. 161.

"**Evidence**" used for "**defendant**." "Where the court correctly instructs the jury, at the request of the defendant, that facts against the defendant must be proved beyond a reasonable doubt, a mistake or misprint in repetition of the same instruction upon the court's own motion, in substituting the word 'evidence' for the word 'defendant,' " was held not calculated to do any injury. *People v. Carroll*, 92 Cal. 568, 28 Pac. 600.

"**Her**" used for "**the**," *City of Baltimore v. Megary*, 122 Md. 20.

"**Influenced**" used for "**uninfluenced**," *Anderson v. Anderson*, 128 Ind. 254.

"**May**" used for "**should**" or "**must**." A criticism that an instruction stating the necessary parts and concluding that you "may" then find the accused guilty of manslaughter, was erroneous in that the word "should" or "must" should have been used, held hypercritical. *Wilson v. State*, 71 Tex. Cr. App. 399.

"**Or**" used for "**and**." *Citizens' Gaslight & Heating Co. v. O'Brien*, 118 Ill. 174, aff'g 19 Ill. App. 231;

Schooler v. State, 52 Tex. Cr. App. 331.

"**Ought**" used for "**must**." An instruction that "when a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt but inconsistent with any other rational conclusion," held not erroneous in that the word "must" should have been used instead of "ought." *State v. Blaine*, 45 Mont. 482, 124 Pac. 516.

"**Physical**" used for "**mental**" in charge as to a plaintiff wandering away because of his "infirm physical condition," held not misleading. *St. Louis, I. M. & S. R. Co. v. Day*, 86 Ark. 104.

"**Plaintiff**" used for "**defendant**." *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269; *Lothridge v. Varnadore*, 140 Ga. 131; *National Enameling & Stamping Co. v. McCorkle*, 219 Ill. 557, aff'g 122 Ill. App. 344; *McKenzie v. Remington*, 79 Ill. 388; *Campbell v. Springfield Traction Co.*, 178 Mo. App. 520; *Lucas Market Sav. Bank v. Goldsoll*, 8 Mo. App. 596.

Use of "plaintiff" for "defendant" held error. *Markley v. Western U. Tel. Co.*, 151 Iowa 612.

"**Result**" used for "**cause**" in instruction as to proximate cause, held not misleading. *Sloss-Sheffield Steel & Iron Co. v. Stewart*, 172 Ala. 516.

"**Should**" used for "**might**" or "**must**." An instruction stating the elements necessary to convict and stating that if the jury found all the facts enumerated they "should" find defendant guilty, held not erroneous in using the quoted word

party,⁴⁷ but a misstatement of a material fact may not be misleading when the entire charge and the evidence is considered.⁴⁸

The inadvertent use of a word is not cause for reversal if the error is favorable to the party complaining,⁴⁹ or where the word used is a synonym of the one that should have been used.⁵⁰ So, also, a phrase of an instruction

instead of "might." *Bader v. State*, 176 Ind. 268.

An instruction as to the burden of proof is not prejudicially erroneous, because the word "should" is used before the words "be satisfied from the evidence," instead of "must." *Kersten v. Great Northern R. Co.*, 28 N. D. 3.

"Signing" used for "signed." *Mutual Life Ins. Co. of New York v. Hodnette*, — Tex. Civ. App. —, 147 S. W. 615.

"Testimony" used for "evidence." Use of word "testimony" in place of "evidence" in instruction as to burden of proof, held not objectionable. *Goodwin v. Mortsen*, — Tex. Civ. App. —, 128 S. W. 1182.

An objection to an instruction requiring defendant to sustain his counterclaim by a preponderance of "testimony," in that the quoted word was too restrictive, and that the word "evidence" should have been used, held without merit where the evidence consisted entirely of the testimony of witnesses. *Black v. Brooks*, — Tex. Civ. App. —, 129 S. W. 177.

"With" used for "without." *Foot v. Brown*, 81 Conn. 218.

"Worthy" used for "unworthy." *Lake Erie & W. R. Co. v. Hobbs*, 40 Ind. App. 511.

"Yes" used for "no." In *re Spencer*, 96 Cal. 448, 31 Pac. 453.

Many other like cases have been reviewed and might be cited, but the above will be sufficient to illustrate the rule.

47—*Southern R. Co. v. Diseker*, 13 Ga. App. 799.

48—A misstatement in stating that the contract price of land was \$6,000, when in fact it was \$6,500, held not misleading where both amounts were named in the instruction and the contract was in evidence. *Beck v. Budd*, 44 Ind. App. 145.

49—An instruction "that every delegation of authority, or creation of an agency, unless the extent of the authority or agency be expressly limited, carries with it the power to do all those things which are necessary, proper, and usual to be done in order to effectuate the purpose of the agency, and embraces all the approximate means necessary to accomplish the desired ends," is not erroneous because it inadvertently uses the word "approximate" instead of the word "appropriate," especially as the party complaining of the instruction was benefited, rather than otherwise, by a substitution of the word "approximate." *River View Land Co. v. Dance*, 98 Va. 239.

50—Use of "convinced" for "satisfied" held not error, the words

which is objected to may be the equivalent of the proper words.⁵¹

Also a party cannot complain of an instruction containing an improper word, where he did not request a charge correcting the language, and the instruction as a whole is not misleading.⁵²

On a prosecution for murder, where the defendant was a woman, instructions that the defendant should be acquitted if she was actuated by the fears "of a reasonable man," of a "man reasonably cool and courageous," were held not erroneous since the defendant did not request an instruction using the words "reasonable woman," and since the statutes provided that the masculine embraced the feminine gender.⁵³

Requested charges should, however, be correct, and when a charge is submitted which is incomplete or unintelligible because of the use of one word where another probably was intended, it should be refused.⁵⁴

being treated as synonymous. *Meyrovitz v. Levy*, 184 Ala. 293.

Alluding to a transaction as a "scheme," held not objectionable where the charge as a whole showed that the words "transaction," "scheme" and "proposition" were used synonymously. *Mowles v. Lorimer*, 129 C. C. A. 11, 212 Fed. 155.

51—An instruction as to a witness testifying falsely "as to any material fact," held not misleading in that the quoted words were used in place of "fact material to the issue." *Hoxie v. Pfaelzer*, 167 Ill. App. 79.

Use of words "by reason of" instead of "as the direct and proximate result of" in instruction as to negligence, held not misleading, the former being the equivalent of the latter. *Houston & T. C. R. Co. v. Anglin*, 45 Tex. Civ. App. 41.

52—An instruction that "an act becomes the proximate cause of an injury whenever such act is the natural and probable consequence of the act in question, held not misleading in the inadvertent use of the word 'act' the second time instead of 'injury,' it being the defendant's duty to request a special charge correcting the language." *Reliable Steam Laundry v. Schuster*, — Tex. Civ. App. —, 159 S. W. 447.

53—*Hightower v. State*, 14 Ga. App. 246.

54—*Johnson v. State*, 8 Ala. App. 14.

A requested charge using the word "defendant" when some other person was intended—probably the prosecuting witness—held not intelligible. *Hendley v. State*, 3 Ala. App. 107.

A requested charge held properly

Also instructions should be refused when the use of an improper case renders the charge incorrect.⁵⁵

In one case the omission of a letter was held to warrant the refusal of a charge, in that the word was without meaning. Such charge was incorrect, however, even when the proper word was substituted for the meaningless one.⁵⁶

§ 33. Omissions.

Mere omissions of words in instructions which are not likely to mislead will not operate as ground for reversal. Thus it has been held not misleading to give an instruction omitting words such as "not,"⁵⁷ "if,"⁵⁸ "malice,"⁵⁹ "of

refused when it hypothesized the killing of the "defendant." *Bennett v. State*, 160 Ala. 25.

55—A charge that "you should find the defendant not guilty unless the evidence against him should be such as to exclude to a moral certainty every hypothesis but that of his guilt," held properly refused as it is not a question what the evidence should be but what it is, and it is not every hypothesis that must be excluded but every reasonable hypothesis. *Crumpton v. State*, 167 Ala. 4.

An instruction in an action for breach of contract that "if the evidence fails to satisfy you, you will find for the defendant," held properly refused as the plaintiffs were entitled to recover upon a preponderance of the evidence, and the word "satisfied" meant more than that. *San Antonio & A. P. Ry. Co. v. Graves & Patterson*, — Tex. Civ. App. —, 131 S. W. 613.

56—An instruction that if deceased made an attack on defendant

with "murderous" intent, defendant was under no obligation to flee, provided defendant was free from fault in bringing on the difficulty, held properly refused, the quoted word being without meaning, and if "murderous" was meant the charge was still erroneous in not describing the nature of the attack or hypothesizing that defendant's danger would be increased by fleeing. *Parker v. State*, 153 Ala. 25.

57—*Missouri, K. & T. R. Co. of Texas v. Redus*, 55 Tex. Civ. App. 205.

58—*Nichols v. Mercer*, 44 Ill. 250.

59—An instruction in a murder case that "if * * * the defendant * * * wilfully, premeditatedly and with aforethought" shot, etc., held not misleading or prejudicial because of the omission of the word "malice" before "aforethought," when the latter part of the instruction used the words "malice aforethought." *State v. Ferrell*, 246 Mo. 322.

proof,"⁶⁰ or "person,"⁶¹ the meaning not being obscured.

In a criminal case it was held not to be error warranting reversal to omit the date of the death of the person killed,⁶² and in negligence cases the omission of the word, "care,"⁶³ and similar words,⁶⁴ have been held not misleading.

§ 34. Abbreviations.

The use of abbreviations in instructions is not to be commended, inasmuch as the tendency is to make the charge vague and indefinite. "The court should specify what things he means, and not leave the jury to speculate as to the other things he has reference to."⁶⁵ Thus, the use of the abbreviation "etc." has been held improper.⁶⁶

60—An instruction that "the burden is upon the plaintiff to show by a preponderance of the testimony his right to recover" is not erroneous as omitting the words "of proof" after "burden," as the charge could mean nothing less than the burden of proof. *Goodwin v. Mortsen*, — Tex. Civ. App. —, 128 S. W. 1182.

61—Omission of word "person" held immaterial error where the ordinary intelligence of the jury would suggest that such word should be supplied. *Texas & P. R. Co. v. Johnson*, 48 Tex. Civ. App. 135.

62—On a trial for murder, where the proof showed that the deceased was found dead on the morning of August 8, 1910, a clerical mistake in an instruction whereby the date of death was stated as "on the — day of August, 1912," was not reversible error, especially since the jury were also instructed to find that the deceased died "within a year and a day" after he was assaulted, and since there is no statute of limitations barring prosecutions

for murder. *State v. Taylor*, 261 Mo. 210.

63—Omission of word "care" in instruction as to negligence "by failing to exercise ordinary in the shipment of sheep," held not misleading. *Galveston, H. & S. A. Ry. Co. v. Word*, — Tex. Civ. App. —, 124 S. W. 478.

64—Omission of words "to exercise ordinary care" or some other equivalent qualification before the words "to furnish" in an instruction stating that "it was the duty of the defendant to furnish to the plaintiff a reasonably safe place in which to work," held not material. *Reynolds v. New Century Min. Co.*, 90 Kan. 208, 133 Pac. 844.

65—*Dallas Consol. Elec. St. R. Co. v. Chambers*, 55 Tex. Civ. App. 331.

66—The use of the abbreviation "etc." in an instruction requiring the jury to assess damages for "loss of time, any sum of money paid out or debts incurred by him for the services of physicians for medicine, etc.," is not to be commended. *Dallas Consol. Elec. St. R. Co. v. Chambers*, 55 Tex. Civ. App. 331.

§ 35. Punctuation.

An instruction is not erroneous because of incorrect punctuation if it is so stated as not to be misunderstood.⁶⁷

§ 36. Brevity and clearness.

In writing instructions, brevity and clearness of expression should be used in order that their meaning may be readily understood by the jury.⁶⁸

The questions to be determined by the jury should be simplified, and the charge should not include extraneous matters,⁶⁹ or be confused and misleading.⁷⁰ They should be made up of clear and distinct legal principles, and should

67—*Terre Haute & I. R. Co. v. Eggmann*, 159 Ill. 550, aff'g 58 Ill. App. 21.

68—*Moore v. Damron*, 157 Ky. 799; *Louisville & N. R. Co. v. Moore*, 150 Ky. 692.

Instructions should be short and concise. *Adams v. Smith*, 58 Ill. 418; *Johansen v. Pioneer Min. Co.*, 77 Wash. 421, 137 Pac. 1019.

Instructions should always be clear, accurate and concise statements of the law as applicable to the facts of the case. *Adams v. Smith*, 58 Ill. 417.

69—*Lang v. Omaha & C. B. St. R. Co.*, 96 Neb. 740.

In a charge to the jury the controverted issues or essential facts should not be incumbered by the recital of unnecessary pleadings, by the unnecessary narration of admitted or immaterial facts, or by superfluous reference to questions already settled by pleadings or by uncontradicted evidence. *Lang v. Omaha & C. B. St. R. Co.*, 96 Neb. 740.

70—*Lang v. Omaha & C. B. St. R. Co.*, 96 Neb. 740.

An instruction tending to confuse between mere conjectures and legit-

imate inferences from the facts is improper. *Wilkinson v. Aetna Life Ins. Co.*, 144 Ill. App. 38, aff'd 240 Ill. 205, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269.

Confused and misleading instructions should be refused, and, if given, are ground for reversal unless it is apparent that the jury were not, in fact, misled.

Alabama. *Louisville & N. R. Co. v. Sandlin*, 125 Ala. 585.

Arkansas. *Arkadelphia Lumber Co. v. Asman*, 68 Ark. 526.

California. *People v. Kelly*, 132 Cal. 430, 64 Pac. 563.

Illinois. *North Chicago St. R. Co. v. Hutchinson*, 191 Ill. 104, aff'g 92 Ill. App. 567; *Stocks v. Scott*, 188 Ill. 266, aff'g 89 Ill. App. 615; *Tichenor v. Newman*, 186 Ill. 264; *Morton v. O'Connor*, 85 Ill. App. 273.

Indiana. *Shenkenberger v. State*, 154 Ind. 630.

Iowa. *Hoffmann v. Cockrell*, 112 Iowa 141.

Michigan. *Fruit Dispatch Co. v. Russo*, 125 Mich. 306.

Minnesota. *O'Brien v. Northwestern Improvement & Boom Co.*, 82 Minn. 136.

be free of redundant verbiage and other confusing elements.⁷¹

“Every word in a charge which is given by a trial court to a jury at the written request of a party to the cause should mean something. Such a charge should correctly, succinctly and plainly state the law as applied to the facts of the case.”⁷²

On the other hand, the fact that an instruction is not as explicit as it might be will not operate to reverse, where it is not misleading or prejudicial and is supported by the evidence,⁷³ and when a defendant deems a portion of a charge misleading, it should request an explanatory instruction.⁷⁴

Texas. *Liverpool & L. & G. Ins. Co. v. Joy*, 26 Tex. Civ. App. 613; *Fant v. Wright* (Tex. Civ. App.), 61 S. W. 514; *Capitol Freehold Land & Investment Co. v. Pecos & N. T. Ry. Co.* (Tex. Civ. App.), 60 S. W. 286; *Reid v. State* (Tex. Cr. App.), 57 S. W. 662.

Virginia. *Horton v. Com.*, 99 Va. 848.

Washington. *Miller v. Dumon*, 24 Wash. 648.

West Virginia. *State v. Morrison*, 49 W. Va. 210.

Instructions should be easy of interpretation and not likely to mislead. *Peterson v. State*, 74 Ala. 34.

Involved and obscure charges should be refused. *Riley v. Fletcher*, 185 Ala. 570.

A charge that if the fact that defendant was not free from fault in bringing on the difficulty was “not shown to the satisfaction of the jury ‘to’ a reasonable doubt, the jury should acquit the defendant,” involved such inaccuracy and obscurity as to be properly refused. *Johnson v. State*, 8 Ala. App. 14.

A charge that “the plea of set-off

entered into by the defendant, if you find that he was damaged by the plaintiff, should be in such amount as you may find that he was damaged,” held unintelligible. *Basenberg v. Lawrence*, 160 Ala. 422.

An instruction in a prosecution for larceny that unless the jury are “satisfied from the evidence beyond all reasonable doubt that the hide of the about 18 month old yearling which the state’s witness saw in * * * at the time referred to by said witness was the hide of the about 12 month old heifer yearling” which was claimed to have been lost, then the jury must find the defendant not guilty, held involved, obscure and misleading. *Yorty v. State*, 11 Ala. App. 160.

71—*Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147.

72—*Tennessee Coal, Iron & Railroad Co. v. Barker*, 6 Ala. App. 413.

73—*Warson v. McElroy*, 33 Mo. App. 553; *Dunbar v. Briggs*, 13 Neb. 332; *Mutual Hail Ins. Co. v. Wilde*, 8 Neb. 427.

74—*Louisville & N. R. Co. v. Mason*, 10 Ala. App. 263.

§ 37. Accuracy, directness and certainty.

It is not only necessary that the instructions should be clear and direct, but they should also be accurate;⁷⁵ and this is especially true when the evidence upon material issues is conflicting,⁷⁶ or where the evidence for both parties is evenly

75—Alabama. Peterson v. State, 74 Ala. 34.

California. People v. Ramirez, 13 Cal. 173.

Illinois. Wabash R. Co. v. Henks, 91 Ill. 406; Cushman v. Cogswell, 86 Ill. 62; Volk v. Roche, 70 Ill. 297.

Michigan. Aikin v. Weckerly, 19 Mich. 482.

Mississippi. Staten v. State, 1 George 619.

Missouri. Otto v. Bent, 48 Mo. 23.

North Carolina. George v. Smith, 51 N. C. 273.

Ohio. Parmlee v. Adolph, 28 Ohio St. 13.

Tennessee. Anderson v. State, 3 Heisk. 86.

Texas. Gibbs v. State, 1 Tex. App. 13.

Instructions should be direct, accurate, and certain:

Alabama. Salomon v. State, ²⁸ Ala. 83.

Illinois. Chicago, B. & Q. R. Co. v. Dougherty, 110 Ill. 521.

Indiana. Loeb v. Weis, 64 Ind. 285.

Michigan. Hyde v. Shank, 77 Mich. 517.

Minnesota. Gaffney v. St. Paul City Ry. Co., 81 Minn. 459.

Missouri. Cahn v. Reid, 18 Mo. App. 115.

Montana. Perkins v. Davis, 2 Mont. 474.

Oregon. Salomon v. Cress, 22 Ore. 177, 29 Pac. 439.

Texas. Trinity & S. Ry. Co. v.

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Schofield, 72 Tex. 496; Welsh v. State, 11 Tex. 368.

Instructions should be positive and direct as to the law under which the jury are to return their verdict. Patterson v. Wenatchee Canning Co., 53 Wash. 155, 101 Pac. 721.

76—Kranz v. Thieben, 15 Ill. App. 482; St. Louis Coal R. Co. v. Moore, 14 Ill. App. 510; City of Mendota v. Fay, 1 Ill. App. 418; State v. Bailey, 60 N. C. 137.

Instructions should be accurate where the evidence is conflicting. Rumbold v. Supreme Council Royal League, 206 Ill. 513, rev'g 103 Ill. App. 596; Muren Coal & Ice Co. v. Howell, 204 Ill. 515, rev'g 107 Ill. App. 1; Perkins v. Knisely, 204 Ill. 275, rev'g 102 Ill. App. 562; Sibert v. Shoal Creek Coal Co., 181 Ill. App. 11; Novitsky v. Knickerbocker Ice Co., 180 Ill. App. 188; Stevens v. Chicago Feather Co., 178 Ill. App. 455; Bartholomew v. Illinois Val. Ry. Co., 154 Ill. App. 512; Gorey v. Illinois Cent. R. Co., 153 Ill. App. 17; Ruddell v. Baltimore & O. R. Co., 152 Ill. App. 218.

Where the evidence is sharply conflicting, it is necessary that the instructions should be accurate in all material particulars. Chickasha Cotton Oil Co. v. Brown, 39 Okla. 245, 134 Pac. 850.

Instructions as to furnishing timbers to miner should be accurate where the question is vital. Meunier

balanced,⁷⁷ or where the facts are of such nature as to appeal to the sympathy of the jurors.⁷⁸

A party need not be content with general rules; he is entitled to have the jury instructed in the law as applied to his particular case.⁷⁹

If an instruction has been held defective by the supreme court, it should not be given, even though it has not been held to be sufficient ground for reversal.⁸⁰

Instructions lacking in these requirements may and should be refused;⁸¹ and the giving of instructions which are lacking in clearness and accuracy, and which may have misled the jury, will be cause for reversal.⁸² The fact that the law is accurately stated on one side will not cure errors in instructions given for the other party.⁸³

v. Chicago & C. Coal Co., 180 Ill. App. 114.

Where the evidence is conflicting as to the seriousness of the injury instructions on damages must be accurate. Trzietatowski v. Evening American Pub. Co., 185 Ill. App. 451.

77—American Ins. Co. v. Crawford, 89 Ill. 62; Norfleet v. Sigman, 41 Miss. 631.

78—Instructions must be clear, accurate and concise where the facts appeal to sympathy. Chicago Union Traction Co. v. Miller, 212 Ill. 49.

79—Cache River Drain Dist. v. Chicago & E. I. R. Co., 255 Ill. 398.

80—People v. Lukoszus, 242 Ill. 101.

81—Alabama. Smith v. Collins, 94 Ala. 394.

Florida. Union Bank v. Call, 5 Fla. 409.

Georgia. Todd v. Fambro, 62 Ga. 665.

Minnesota. Hocum v. Weitherick, 22 Minn. 152.

Ohio. Adams v. State, 29 Ohio St. 412.

West Virginia. Baltimore & O. R. Co. v. Lafferty, 2 W. Va. 104.

Wisconsin. Large v. Orvis, 20 Wis. 696.

82—Georgia. Smith v. Overby, 30 Ga. 241.

Illinois. Chicago, R. I. & P. Ry. Co. v. Harmon, 12 Ill. App. 54.

Maine. Gilmore v. McNeil, 45 Me. 599.

Nebraska. City of Crete v. Childs, 11 Neb. 252; Meyer v. Midland Pac. R. Co., 2 Neb. 319.

Ohio. Pendleton St. R. Co. v. Stallmann, 22 Ohio St. 1; Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co., 5 Ohio St. 459.

Instruction misquoting statute in relation to duties of mine examiner, but not changing its meaning, held not prejudicial error. Colesar v. Star Coal Co., 255 Ill. 532.

83—Illinois Cent. R. Co. v. Maffit, 67 Ill. 431; Village of Warren v. Wright, 3 Ill. App. 420.

§ 38. Ambiguous instructions.

Instructions should not be susceptible of two meanings, but should be drawn in plain and unambiguous language,⁸⁴ so as not to be misleading.⁸⁵

Requests for instructions which are ambiguous should be refused,⁸⁶ and the giving of such charges will constitute reversible error, if the jury are misled,⁸⁷ and the instruc-

84—*Young v. Ridenbaugh*, 67 Mo. 574.

85—When instructions are susceptible of two meanings, they are misleading.

Illinois. *Chicago, B. & Q. R. Co. v. Housh*, 12 Ill. App. 88.

Michigan. *Marquette, H. & O. R. Co. v. Marcott*, 41 Mich. 433; *Comstock v. Smith*, 26 Mich. 306; *Dodge v. Brown*, 22 Mich. 446.

Missouri. *Medlin v. Brooks*, 9 Mo. 106; *Legg v. Johnson*, 23 Mo. App. 590; *Furgeson v. Brown*, 1 Mo. App. 458.

Virginia. *Gordon v. City of Richmond*, 83 Va. 436; *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. 230.

West Virginia. *Gas Co. v. Wheeling*, 8 W. Va. 371.

86—**Alabama.** *Brewer v. Watson*, 71 Ala. 299, 46 Am. Rep. 318; *Duckworth's Ex'rs v. Butler*, 31 Ala. 164; *Robbins v. Harrison*, 31 Ala. 160; *Rolston v. Langdon*, 26 Ala. 660; *Ross v. Ross*, 20 Ala. 105.

Indiana. *Loeb v. Weis*, 64 Ind. 285.

Maryland. *Baltimore & O. R. Co. v. Thompson*, 10 Md. 76.

Missouri. *Dunn v. Dunnaker*, 87 Mo. 597; *Kaw Brick Co. v. Hogsett*, 82 Mo. App. 546; *Wood v. White*, 6 Mo. App. 592.

Ohio. *Miller v. Florer*, 19 Ohio St. 356.

West Virginia. *Henry v. Davis*, 7 W. Va. 715.

United States. *United States v. Jones*, 8 Pet. 399.

87—The giving of ambiguous instructions, if calculated to mislead the jury, will be a good ground for reversal:

California. *People v. Maxwell*, 24 Cal. 14.

Georgia. *Fain v. Cornett*, 25 Ga. 184.

Missouri. *Belt v. Goode*, 31 Mo. 128.

Nevada. *State v. McGinnis*, 5 Nev. 337.

North Carolina. *Adams v. Reeves*, 68 N. C. 134, 12 Am. Rep. 627.

United States. *Gougar v. Morse* (C. C. A.), 66 Fed. 702.

An instruction given in language which is capable of two interpretations, the one correct in point of law, and the other incorrect, which may have misled them, to the prejudice of the complaining party, amounts to a misdirection, and the judgment should be reversed for this error. *Ocean Steamship Co. v. McAlpin*, 69 Ga. 440; *McCracken v. Webb*, 36 Iowa 551; *Frederick v. Ballard*, 16 Neb. 559; *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283.

If it be apparent that an instruction, though ambiguous, did not mislead the jury to the prejudice of the complaining party, it will not be

tions when considered as a whole, show probable prejudice.⁸⁸

In determining whether an instruction is misleading the test is not what the ingenuity of counsel can at leisure work out the instructions to mean, but how and in what sense under the evidence before them and the circumstances of the trial would ordinary men and jurors understand the instructions.⁸⁹

It has been held that an instruction that "the defendant company denies that they were guilty of negligence and that he was killed by the negligence of his coemployees" is not erroneous, as the latter part of the charge relates back to the word "denies,"⁹⁰ and an instruction as to damages, allowing plaintiff "just and reasonable compensation for necessary nursing and attention to the child until cured," has been held not erroneous in that since the child had her limb amputated she could never be "cured," as this was a strained construction of the word "cured."⁹¹

But where a defendant alleged that the plaintiff was injured while working under the direction of the mine manager, an instruction using the term "miner" without distinguishing between a miner working at his calling and one entering the mine and working under the direction of the mine manager to make conditions safe, was misleading.⁹² And an instruction on insanity or nuncupative wills, when the only question is the authorship of a mutilation, is ambiguous.⁹³

ground for reversal. *Burbridge v. Kansas City Cable R. Co.*, 36 Mo. App. 669. See *Railroad Co. v. Hambleton*, 40 Ohio St. 496; *Reid v. State* (Tex. Cr. App.) 57 S. W. 662.

88—In determining whether the jury might reasonably have been misled by an ambiguous instruction, the instructions should be construed as a whole. *Sweeney v. Merrill*, 38 Kan. 216, 5 Am. St. Rep. 734, 16 Pac. 454. See also, *People v. Alsemi*, 85 Cal. 434, 24 Pac. 810; *Fisher v.*

People, 20 Mich. 135; *Rice v. Olin*, 79 Pa. St. 391.

89—*Young v. City of Fairfield*, 173 Ill. App. 311.

90—*Southern R. Co. v. Diseker*, 13 Ga. App. 799.

91—*Ft. Worth & D. C. R. Co. v. Wininger*, — Tex. Civ. App. —, 159 S. W. 881.

92—*Driza v. Jones & Adams Coal Co.*, 171 Ill. App. 139.

93—*Tucker v. Whitehead*, 59 Miss. 594.

When instructions are ambiguous, the attention of the court should be called thereto, so that the error may be corrected.⁹⁴

§ 39. Vague, involved and obscure instructions.

Inasmuch as instructions must be brief, clear and concise,⁹⁵ it is proper to refuse instructions which are long, involved, vague or obscure.⁹⁶

The charge should not be so worded as to leave the jury

94—Where instructions are ambiguous or susceptible of different interpretations, and the attention of the court is called thereto, no matter at what stage of the trial, if before the jury have acted thereon, it at once becomes the duty of the court to remove the ambiguity, and to make its meaning plain. *Baltimore & O. R. Co. v. Boyd*, 67 Md. 32, 1 Am. St. Rep. 362.

If the charge is ambiguous, the party who is dissatisfied should ask the court to explain it before the jury leave the bar, and, if he do not, he will be deemed to have waived the objection. *Schuykill & D. Improvement Co. v. Munson*, 14 Wall. (U. S.) 442, 20 L. Ed. 867. See also, *Railroad Co. v. Hambleton*, 40 Ohio St. 496.

95—See §§ 36, 37, *ante*.

96—*Alabama*. *Street v. State*, 67 Ala. 87; *Tillman v. Chadwick*, 37 Ala. 317; *Miller v. Garrett*, 35 Ala. 96.

Arkansas. *Sparks v. Mack*, 31 Ark. 666.

California. *People v. Carroll*, 92 Cal. 568, 28 Pac. 600; *People v. Best*, 39 Cal. 690.

Georgia. *Central R. Co. v. Haslett*, 74 Ga. 59.

Illinois. *Roth v. Smith*, 54 Ill.

431; *Preisker v. People*, 47 Ill. 382.

Iowa. *Perry v. Dubuque Southwestern Ry. Co.*, 36 Iowa 102.

Louisiana. *State v. Lacombe*, 12 La. Ann. 195.

Maine. *Hunter v. Randall*, 69 Me. 183.

Maryland. *Cumberland Coal & Iron Co. v. Scally*, 27 Md. 589.

Minnesota. *Hayward v. Knapp*, 23 Minn. 430.

Mississippi. *Tucker v. Whitehead*, 59 Miss. 594.

Missouri. *Greer v. St. Louis, I. M. & S. Ry. Co.*, 80 Mo. 555.

Nevada. *Colquhoun v. Wells, Fargo & Co.*, 21 Nev. 459, 33 Pac. 977.

Pennsylvania. *McKinney v. Snyder*, 78 Pa. 497.

Virginia. *Levasser v. Washburn*, 11 Gratt. 572.

West Virginia. *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *State v. Cain*, 20 W. Va. 679; *Gas Co. v. Wheeling*, 8 W. Va. 320.

United States. *Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 451, 40 L. Ed. 766.

Long and involved instructions properly stating that there is no evidence on an issue may be refused. *Green v. Smith*, 180 Ill. App. 572.

to conjecture as to its meaning, and the giving of vague and involved instructions usually tends to mislead the jury.⁹⁷ Thus, an instruction requiring the plaintiff to establish "his case" by a preponderance of the evidence is misleading when there is no controversy as to the plaintiff's case, but only as to the defenses thereto.⁹⁸

And where an indictment charges an assault with intent to commit rape, an instruction that if the jury believe from the evidence that the defendant is guilty of "an attempt," as charged in the indictment, their verdict should be guilty, is too vague, and may well be misleading.⁹⁹

It has also been held misleading to instruct "that a pistol is not concealed unless it is hid from the ordinary observation of those who are in a position to see it if it were not concealed,"¹ or to charge that "any fact in favor of a defendant is sufficiently established when proven by a preponderance of evidence; and even though, as to such fact, the jury have some doubt, if it has been proven by a preponderance of evidence, they must acquit."²

An instruction that "you will assess to the plaintiffs such damages as, from all the evidence in this case, you shall find he has sustained by reason of the illegal taking and detention of the personal property," is misleading.³

Obscure and confused instructions are ground for reversal if it appears that the jury were misled,⁴ although some

97—Illinois. *City of Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407.

Mississippi. *Archer v. Sinclair*, 49 Miss. 343; *Preston v. State*, 25 Miss. 383.

Missouri. *State v. Laurie*, 1 Mo. App. 371.

New York. *Wilson v. Dickel*, 7 App. Div. 175.

Texas. *Henry v. Sansom*, 2 Tex. Civ. App. 150.

West Virginia. *State v. Jones*, 20 W. Va. 764.

98—*Cutler v. Pardridge*, 182 Ill. App. 350.

99—*Preisker v. People*, 47 Ill. 382.

1—*Street v. State*, 67 Ala. 87.

2—*People v. Carroll*, 92 Cal. 568, 28 Pac. 600.

3—*Morehead v. Adams*, 18 Neb. 569.

4—Georgia. *Chattanooga, R. & C. R. Co. v. Owen*, 90 Ga. 265; *Thomas v. State*, 67 Ga. 767.

Illinois. *Haskin v. Haskin*, 41 Ill. 197; *Union Stock Yards & Transit Co. v. Monaghan*, 13 Ill. App. 148.

decisions hold that the failure to ask an explanatory charge will constitute a waiver of the error.⁵

§ 40. Predicating instructions on belief from evidence.

Instructions should be applicable to and limited to the evidence adduced in the cause,⁶ and it is therefore customary to preface the instructions with the words "If you believe from the evidence," or words of the same purport, and the omission of such words usually renders the instructions erroneous.⁷

It will not be sufficient to preface an instruction with the words, "If you believe,"⁸ and the omission of the words "from the evidence" may warrant the refusal of an instruc-

Maryland. *Baltimore & O. R. Co. v. Boyd*, 67 Md. 32, 1 Am. St. Rep. 362.

Missouri. *James v. Missouri Pac. Ry. Co.*, 107 Mo. 480.

Nebraska. *Morehead v. Adams*, 18 Neb. 569.

Pennsylvania. *Murray v. Com.*, 79 Pa. St. 312; *Com. v. Drum*, 58 Pa. St. 9.

Texas. *Kalamazoo Nat. Bank v. Sides* (Tex. Civ. App.), 28 S. W. 918.

Virginia. *Gordon v. City of Richmond*, 83 Va. 436.

An instruction which is vague and obscure will not be ground for reversal if it has no tendency to mislead. *Palmore v. State*, 29 Ark. 248; *Denton v. Jackson*, 106 Ill. 433.

5—*O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322; *Whilden v. Merchants' & Planters' Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1n.

6—See § 82, *post*.

7—**Colorado.** *Ingols v. Plimpton*, 10 Colo. 535, 16 Pac. 155; *Salomon v. Webster*, 4 Colo. 353.

Illinois. *Graff v. People*, 134 Ill. 380; *Horne v. Walton*, 117 Ill. 130; *Holliday v. Burgess*, 34 Ill. 193; *Fame Ins. Co. v. Mann*, 4 Ill. App. 485.

Missouri. *McPherson v. St. Louis, I. M. & S. Ry. Co.*, 97 Mo. 253.

The jury should be permitted to believe nothing unless that belief be occasioned by the evidence. Their minds should always be directed to that, and to that only, as the grounds of their belief. *Ewing v. Runkle*, 20 Ill. 448; *Fame Ins. Co. v. Mann*, 4 Ill. App. 485.

If any instruction directs the jury that upon any question submitted to them it must be determined from the evidence upon the question or equivalent direction, it is sufficient. *Vandalia Coal Co. v. Yemm*, 175 Ind. 524.

8—*Salomon v. Webster*, 4 Colo. 353; *Graff v. People*, 134 Ill. 380; *Ewing v. Runkle*, 20 Ill. 448; *Fame Ins. Co. v. Mann*, 4 Ill. App. 485. But see *Blumhardt v. Rohr*, 70 Md. 328.

tion,⁹ but will not always constitute reversible error.¹⁰

Where the words "If you believe from the evidence" are used in the first clause of an instruction, it is not necessary to repeat the restriction "from the evidence" in subsequent clauses.¹¹

9—An instruction defective in this regard may properly be refused, especially when its substance has already been given in another instruction. *Horne v. Walton*, 117 Ill. 130; *Pärshing v. Heitner*, 91 Ill. App. 407.

10—The fact that an instruction, in its first part, omits the words "from the evidence" after the words "if you believe" will not work a reversal if the instruction, in its concluding clause, uses the words "and if you further believe from the evidence," as the jury cannot be misled. *Belden v. Woodmansee*, 81 Ill. 25.

"Where a jury are instructed, if certain facts are true, provided they further believe, from the evidence, certain other facts exist, * * * a jury of ordinary intelligence would surely conclude that they must believe the facts first enumerated, from the evidence, as well as those last mentioned." *Toledo, W. & W. Ry. Co. v. Ingraham*, 77 Ill. 309.

Where the judge charged: "If you believe that the defendant violated the lease contract and cut and carried away any timber that it had no right to cut and carry away under the terms of the lease contract, and you believe that the plaintiff is entitled to recover damages, then the court gives you this rule of law by which damages are measured," and the charge showed that the jury must be satisfied from the evidence as to the right of recovery, the

omission of the words, "from the evidence" after "if you believe," furnished no ground for new trial. *Phillips Lumber Co. v. Bush*, 134 Ga. 323.

A failure to base the instructions on a belief from the evidence is not such an error as will call for a reversal of the judgment. *McPherson v. St. Louis, I. M. & S. Ry. Co.*, 97 Mo. 253; *State v. Umfried*, 76 Mo. 404.

The judgment should not be reversed unless it appears that the jury were misled. *Holliday v. Burgess*, 34 Ill. 193.

11—*Leighton & Howard Steel Co. v. Snell*, 217 Ill. 152, aff'g 119 Ill. App. 199; *Slack v. Harris*, 200 Ill. 96, aff'g 101 Ill. App. 527; *Village of Altamont v. Carter*, 196 Ill. 286, aff'g 97 Ill. App. 196; *People v. Mullen*, 179 Ill. App. 262.

The failure of the trial court to repeat, in every clause of an instruction, that the jury must find from the evidence, is not reversible error. *Wear v. Duke*, 23 Ill. App. 322; *Powers v. Com.*, 110 Ky. 386; *State v. Davis*, 27 S. C. 609.

The introductory sentence in an instruction, "If the jury believe from the evidence that," qualifies the residue of the instruction, and submits to the jury for its finding every fact therein stated. *Wills v. Cape Girardeau Southwestern R. Co.*, 44 Mo. App. 51.

A jury of intelligent men will not be misled if such qualification is

It is not error to use the words "if the evidence shows you,"¹² and the use of the words "if it appears" from the evidence have been held improper but not misleading.¹³

Also, it has been held not misleading to use the words "if the plaintiff has shown by the evidence."¹⁴

An instruction that "if there is in the mind of any juror a reasonable supposition of the defendant's innocence, you should not convict," is properly refused as it does not predicate the duty not to convict upon a supposition founded upon the evidence.¹⁵

It is likewise improper to direct the jury to find for one of the parties "if * * * they are inclined to believe * * *," since jurors are to decide cases according to their convictions of the truth of the matter found by their verdict, and not their mere inclinations.¹⁶

Instructions have been held harmful where they affirmatively direct the jury to consider all the facts and circumstances, and contain like expressions, or include improper elements, without limiting the inquiry to the evidence or to evidence upon a particular point.¹⁷

It has also been held error to base an instruction on a belief from "the evidence and the instructions,"¹⁸ or to

omitted in the remaining portion of the instruction. *Gizler v. Witzel*, 82 Ill. 322; *Powers v. Com.*, 110 Ky. 386.

12—*Silberberg v. Pearson*, 75 Tex. 287.

13—*Lecklied v. Chicago City Ry. Co.*, 172 Ill. App. 557.

14—A criticism of an instruction telling the jury "if the plaintiff has shown by the evidence" instead of using the words "if the jury believe from the evidence," held too technical, since the jury could not have been misled. *Southern R. Co. v. Floyd*, 99 Miss. 519.

15—*McCoy v. State*, 170 Ala. 10.

16—*Cox v. People*, 109 Ill. 459.

17—*Vandalia Coal Co. v. Yemm*, 175 Ind. 524.

Held error to base an instruction on a belief "from the evidence and circumstances proven in the case." *Greer v. Com.*, 111 Ky. 93.

An instruction to determine on which side the preponderance of the evidence lies from the "facts shown by the evidence and from all other facts and circumstances," held cause for reversal. *Balenovic v. Ansick*, 181 Ill. App. 660.

18—*Kranz v. Thieben*, 15 Ill. App. 482.

preface an instruction with the words, "If they believed, under the charge."¹⁹

Where there is no conflicting evidence as to certain facts, there is no error in stating them to the jury without qualification,²⁰ and there is another line of cases which hold, especially in assessing damages, that an instruction is not harmful for lack of a specific direction limiting the inquiry to the evidence.²¹

An instruction that "if you believe from the evidence in this case" instead of the "preponderance" of the evidence, is not erroneous where other instructions correctly submit the burden of proof.²²

§ 41. Necessity of hypothesizing facts.

Usually instructions should be so drawn as to state the law upon a supposed state of facts to be found by the jury,²³

19—Munden v. State, 37 Tex. 353. But see Hoxie v. Pfaelzer, 167 Ill. App. 79.

Where an instruction that if the jury find "from the evidence" a certain fact, was held not faulty because the words "and from the instructions" or "under the instructions of the court" were not added. And in National Live Stock Ins. Co. v. Wolfe, — Ind. App. —, 106 N. E. 390, it was held that it is not a correct expression to say in an instruction: "If you find under the instructions given," etc., but the error is harmless where the instructions as a whole correctly submit the issues.

20—Carpenter v. Hyman, 67 W. Va. 4, 20 Ann. Cas. 1310.

If an instruction is based on admitted facts, it is not necessary to preface it with the words, "If you believe from the evidence." Schmidt v. Pfau, 114 Ill. 494.

21—Vandalia Coal Co. v. Yemm, 175 Ind. 524.

Where damages can be lawfully assessed and the instruction states the correct elements, it is not harmful to fail to restrict the consideration to the evidence. Vandalia Coal Co. v. Yemm, 175 Ind. 524.

22—Coulter v. Illinois Cent. R. Co., 264 Ill. 414.

23—Arkansas. St. Louis, I. M. & S. Ry. Co. v. Vincent, 36 Ark. 451; Stillwell v. Gray, 17 Ark. 473; State Bank v. McGuire, 14 Ark. 530.

California. People v. Levison, 16 Cal. 98, 76 Am. Dec. 505.

Illinois. Wall v. Goodenough, 16 Ill. 415; Sherman v. Dutch, 16 Ill. 283; Eames v. Blackhart, 12 Ill. 195.

Nebraska. Strong v. State, 61 Neb. 35.

An instruction may be given which applies the law to the hypothetical state of facts, if the

especially where the evidence introduced is conflicting.²⁴

The court should not assume the existence of disputed facts,²⁵ and it has been held not erroneous to refuse a requested instruction which may have been meant to be hypothetical, but which the court understood to be positive.²⁶ However, when the facts are undisputed, the court may charge upon them directly and without hypothesis,²⁷ and a defendant may successfully move the court for peremptory instructions, where he does so on plaintiff's evi-

jury believe from the evidence that the facts contained in the hypothesis exist, and it is error to refuse an instruction based upon such hypothetical statement. *Sims v. Southern Ry. Co.*, 59 S. C. 246.

The proper method of drafting instructions is to tell the jury that if the facts are so and so, then certain consequences will follow. *State Bank v. McGuire*, 14 Ark. 530; *Gowen v. Kehoe*, 71 Ill. 66; *Baltimore & O. R. Co. v. Skeels*, 3 W. Va. 556.

24—**Alabama.** *American Oak Extract Co. v. Ryan*, 112 Ala. 337; *Carlisle v. Hill*, 16 Ala. 398.

Arkansas. *Britt v. Aylett*, 11 Ark. 475, 52 Am. Dec. 282.

Colorado. *Bushnell v. Crooke Mining & Smelting Co.*, 12 Colo. 247, 21 Pac. 931.

Georgia. *Southern Insurance & Trust Co. v. Lewis*, 42 Ga. 587.

Illinois. *Chambers v. People*, 105 Ill. 409; *Gowen v. Kehoe*, 71 Ill. 66; *Hopkinson v. People*, 18 Ill. 264.

Kentucky. *Chiles v. Booth*, 3 Dana 566; *Stout v. Cloud*, 5 Litt. 207; *Dallam v. Handley*, 2 A. K. Marsh. 418; *Smith's Heirs v. Roberson*, 5 J. J. Marsh. 636; *Bucklin v. Thompson*, 1 J. J. Marsh. 226.

Michigan. *Dodge v. Brown*, 22 Mich. 446.

Mississippi. *Wilson v. Williams' Heirs*, 52 Miss. 487.

Missouri. *Linville v. Welch*, 29 Mo. 203; *Watson v. Musick*, 2 Mo. 29.

New York. *Chapman v. Erie Ry. Co.*, 55 N. Y. 579; *Doughty v. Hope*, 3 Denio 594.

Ohio. *Oliver v. Sterling*, 20 Ohio St. 391.

Pennsylvania. *Bartley v. Williams*, 66 Pa. St. 329; *Pennsylvania R. Co. v. McTighe*, 46 Pa. St. 316; *Sweitzer v. Hummel*, 3 Serg. & R. 228; *Delaware, L. & W. R. Co. v. Smith*, 1 Walk. 88.

South Carolina. *Devereux v. Champion Cotton Press Co.*, 17 S. C. 72.

West Virginia. *Baltimore & O. R. Co. v. Skeels*, 3 W. Va. 556.

25—See ch. XI, *post*.

26—*Dodge v. Brown*, 22 Mich. 446.

27—*Nelms v. Williams*, 18 Ala. 650; *Williams v. Shackelford*, 16 Ala. 318; *Henderson v. Mabry*, 13 Ala. 713; *Chiles v. Booth*, 3 Dana (Ky.) 566.

dence alone, and admits every fact that plaintiff's evidence conduces to prove.²⁸

Requested charges which do not properly hypothesize all the facts should be refused. Thus, in an action for injuries to a person while boarding a train caused by being caught between such train and the platform, a charge hypothesizing a knowledge by the plaintiff of his peril in holding onto the train when it moved, but not hypothesizing a belief or knowledge that his peril would be decreased by releasing his hold, is properly refused.²⁹

Where an instruction to the jury in a case embraces a hypothetical statement of the facts of the case, or of the facts which bear on any issue in the case, and the jury are told that, if they believe the facts as stated to be true, they are authorized to find in a particular way, the statement should be complete, and embrace all of the material facts pertinent to the particular issue which the evidence tends to prove.³⁰

28—*Dallam v. Handley*, 2 A. K. Marsh. (Ky.) 418.

But see *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505, where it was said that although circumstances are sometimes conclusive, in the absence of opposing proof, they are not generally conclusive, and that it should always be left to the jury to determine whether those circumstances are established.

29—*Central of Georgia Ry. Co. v. Hingson*, — Ala. —, 65 So. 45.

30—*Mississippi*. *Dean v. Tucker*, 58 Miss. 487; *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607.

Missouri. *First Nat. Bank of Warsaw v. Currie*, 44 Mo. 91.

Nebraska. *Bowie v. Spaid*, 26 Neb. 635; *Gilbert v. Merriam & Roberson Saddlery Co.*, 26 Neb. 194; *Runge v. Brown*, 23 Neb. 818.

Where upon a certain hypothesis the jury are authorized to find for plaintiff, the hypothetical statement must embrace all the facts essential to plaintiff's right of recovery. An instruction that a plaintiff is entitled to recover upon the finding of certain facts withdraws from the jury the finding of any other fact that would defeat such a verdict. *Adams v. Capron*, 21 Md. 186, 83 Am. Dec. 566.

If an instruction be so drawn as to predicate the right of recovery of a portion only of the facts constituting the cause of action, it will nevertheless be held sufficient if in view of all the evidence the court can say that the other essential facts necessarily follow in case those supposed be found. *Moore v. Missouri Pac. Ry. Co.*, 73 Mo. 438.

The fact that an instruction was not hypothetical in form will not be a ground for reversal if no prejudice could have resulted.³¹

31—Southern Insurance & Trust Co. v. Lewis, 42 Ga. 587. Where the only testimony upon the point at issue between the parties is the testimony of the parties, and the testimony of the two parties is in direct

contradiction, the court may charge that, if the jury believe the testimony of the defendant, plaintiff cannot recover. *Laviolette v. Alberts*, 126 Mich. 96.

CHAPTER VI.

NECESSITY OF INSTRUCTING IN WRITING.

- § 42. Necessity for instructing in writing at common law and under statutes.
- § 43. Effect of presence of stenographer or reporter.
- § 44. When statutes apply—What are instructions.
- § 45. Remarks during course of trial—Statements not made to jury.
- § 46. Statements as to evidence—Recapitulation of evidence.
- § 47. Reading statutes to jury or reading from books and papers.
- § 48. Statements as to duty and conduct of jurors and their qualifications.
- § 49. Directions as to verdict.
- § 50. Remarks while giving instructions—Questions of jurors.
- § 51. Sufficiency of request for written charge.
- § 52. Sufficiency of compliance with statute.
- § 53. Oral explanations, modifications, additions, or withdrawals of written instructions.
- § 54. Subsequent reduction of oral charge to writing.
- § 55. Effect of failure to instruct in writing when required.
- § 56. Waiver or loss of right to written instructions.

§ 42. Necessity for instructing in writing at common law and under statutes.

At common law, and in the absence of statute, instructions may be either oral or written at the discretion of the trial judge. If the charge contains the law applicable to the case and is explained so as to be understood by the jury, and there is no statute governing the matter, it can make no essential difference whether such instruction is given orally or in writing. The matter is one which is left entirely to the discretion of the court, and the manner in which such discretion is exercised is not subject to criticism on appeal.¹

1—Smith v. Crichton, 33 Md. 103. doubted right to have it reduced to writing. Smith v. Crichton, 33 Md. 103.
But where a party desires to except to an instruction, it is his un-

In many states, statutes have been enacted which provide for the giving of instructions in writing.²

2—Alabama. In all civil and criminal cases, the judge must charge the jury in writing, if the charge is required to be so given by either party and notice of such requisition is given after the testimony is closed and before argument to the jury is commenced. Code 1907, § 5363.

Arizona. If the court reporter be not present the charge shall be in writing, unless waived. Code 1913, § 514.

Arkansas. Const., art. VII, § 23, requires the charge to be in writing if requested by either party.

California. In criminal cases, all instructions given (except such as might incidentally be given during the admission of evidence) shall be in writing, unless both parties request the giving of oral instructions, or consent thereto, and when given orally, the instructions must be taken down by the reporter. Penal Code, ¶ 1127, § 1093.

Code Civ. Proc., § 608, requires instructions to be written.

Colorado. In the trial of criminal cases in courts of record, instructions shall be given in writing. Mills Ann. St. 1912, § 2114.

In civil and criminal cases in the district court, instructions shall be reduced to writing, * * * provided that at the request of both parties, instructions may be given orally. Mills Ann. St. 1912, § 2115.

See *Tyler v. McKenzie*, 43 Colo. 233, 95 Pac. 943.

Instructions must be written. *Wettengel v. City of Denver*, 20 Colo. 552, 39 Pac. 343.

Florida. Every charge to the jury shall be oral, except when in circuit, criminal courts of record or county court, either party or his attorney shall request in writing before the evidence is closed that it be in writing. Gen. St. 1906, § 1497.

In capital cases, charge shall be wholly in writing. Gen. St. 1906, § 3990.

Georgia. Judges * * * shall, when counsel for either party requests it before argument begins, write out their charges. Code 1911, § 1056.

Idaho. Either party may request court to give instructions in writing on law arising in the cause. With the consent of the parties the court may charge orally, and such charge is to be taken down by the court reporter. Rev. Codes, § 4383.

Illinois. No judge shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing. J. & A. Ann. St. ¶ 8610.

In the municipal court of Chicago, the charge may in the discretion of the court be given orally or in writing, but when given orally it shall at the request of either party be taken down in shorthand. J. & A. Ann. St. ¶ 3349.

Indiana. Instructions shall be in writing. Burns' Ann. St. 1914, § 558 (5).

See also, *Lesueur v. State*, 176 Ind. 448.

Failure to give all instructions in writing where parties do not consent to oral charges is reversible error. *Molt v. Hover*, 40 Ind. App. 552.

Thus, some statutory enactments require all instructions to be in writing, while others provide for written instruc-

Iowa. All instructions asked and the charge of the court shall be in writing. Ann. Code 1897, § 3705.

Kansas. In criminal cases, the judge must charge the jury in writing, and the charge shall be filed among the papers in the cause. Gen. St. 1909, § 6815.

Kentucky. In civil cases, written instructions must be given when requested by either party. Civ. Code 1900, § 317, subd. 5.

In criminal cases, instructions must be written. Crim. Code Prac., § 225.

Louisiana. Court must charge in writing on timely request. Code Prac., § 515.

Maine. Court shall charge orally or in writing on all matters of law arising in the case. Rev. St. 1904, ch. 84, § 97, p. 750.

Massachusetts. All instructions must be reduced to writing and filed in the case. Pub. St. 1882, p. 842, § 11.

Michigan. In all civil and criminal cases at law, circuit courts in charging juries shall charge only as to the law of the case, and such instructions need be in writing only where there is no stenographer present. Mich. Judicature Act of 1915, in force Jan. 1, 1916, ch. XVIII, § 58.

Minnesota. The stenographic reporter shall * * * record * * * charge to jury. Gen. St. 1913, § 241.

Mississippi. All instructions asked by either party must be in writing, and all alterations or modifications given by the court or refused shall be in writing. Code 1906, ch. 20, § 793.

Missouri. All instructions must be written. State v. De Mosse, 98 Mo. 340; Mallison v. State, 6 Mo. 399; City of Cape Girardeau v. Fisher, 61 Mo. App. 509.

Nebraska. All instructions must be in writing if either party requires it. Cobbey's Ann. St. 1911, § 1267; Neb. Rev. St. 1913, §§ 7846, 7850.

New Mexico. All instructions asked by either party, whether given or refused, and charge of court shall be in writing. Comp. L. 1897, §§ 2992, 2994.

North Carolina. Where the whole of the charge on the law is not put in writing as requested, the defendant is entitled to a new trial. Sawyer v. Roanoke Railroad & Lumber Co., 142 N. C. 162.

North Dakota. No court shall instruct the jury in civil cases unless such instructions shall first be reduced to writing. Comp. L. 1913, § 7620.

The giving of oral instructions is authorized only in an exceptional case where the parties voluntarily assent thereto, and should be given only after such consent is obtained and entered on the minutes, at such time and in such manner as will not operate to the prejudice of the rights of either party. Forzen v. Hurd, 20 N. D. 42.

Ohio. It is error to charge orally after a timely request to charge in writing. Village of Monroeville v. Root, 54 Ohio St. 523.

Oregon. If either party requires it and gives notice of intention, charge of court, so far as it relates to the law and the facts of the case,

tions when a timely request therefor has been made, and in some states instructions may be given orally when so requested or when written charges are waived. Such provisions are construed as being mandatory in some states,³

shall be reduced to writing. Lord's L. 1910, § 132 (6).

In absence of request, court may instruct in writing or orally at its option. *State v. Goff*, 71 Ore. 352, 142 Pac. 564.

South Dakota. No judge shall instruct the jury, in civil or criminal cases, unless such instructions are reduced to writing. Comp. L. 1913, vol. 2, p. 366, § 256.

In criminal cases, charge must, if requested, be reduced to writing before given, unless by tacit or mutual consent it is given orally, or unless it is fully taken down at the time it is given by a stenographic reporter. Comp. L. 1913, vol. 2, p. 703, § 350.

Tennessee. In civil cases, court must charge in writing when so requested. Code 1896, § 4683.

Where felony is charged, every word of the charge must be in writing. Code 1896, § 7186; Acts 1873, ch. 57.

Texas. The charge shall be in writing and signed by the judge. Rev. Civ. St. 1911, p. 433, art. 1971.

See *Sharman v. Newsome & Johnston*, 46 Tex. Civ. App. 111.

Written instruction limiting the purpose for which evidence may be considered should be given, but the giving of oral charges is not error where no request for a written charge was made. *La Flour v. State*, 59 Tex. Cr. App. 645.

Utah. Court shall instruct the jury in writing * * * provided that with consent of the parties entered on the minutes, the court may

instruct orally, in which case the instructions shall be taken down by the stenographer. Comp. L. 1907, § 3147. See also, § 3150.

Instructions shall be in consecutively numbered paragraphs and shall be read to the jury without oral comment or explanation. Comp. L. 1907, § 3149.

Washington. If there is no request for a charge to be in writing, or if no instruction is requested, the charge may be oral. Ball Code 1897, § 4993.

Oral instructions may be given where the parties stipulate that the instructions may be "partly oral and partly in writing." *Wheeler v. Hotel Stevens Co.*, 71 Wash. 142, Ann. Cas. 1914 C 576n, 127 Pac. 840.

West Virginia. On the trial of issues before juries in all civil and criminal cases, all instructions of the court to the jury shall be plainly written in longhand or typewriting, before given to the jury * * * provided that the court may instruct the jury to disregard incompetent testimony without reducing the instruction to writing. Acts 1907, Reg. Sess. ch. 38, § 1.

Wisconsin. Instructions must be in writing whether requested or not. St. § 2853.

Wyoming. Instructions requested or given shall be in writing. Comp. St. 1910, §§ 4499, 6235.

3—The statutory requirement is mandatory, and error follows from a refusal to comply therewith.

although in some states there are decisions holding such a statute to be directory.⁴

While the provisions as to instructing in writing in criminal cases are usually similar to those governing civil cases, some statutes require instructions to be in writing in felony cases,⁵ and it has been held in misdemeanor cases that the court is not required to charge in writing, except at the request of counsel, and then only to give such proper charges as are prepared in writing and asked to be given.⁶

It has also been held that a written charge is unneces-

McIntosh v. Sawmill Phoenix, 49 Wash. 152, 94 Pac. 930.

Act of 1855, § 1 (Cal. Code Civ. Proc., § 608), requiring instructions to be written, is mandatory. **People v. Beeler**, 6 Cal. 246.

The giving of an oral instruction in a case where the statute requires written instructions constitutes error for which the judgment may be set aside or a new trial granted, the statute being regarded as mandatory.

Arkansas. **Mazzia v. State**, 51 Ark. 177; **National Lumber Co. v. Snell**, 47 Ark. 407; **Anderson v. State**, 34 Ark. 257.

California. **People v. Hersey**, 53 Cal. 575; **People v. Sanford**, 43 Cal. 29; **People v. Beeler**, 6 Cal. 246.

Connecticut. **Wilson v. Town of Granby**, 47 Conn. 59, 36 Am. Rep. 51.

Illinois. **Ellis v. People**, 159 Ill. 337.

Indiana. **Bradway v. Waddell**, 95 Ind. 170; **Shafer v. Stinson**, 76 Ind. 376; **Toledo & W. Ry. Co. v. Daniels**, 21 Ind. 260; **Rising Sun & V. Turnpike Co. v. Conway**, 7 Ind. 187.

Kansas. **City of Atchison v. Janzen**, 21 Kan. 560; **State v. Potter**, 15 Kan. 302; **Wheat v. Brown**, 3 Kan. App. 431, 43 Pac. 807.

Tennessee. **Equitable Fire Ins. Co. v. Trustees C. P. Church**, 91 Tenn. 135.

Contra, **Scheuing v. Yard**, 88 Pa. 286; **Patterson v. Kountz**, 63 Pa. 246.

4—Refusal to give written charge when requested by both parties held reversible error, statute being mandatory. **Sharman v. Newsome & Johnston**, 46 Tex. Civ. App. 111.

The statute is mandatory in the absence of express waiver. **Sharman v. Newsome & Johnston**, 46 Tex. Civ. App. 111.

Statute is mandatory in criminal cases but directory in civil cases. **People v. Hersey**, 53 Cal. 574.

Statute requiring instructions to be in writing, in civil cases, is directory. **Parker v. Chancellor**, 78 Tex. 524; **Boone v. Thompson**, 17 Tex. 605; **Chapman v. Sneed**, 17 Tex. 428; **Reid v. Reid**, 11 Tex. 585; **Toby v. Heidenheimer**, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 795; *contra*, **Ralph Levy & Co. v. McDowell & Field**, 45 Tex. 220.

5—See statutes cited in § 42, note 2.

6—**Greer v. State**, 62 Tex. Cr. App. 81; **Garrison v. State**, 54 Tex. Cr. App. 600.

sary in misdemeanor cases, and a request therefor may be refused.⁷

The object of statutes requiring instructions to be written is to insure the preservation of the instructions *verbatim* as they come from the lips of the judge, so that there will be no dispute as to their form or substance in the subsequent proceedings in the case.⁸

§ 43. Effect of présence of stenographer or reporter.

In the statutes referred to in the prior section, it will be noted that there are provisions requiring instructions to be taken down by the official stenographer as well as provisions that the requirement that the instructions shall be in writing shall not apply when an official stenographer is present.⁹ And it has been held that the statutes only require written instructions in cases where the instructions are not taken down by the stenographer.¹⁰

Where the reporter is present, his failure to perform his duty and take down fully and correctly the charge as given will not be imputed as error of the court. In such case the judge may put into the bill of exceptions what was actually said.¹¹

In one state it has been said that the requirement of the statute is fully satisfied when the charge of the court is taken down by a stenographer in the employ and under the control of both parties to the action,¹² but the court is not

7—Dobson v. State, 5 Lea (Tenn.) 271.

8—California. People v. Leary, 105 Cal. 486, 39 Pac. 24; People v. Hersey, 53 Cal. 574.

Idaho. State v. Preston, 4 Idaho 215, 38 Pac. 694.

Nevada. State v. Stewart, 9 Nev. 120.

North Carolina. Jenkins v. Wilmington & W. R. Co., 110 N. C. 442.

9—See statutes cited in § 42, note 2.

10—People v. Leary, 105 Cal. 486,

39 Pac. 24; People v. Ferris, 56 Cal. 442.

An oral charge given in a criminal case when the official reporter is absent, is error. People v. Leary, 105 Cal. 486, 39 Pac. 24.

11—People v. Cox, 76 Cal. 281, 18 Pac. 332. Explained in People v. Leary, 105 Cal. 486, 39 Pac. 24.

12—Sturgeon v. Tacoma Eastern R. Co., 51 Wash. 124, 98 Pac. 87; Collins v. Huffman, 48 Wash. 184, 93 Pac. 220.

relieved from its obligation to give the charges in writing when there are two stenographers, employed by the different parties to the action.¹³

Where a defendant has the positive right to written charges, the taking down by a reporter of the oral instructions does not constitute them written charges;¹⁴ and it has been held that a statute requiring instructions to be in writing is not repealed by a subsequent statute providing for an official stenographer, and requiring him to correctly report all the proceedings of the court.¹⁵

§ 44. When statutes apply—What are instructions.

. It is not every remark by the judge to the jury that is required to be in writing, inasmuch as such remarks or communications are not necessarily instructions. It is held quite uniformly that the statutes only apply to "instructions" technically so called,¹⁶ and "the mere fact that an oral communication has passed from the court to the jury is not of itself proof that the statute has been disregarded."¹⁷

The general rule is that in order to fall within the statutory requirement, the remarks of the judge must amount to a positive direction to the jury as to the principles of law applicable to the case on trial, and the evidence adduced.¹⁸

13—*Sturgeon v. Tacoma Eastern R. Co.*, 51 Wash. 124, 98 Pac. 87; *McIntosh v. Sawmill Phoenix*, 49 Wash. 152, 94 Pac. 930; *Collins v. Huffman*, 48 Wash. 184, 93 Pac. 220; *State v. Mayo*, 42 Wash. 540, 7 Ann. Cas. 881, 85 Pac. 251.

14—*Lesueur v. State*, 176 Ind. 448.

15—*Bowden v. Achor*, 95 Ga. 243. See also, *Rich v. Lappin*, 43 Kan. 666, 23 Pac. 1038; *Wheat v. Brown*, 3 Kan. App. 431, 43 Pac. 807. But see *State v. Preston*, 4 Idaho, 215, 38 Pac. 694.

16—"The word 'charge,' as used in the statutes, is not intended to include any and every question and answer passing between the court and jury." *Millard v. Lyons*, 25 Wis. 516.

17—*State v. Potter* 15 Kan. 302.

18—*Boggs v. United States*, 10 Okla. 424, 65 Pac. 927, 63 Pac. 969; *Hasbrouck v. City of Milwaukee*, 21 Wis. 217.

Instructions within the meaning of the statute have reference to the law bearing upon the merits of the

Thus, it has been said that the statute requiring the charge to be in writing means the statement of the issues and of the law governing the case as given to the jury when the case is ready for final submission.¹⁹

Instructions, proper, are directions as to the law of the case,²⁰ and a statement not bearing upon questions of law or fact involved in the issue is not to be taken as a part of the instruction.²¹

So it has been held that a peremptory instruction upon an uncontradicted fact need not be in writing, since such direction is not an instruction upon any question of law involved.²²

On the other hand, a statement that a theory is not tenable has been held to be an instruction which must be writ-

controversy. *Lett v. Eastern Moline Plow Co.*, 46 Ind. App. 56.

Statute requires written instructions on "points of law." *Baxter v. Magill*, 127 Mo. App. 392.

"Only when the statements of the court amount to a positive direction as to the law of the case will such statements be regarded as an instruction within the meaning of the statute requiring instructions of the court to be in writing." *Boggs v. United States*, 10 Okla. 424, 65 Pac. 927, 63 Pac. 969.

19—*State v. Smith*, 132 Iowa 645.

20—**Georgia.** *Fry v. Shehee*, 55 Ga. 208.

Illinois. *Ellis v. People*, 159 Ill. 337; *Illinois Cent. R. Co. v. Wheeler*, 149 Ill. 525.

Indiana. *Dodd v. Moore*, 91 Ind. 522; *Lawler v. McPheeters*, 73 Ind. 579; *Stanley v. Sutherland*, 54 Ind. 339.

North Carolina. *Jenkins v. Wilmington & W. R. Co.*, 110 N. C. 438; *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 417.

Statements of rules of law governing the matter in issue or the amount of recovery are instructions. *Bradway v. Waddell*, 95 Ind. 170; *Lawler v. McPheeters*, 73 Ind. 579; *Stanley v. Sutherland*, 54 Ind. 339.

What the court may say in regard to the principles of law applicable to the case on trial and the evidence adduced is a part of the charge, and must be in writing, if a written charge is required. *Millard v. Lyons*, 25 Wis. 517; *Hasbrouck v. City of Milwaukee*, 21 Wis. 217.

An instruction which is not to govern the jury, as a matter of law, as to the substance of their verdict, need not be in writing. *Burns v. People*, 45 Ill. App. 70.

21—*Lehman v. Hawks*, 121 Ind. 541; *Lawler v. McPheeters*, 73 Ind. 577; *McCallister v. Mount*, 73 Ind. 559; *Hasbrouck v. City of Milwaukee*, 21 Wis. 219.

22—*Derby v. Peterson*, 128 Ill. App. 494.

ten.²³ In the following sections²⁴ the questions as to what statements constitute "instructions" will be considered in detail.

§ 45. Remarks during course of trial—Statements not made to jury.

While it has been held that a remark made by the court in the hearing of the jury has the same effect as if given as a formal instruction,²⁵ it has also been held that a statement addressed to counsel of one of the parties, in the hearing of the jury, of the reasons for refusing instructions requested is not an instruction within the statutes requiring the charges to be written.²⁶

Other decisions hold that remarks not addressed to the jury are not prejudicial,²⁷ and that such remarks will not be presumed to have influenced the verdict.²⁸

It has also been held that a statute as to written instructions was not intended to deprive the court of the power

23—The following statement has been held to be an instruction, within the rule requiring instructions to be written, viz.: "This idea of an accident, which has been urged by the defense, amounts to nothing, and is not tenable. There is no evidence to show it was an accident. On the contrary, it shows there was a scuffle, and that the defendant persisted in holding on to the pistol." *People v. Bonds*, 1 Nev. 33.

24—Sections 40-50, *post*.

25—*People v. Bonds*, 1 Nev. 33.

26—*Hasbrouck v. City of Milwaukee*, 21 Wis. 219.

27—Where a stipulation in another case was introduced in evidence during the progress of a trial, and the court said, in the presence of the jury, "I shall hold that by that stipulation defendants acknowl-

edge that there was twelve hundred dollars and interest due the said railroad company that has not been paid," it was held that, as the remark was not addressed to the jury, and as there was no conflict in the evidence as to the fact that the amount named was in fact due the railroad company, and the question of indebtedness was fairly submitted to the jury, no prejudice could have resulted from the remark. *Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan*, 77 Iowa, 535.

28—A remark of the court, not designed as an instruction to the jury, nor addressed to them, nor of a nature to be considered while they were deliberating upon their verdict, will not be presumed to have influenced their verdict. *Cormac v. Western White Bronze Co.*, 77 Iowa 32.

to administer admonitions to the jury during their deliberation, in case of rumored misconduct, when deemed necessary to the securing of a fair trial.²⁹

"The court may properly make oral statements to the jury in reference to * * * the manner in which the trial has been conducted, the behavior of the jury, or counsel, or parties, or any other oral statement which is not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, or a comment upon the evidence."³⁰

So, it has been held not improper to apologize, orally, for the impatience of the court at the length of the trial,³¹ or to give oral directions to counsel as to the scope of their arguments,³² as such statements or directions are not instructions.

§ 46. Statements as to evidence—Recapitulation of evidence.

Statutory provisions requiring instructions to be in writing have been held not to apply to remarks calling the jury's attention to the purpose for which certain evidence is admitted,³³ to remarks as to the admissibility of evi-

29—Rem. & Bal. Code Wash., §§ 339, 395; Maryland Casualty Co. v. Seattle Elec. Co., 75 Wash. 430, 134 Pac. 1097.

30—State v. Potter, 15 Kan. 302.

31—The following oral remarks were held not erroneous: "Before reading the instructions to you, I desire to say that the trial has been a long and tedious one, occupying one day longer in taking the evidence than any case which has been tried in this circuit for seven years. During the long and fatiguing trial, the court may have become impatient at the delay of the counsel, and made remarks that may possibly have influenced some juror. I wish it especially understood that

nothing I have said was intended to influence unduly the verdict of the jury, and I do not wish any juror to be influenced by it in the least." Hasbrouck v. City of Milwaukee, 21 Wis. 227.

32—The court may orally direct counsel to confine their arguments to the points of law which it deems controlling, and may state what those points are. Such directions are not instructions. O'Hara v. King, 52 Ill. 304.

33—The court may state orally the purpose for which evidence was introduced. Farmer v. Thrift, 94 Iowa 374; Green v. Com., 17 Ky. Law Rep. 943.

dence,³⁴ to admonitions to disregard certain evidence ruled out,³⁵ or to a statement withdrawing evidence.³⁶ In some states it has been held, however, that communications as to the effect or noneffect, propriety or impropriety, of parts of the evidence should be in writing.³⁷

A statement by the court to the jury that, "the defend-

Explanations or statements made by the court during the trial to the jury, in order that they may understand the purpose and condition on which the evidence is admitted, are not "instructions" which, on request, should be in writing. *Stanley v. Sutherland*, 54 Ind. 339.

An oral statement by the judge during the trial, limiting the application of the evidence and stating the grounds and purposes for which it is admissible, is not reversible error. *State v. Becton*, 7 Baxt. (Tenn.) 139.

The statute requiring instructions given by the court of its own motion to be in writing (Acts 1903, p. 338, ch. 193, § 1) only applies to instructions given at the close of the argument and not to what the court may say during the trial calling the attention of the jury to the purpose for which certain evidence is admitted. *Providence Washington Ins. Co. v. Wolf*, 168 Ind. 690, 120 Am. St. Rep. 395.

Oral remarks made in pursuance of a request of the district attorney to caution the jury as to the purpose for which evidence is admissible do not constitute an instruction but are merely an oral direction which does not modify or qualify other instructions given. *Irving v. People*, 43 Colo. 260, 95 Pac. 940. See also, *Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan*, 77 Iowa 535, where re-

marks as to the effect of a stipulation were held harmless error.

34—"A casual remark by the presiding judge to counsel, pending the discussion of a legal question, as to the admissibility of evidence, though made in the hearing of the jury, is not revisable on error as a ruling or charge, when the record shows that it was not intended for the jury, and it does not appear to have influenced their verdict." *Meinaka v. State*, 55 Ala. 47.

The court may give its opinion orally of the law governing the admissibility of testimony in the presence of the jury, and although all instructions were requested to be in writing. *Fruchey v. Eagleson*, 15 Ind. App. 88. See also, *McCormick v. Ketchum*, 48 Wis. 643.

35—An admonition by the court that certain evidence must not be considered is not required to be in writing. *Krause v. Redman*, 134 Iowa 629; *State v. Smith*, 132 Iowa 645.

36—"Oral directions to the jury to reject evidence * * * are not 'instructions.'"

Indiana. *Madden v. State*, 148 Ind. 183; *Bradway v. Waddell*, 95 Ind. 170; *Lawler v. McPheeters*, 73 Ind. 579; *Stanley v. Sutherland*, 54 Ind. 339.

Missouri. *State v. Good*, 132 Mo. 114.

37—*Peck v. Springfield Traction Co.*, 131 Mo. App. 134.

ant's attorney has let down the fence, and that all is now before the jury," is an oral instruction.³⁸ And it has been held error to give an oral statement as to the right of the jury to disbelieve evidence,³⁹ or to give an oral direction to try the case on the evidence.⁴⁰

The question as to the existence of evidence proving an instrument as a last will requires written instructions,⁴¹ and the remark of a court, as to certain evidence, that if these things were true "it would follow as a matter of law that the act of the agent was the act of defendant," has been held error, as the remark, though correct, should have been embodied in a written charge.⁴²

It has also been held error to charge orally as to whether the evidence raises a reasonable doubt.⁴³

While there are decisions to the contrary,⁴⁴ it is usually held that the recapitulation of the evidence need not be in writing,⁴⁵ and it is not error to orally repeat admissions

38—Coppage v. Com., 3 Bush (Ky.), 532.

39—After the court had finished its charge, one of the jurors asked whether they must believe all the testimony, or could disbelieve any part of it. The court answered orally that they could reject, etc., and it was held reversible error. Dixon v. State, 13 Fla. 637.

40—A statement by the judge to the jury, before delivering his written charge, that it is their duty to try the case on the sworn testimony, and to disregard their personal knowledge, is an instruction, and must be in writing. Equitable Fire Ins. Co. v. Trustees C. P. Church, 91 Tenn. 135.

41—Mayville v. French, 246 Ill. 434.

42—State v. Potter, 125 Mo. App. 465.

43—Where there was a request for written instructions, it was held

error to charge the jury orally that, "if the state has failed to make out a case against this defendant beyond a reasonable doubt or if the defendant, by his evidence, has raised a reasonable doubt, then your verdict will be as follows (reading form of verdict for defendant)." Stephenson v. State, 110 Ind. 358, 59 Am. Rep. 216; Smurr v. State, 88 Ind. 504.

44—"When the court has been requested to give the instructions to the jury in writing, it is erroneous to recapitulate the substance of the testimony verbally, notwithstanding the court states that the jury should not take its statements." McClay v. State, 1 Carter (Ind.), 385.

45—Sawyer v. Roanoke Railroad & Lumber Co., 142 N. C. 162; Jenkins v. Wilmington & W. R. Co., 110 N. C. 442; Dupree v. Virginia Home Ins. Co., 92 N. C. 417.

in evidence, which are made by a party to the action.⁴⁶

§ 47. Reading statutes to jury or reading from books and papers.

Some courts hold, without qualification, that it is a violation of the statute and error for the court to read from books and papers—even from the statutes—where such extracts are not copied into the written charge.⁴⁷ This is upon the theory that it is only by a strict enforcement of the statute that the identity of the charge can be secured.⁴⁸

On the other hand, it is frequently held that it is not a violation of the statute to read from the statutes of the state, without otherwise embodying such statutes in the

46—Where, in an action for personal injuries, the defendants at the close of the trial admit that the premises where the accident occurs were owned and controlled by them, and the court merely repeats, in the hearing of the jury and of the counsel on both sides, so that the jury can understand what it is, the statute prohibiting oral instructions is not violated. *Hinckley v. Horazdowsky* (Ill.), 23 N. E. 338, adhered to on rehearing, 133 Ill. 359, 8 L. R. A. 490, 23 Am. St. Rep. 618.

47—**Indiana.** *Sellers v. City of Greencastle*, 134 Ind. 645; *Bradway v. Waddell*, 95 Ind. 170; *Smurr v. State*, 88 Ind. 504; *Bottorff v. Shelton*, 79 Ind. 98.

Iowa. *State v. Birmingham*, 74 Iowa 407; *Hall v. Carter*, 74 Iowa 364.

Tennessee. *Manier v. State*, 6 Baxt. 595, overruling *Logston v. State*, 3 Heisk. 414. See also, *People v. Sanford*, 43 Cal. 29, which case, however, is overruled by later cases.

Reading a statute to the jury constitutes an instruction. *Bottorff v. Shelton*, 79 Ind. 98.

Where the court was requested to instruct in writing, it was error to read a section of a statute to the jury, instead of copying the same and giving it as a part of the written charge. *Chicago & E. R. Co. v. Murphy*, 54 Ind. App. 531.

48—“Where the request to instruct in writing is made, it is not complied with by reading from the statutes of the state or from other law books. This is not reducing the charge to writing, as required by the statute. It is proper, of course, for the court to make extracts which are law and applicable to the case from any law book, and to copy the same in its written charge, and to read the charge containing such extracts to the jury. The extracts from books given in this way to the jury become part of the court’s written charge. The identity of the charge is secured. But if the Court may, in charging the jury, where there is a request to instruct in writing, read from law books, reading a few lines here and a few there, omitting occasionally a word or a sentence not deemed applicable to

written charge.⁴⁰ This seems to proceed upon the ground that the statutes of the state are sufficiently fixed, permanent, and known to come within the spirit of the statute requiring instructions to be in writing, for, in preparing a bill of exceptions, they are always conveniently accessible.⁵⁰ In this connection, a distinction has been drawn between reading from the statutes and reading from other books or papers;⁵¹ and it has also been admitted that the case might be different where the jury are to take the charge with them into the jury room.⁵²

§ 48. Statements as to duty and conduct of jurors and their qualifications.

Remarks made to the jury upon matters not relating particularly to the case on trial, and of a general character as

the case, a party would be put to much and, perhaps, fruitless effort in collecting together the court's charge." *Smurr v. State*, 88 Ind. 509. The error may, of course, have been harmless. See *Hall v. Carter*, 74 Iowa 364.

In Texas, the question has been decided both ways. See *Carr v. State*, 41 Tex. 544, and *Hobbs v. State*, 7 Tex. App. 117.

It is reversible error to read the complaint and answer to the jury from the originals, without oral explanation, without copying them into the instruction. *Woodruff v. Hensley*, 26 Ind. App. 592.

49—**Arkansas.** *Palmore v. State*, 29 Ark. 248.

California. *People v. Lewis*, 64 Cal. 401, 1 Pac. 490; *People v. Brown*, 59 Cal. 345; *People v. Mortier*, 58 Cal. 262.

Kansas. *State v. Mortimer*, 20 Kan. 93.

Louisiana. *State v. Thomas*, 34 La. Ann. 1084.

Michigan. *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

Nevada. *State v. Stewart*, 9 Nev. 120. But see *Josselyn v. McAllister*, 22 Mich. 300.

50—*Palmore v. State*, 29 Ark. 268; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389; *State v. Stewart*, 9 Nev. 120. In *Josselyn v. McAllister*, 22 Mich. 306, the question was raised whether the entire charge was not vitiated by the course of the judge in reading orally from a textbook a passage, with a statement that he would afterwards insert it in the written charge, instead of embodying it there in the first instance. The court, however, refused to decide the question, as no objection was made until after the verdict. A contrary conclusion was reached in *People v. Sanford*, 43 Cal. 29, but this was overruled by later cases.

51—*Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

52—*Swartwout v. Michigan Air*

to their duties as jurors, are not a part of the instructions required by the statute to be in writing, and such remarks will not be a good ground for reversal merely because made orally.⁵³ It is not improper to state orally that the jury are to pay particular attention to the instructions,⁵⁴ to give oral directions as to their conduct while deliberating,⁵⁵ or to verbally impress upon the jury the importance of agreeing upon a verdict.⁵⁶

Line R. Co., 24 Mich. 389; *State v. Stewart*, 9 Nev. 120. See *Manier v. State*, 6 Baxt. (Tenn.) 595. See also, *Hopt v. People*, 104 U. S. 631, 26 L. Ed. 873.

53—See *Moore v. City of Platteville*, 78 Wis. 644; *State v. Glass*, 50 Wis. 218, 36 Am. Rep. 845; *Seymour v. Colburn*, 43 Wis. 67; *Grant v. Connecticut Mut. Life Ins. Co.*, 29 Wis. 125; *Millard v. Lyons*, 25 Wis. 516; *Hasbrouck v. City of Milwaukee*, 21 Wis. 238.

Oral statements as to the form of the verdict, the manner in which the trial has been conducted, the behavior of the jury or counsel or parties, are proper, as is "any other oral statement which is not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, or a comment upon the evidence." *State v. Potter*, 15 Kan. 302.

A direction to the jury as to their duties not involving any principle of law affecting the merits of the case cannot be regarded as an instruction within the meaning of the statute. *Lett v. Eastern Moline Plow Co.*, 46 Ind. App. 56.

The statutes do not forbid the Court to direct the jury *ore tenus* about their ordinary duties as jurors. *Baxter v. Magill*, 127 Mo. App. 392.

54—An admonition by the court, before reading the charge to the jury, that they are to pay particular and careful attention to each word and sentence of the charge, so that they may be advised as to the law of the case, is not a part of the charge, and may be made orally. *Sargent v. State*, 35 Tex. Cr. App. 325.

55—Oral directions by the court to the jury to retire with their bailiff, to separate for their meals, to seal up their verdict, to abstain from talking among themselves or with others, to sign their general verdict, or to answer interrogatories, are not instructions, within the meaning of the statute requiring the court to instruct the jury in writing when so requested by a party. *Lehman v. Hawks*, 121 Ind. 541; *Trentman v. Wiley*, 85 Ind. 33; *McCallister v. Mount*, 73 Ind. 559.

An oral statement to the jury that it would be improper for them to examine the scene of the accident except by agreement of counsel, and in charge of an officer, and that they must keep away, in the absence of such agreement, is not error. *Pioneer Fireproof Const. Co. v. Sunderland*, 188 Ill. 341.

56—The court may verbally impress upon the jury the importance of agreeing upon a verdict, point out

Also, remarks on the *voir dire* as to the qualifications of jurors do not violate the statutory prohibition.⁵⁷ It has been held, however, that an address by the trial judge referring to the institution of trial by jury and to the duty of the jury with respect to the case on trial is an oral instruction and erroneous.⁵⁸

§ 49. Directions as to verdict.

Usually a statement as to the duty of the jury to agree upon a verdict,⁵⁹ a direction to answer interrogatories,⁶⁰ or a direction to retire for further consideration of the verdict,⁶¹ need not be in writing.

the expense to the county and to the parties which the suit involves, and ask the individual jurors to listen to the arguments of the others. *Moore v. City of Platteville*, 78 Wis. 644; cf. *Equitable Fire Ins. Co. v. Trustees C. P. Church*, 91 Tenn. 135. See also, § 49, *post*.

57—Explanatory remarks to the jury, on their *voir dire* examination, as to what facts will or will not disqualify them, do not violate the statutory prohibition against oral instructions. *Oberbeck v. Mayer*, 59 Mo. App. 289.

58—*Jarneck v. Chicago Consol. Traction Co.*, 150 Ill. App. 248.

59—An oral admonition as to the importance of finding a verdict is not an instruction, within the rule. *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111; *Moore v. City of Platteville*, 78 Wis. 644. See also, *State v. Jones*, 7 Nev. 408.

The mere fact that the court made certain oral statements to the jury in relation to their agreeing upon a verdict, after they had retired to consider their verdict, and had been returned into court, is not such an instruction as is required to be in

writing by *Crim. Code Kan. § 236*, where the court did not direct them upon any rule of law involved in the trial, or make any comment upon the testimony. *State v. McLafferty*, 47 Kan. 140, 27 Pac. 843.

An oral statement to the jury in the nature of an argument upon the facts, and in regard to the duty of the jury to agree upon a verdict, is an instruction, within the meaning of the statutes, and is erroneous. *City of Abingdon v. Meadows*, 28 Ill. App. 442.

60—An oral statement by the judge to the jury, directing them to answer certain interrogatories, is not an instruction, within the meaning of the law, and there is no error in making it after a request to instruct in writing. *Trentman v. Wiley*, 85 Ind. 33; *McCallister v. Mount*, 73 Ind. 559; *Judge v. Jordan*, 81 Iowa 519.

61—A direction to the jury to retire and consider further of their verdict, and answer an interrogatory previously propounded to them, is not such an instruction as must be in writing. *Judge v. Jordan*, 81 Iowa 519.

But it has been held a violation of the statute to instruct orally as to the impropriety of certain modes of arriving at the amount of a verdict.⁶²

According to some decisions, a direction to find a verdict for one party, when such direction is proper, is not an instruction, and need not be in writing,⁶³ but other decisions hold that such direction is an instruction.⁶⁴

A direction as to the form of the jury's verdict is not an instruction which must be written.⁶⁵

The jury may be told orally that they must find one of three verdicts, the forms of which are submitted to them,⁶⁶ and a statement that if the verdict is for the plaintiff, it should be for the amount claimed, and if for the defendant,

62—Illinois Cent. R. Co. v. Hammer, 85 Ill. 526.

63—Leggett & Myer Tobacco Co. v. Collier, 89 Iowa 144; Young v. Burlington Wire Mattress Co., 79 Iowa 415; Milne v. Walker, 59 Iowa 186; Stone v. Chicago & N. W. R. Co., 47 Iowa 82, 29 Am. Rep. 458; Grant v. Connecticut Mut. Life Ins. Co., 29 Wis. 125.

64—Greenwich Ins. Co. v. Raab, 11 Ill. App. 636.

The statute applies to an affirmative charge or direction to the jury to find a verdict for one party or the other. Citizens' Bank of Bainbridge v. Fort, 142 Ga. 611.

65—California. People v. Bonney, 19 Cal. 426.

Illinois. Illinois Cent. R. Co. v. Wheeler, 149 Ill. 525, aff'g 50 Ill. App. 205; Economy Light & Power Co. v. Hiller, 113 Ill. App. 103, aff'd 211 Ill. 568.

Indiana. Lehman v. Hawks, 121 Ind. 541; Bradway v. Waddell, 95 Ind. 170; McCallister v. Mount, 73 Ind. 559; Stanley v. Sutherland,

54 Ind. 339; Indianapolis & N. W. Traction Co. v. Henderson, 39 Ind. App. 324.

Kansas. State v. Potter, 15 Kan. 302.

Oral statements with reference to the form of the jury's verdict which do not contain directions upon some question of law, or comment on the evidence, are not instructions within the statute. Douglas v. Territory, 1 Okla. Cr. App. 583, 98 Pac. 1023.

Held not reversible error to give oral instructions as to the form of a jury's verdict, since if jury returned informal verdict court could have had it changed, under statute, with jury's consent. Ragsdale v. State, 61 Tex. Cr. App. 145.

Contra, Helm v. People, 186 Ill. 153.

The action of the trial judge in instructing orally in regard to the verdict the jury were authorized to render, held fatal error. Simmons v. State, — Miss. —, 65 So. 511.

66—State v. Glass, 50 Wis. 218, 36 Am. Rep. 845.

it should simply be for the defendant, need not be in writing.⁶⁷

A direction to sign the general verdict is not an instruction,⁶⁸ and where the jury return with an informal verdict, the court may direct the jury orally to retire and bring in a verdict covering the issues in the case, such a statement not being an exposition of any principle of law to be applied to the case.⁶⁹ So, a direction to retire and return a verdict in accordance with the previous charge does not constitute an instruction and need not be in writing.⁷⁰ Also, an oral charge that it is the duty of the jury to answer each interrogatory fully under the evidence, and that it must be signed by the foreman and returned with the general verdict, has been held not an instruction within the meaning of the statute.⁷¹

§ 50. Remarks while giving instructions—Questions of jurors.

In giving instructions it has been held unnecessary to reduce to writing remarks of the court as to his right to instruct,⁷² language leading up to an instruction,⁷³ a state-

67—*Jenkins & Reynolds Co. v. Lundgren*, 85 Ill. App. 494.

68—*McCallister v. Mount*, 73 Ind. 559.

69—*Lehman v. Hawks*, 121 Ind. 541; *Bradway v. Waddell*, 95 Ind. 170; *State v. Potter*, 15 Kan. 302.

70—*Johnson v. Rider*, 84 Iowa 50.

71—*Lett v. Eastern Moline Plow Co.*, 46 Ind. App. 56.

72—A statute requiring a charge “to be in writing is not violated by the judge telling the jury that he could not instruct them as to matters of fact.” *State v. Waterman*, 1 Nev. 543.

73—It was held in *People v. Cox*, 76 Cal. 281, 18 Pac. 332, that, although it is error to charge a jury in a criminal case orally, “yet, where the record shows that the language used, which was not taken down by the reporter, merely led up to an instruction which was properly taken down, and did not affect nor in any way qualify the charge which was taken down, it is not ground for reversal.” If any more absolute rule was intended to be announced in *People v. Hersey*, 53 Cal. 574, it is to be taken as modified by what was held in the *Cox* case.

ment as to who requested the instruction,⁷⁴ or the court's reply to an exception to a charge.⁷⁵

As to questions asked by jurors, it has been said that: "Where a juror propounds a question to the court, it may make a direct answer without reducing the same to writing, provided, in so doing, it does not make an independent statement of a rule of law. In other words, where the question of the juror is the full statement of the rule, and the answer is no more than an affirmation or denial, such affirmation or denial need not be reduced to writing before it is given."⁷⁶

Thus it has been held not improper to answer irrelevant questions, verbally,⁷⁷ and the court may orally refuse to answer questions, or state that they are irrelevant.⁷⁸ When

74—It is not reversible error, no harm being shown, for the court to state orally to the jury that "defendant's counsel have asked me to give the following instructions." *Sample v. State*, 104 Ind. 289, 55 Am. Rep. 211. See also, *Dodd v. Moore*, 91 Ind. 522; *Scott v. Chicago, M. & St. P. R. Co.*, 68 Iowa 360.

75—The following remark in reply to an exception to charge, viz.: "I have not attempted to state what the facts are, but simply what is claimed," is in no sense a charge. *Malachi v. State*, 89 Ala. 134.

76—*State v. Potter*, 15 Kan. 302.

"Where, after having received full written instructions, the jury returned into court, and, in the absence of the official reporter, orally asked the court whether, if the defendant was found guilty of murder in the first degree, the jury could fix the punishment of imprisonment for life, to which the court orally answered that they could, if that was their verdict, and, upon one of the jurymen orally asking whether

the jury could bring in any one of the six verdicts given to the jury which they might agree upon, the court orally answered, 'Yes,' such oral conversation and instruction to the jury causes no prejudicial injury to the defendant, and is not ground for a new trial." *People v. Leary*, 105 Cal. 486, 39 Pac. 24.

77—Where the jury returned and inquired what was the least punishment for the offense charged, and the court replied orally that the jury had nothing to do with that matter, but informed them of the penalty, it was held that such remarks were immaterial, and not erroneous for not being in writing. *People v. Jackson*, 57 Cal. 316.

78—Where the jury send questions to the judge, who, in reply, states that such questions have nothing to do with the case under the evidence and instructions given, such reply is not an instruction, but rather a refusal to instruct, and need not be in writing. *Sullivan v. Collins*, 18 Iowa 228. So, the court may tell

no exception is taken to the oral repetition of a portion of a written charge, a party cannot object on appeal.⁷⁹

§ 51. Sufficiency of request for written charge.

It has been noted that some statutes require the instructions to be written only in cases when a timely request has been made therefor.⁸⁰

In one case, where a defendant submitted certain requested charges and requested the court to "give the following instructions and all instructions in writing to the jury," and such charges were refused and the jury instructed orally, it was held that the practice of requesting written charges in such a manner would not be sanctioned.⁸¹

But in another case, where the facts were almost identical, it was held that the defendant was entitled to a new trial because of the giving of oral charges.⁸²

§ 52. Sufficiency of compliance with statute.

A judge need not write the whole charge himself, but may adopt part or all from charges of other judges or from books, provided he puts all in such shape that the jury can take it with them to the jury room;⁸³ but "it is error to

the jury orally that questions asked by them are irrelevant. *Seymour v. Colburn*, 43 Wis. 71.

79—Where the court, having complied with a request to give its instructions in writing, repeats a portion thereof orally, and no exception is taken to such repetition, it cannot be objected to in the supreme court. *Howard v. State*, 73 Ind. 528.

80—See § 42, *ante*, note 2.

81—*Davis v. C. & J. Michel Brewing Co.*, 31 S. D. 284.

82—See *Sawyer v. Roanoke Railroad & Lumber Co.*, 142 N. C. 162, where the defendant requested the court "to put its charge to the jury in writing, and in part to charge as

follows." In that case the defendant was held entitled to a new trial, because oral charges were given, even though the trial judge stated that through inadvertence in the haste of the trial, he did not observe that the prayer was to put the charge in writing.

83—*Ohio & M. R. Co. v. Sauer*, 4 Ohio Cir. Ct. R. 466, wherein the court read part prepared by himself, and part from a copy of a former charge of another judge at a former trial. It was held that error in not putting the charge in such shape that the jury could take it with them was waived by consent of counsel that it need not go into the jury room.

give an instruction, not reduced to writing, otherwise than by reference to a certain page of a law magazine.”⁸⁴ It is sufficient for the judge to dictate an instruction, and for the attorney to reduce it to writing. It is not necessary for the judge to do it with his own hand.⁸⁵ A charge written in English and orally translated for the jury into Spanish, which was their language, is a charge “in writing,” within the meaning of the statute,⁸⁶ as is also a printed charge,⁸⁷ or a charge written in lead pencil.⁸⁸

Where instructions are required to be in writing, every word of the charge should be in writing, and it is error to charge the jury orally, either in whole or in part.⁸⁹ “Charges in writing should be given literally as they are written.”⁹⁰ An instruction that the defendant is on trial on the “following indictment,” and which says that the

84—*Hopt v. People*, 104 U. S. 631, 26 L. Ed. 873.

85—*Barkman v. State*, 13 Ark. 706; *Pleasant v. State*, 13 Ark. 360.

86—*Territory v. Romine*, 2 N. M. 114.

87—*State v. Fooks*, 65 Iowa 196; *State v. Kelly*, 73 Mo. 608; *State v. Stewart*, 9 Nev. 120.

Under a statute requiring instructions to be written, the fact that an instruction is printed and not type-written is not error warranting reversal. *People v. Dressen*, 158 Ill. App. 139.

88—*Harvey v. Tama County*, 53 Iowa 228.

89—*Georgia*. *Wheatley v. West*, 61 Ga. 401.

Indiana. *Davis v. Foster*, 68 Ind. 238; *Bosworth v. Barker*, 65 Ind. 596; *Watts v. Coxen*, 52 Ind. 155; *Hardin v. Helton*, 50 Ind. 319; *Gray v. Stivers*, 38 Ind. 197; *Sutherland v. Venard*, 34 Ind. 390; *Feriter v. State*, 33 Ind. 283; *Riley v. Watson*,

18 Ind. 291; *Rising-Sun & V. Turnpike Co. v. Conway*, 7 Ind. 187.

Kansas. *State v. Bennington*, 44 Kan. 583, 25 Pac. 91.

Ohio. *Householder v. Granby*, 40 Ohio St. 430.

Tennessee. *Manier v. State*, 6 Baxt. 595.

“The judge having refused to give instructions asked for by the defendant, and having given oral instructions, subsequently, and before the jury retired, gave the jury written instructions offered by the plaintiff, saying to the jury that the written instructions thus given were substantially the oral instructions he had given, and that he adopted them as the instructions of the court. This is a compliance with the statute, requiring charges in cases of this character to be wholly in writing.” *Southern Exp. Co. v. Van Meter*, 17 Fla. 783, 35 Am. Rep. 107.

90—*Morrison v. State*, 42 Fla. 149.

defendant has entered a plea of not guilty to such indictment, but which does not actually include the indictment, does not comply with the statute.⁹¹

§ 53. Oral explanations, modifications, additions, or withdrawals of written instructions.

When the statutes require instructions* to be written, it is error to make oral explanations or additions, or to orally modify or illustrate the principles of law laid down,⁹² and such rule applies equally to instructions in chief given by the court *suo motu*, and to instructions asked by a party.

91—State v. Birmingham, 74 Iowa 407.

92—Georgia. Willis v. State, 89 Ga. 188; City Bank of Macon v. Kent, 57 Ga. 283.

Illinois. Ellis v. People, 159 Ill. 337; Ray v. Wooters, 19 Ill. 82.

Indiana. Stephenson v. State, 110 Ind. 358, 59 Am. Rep. 216; Hauss v. Niblack, 80 Ind. 407; Provines v. Heaston, 67 Ind. 482; Bosworth v. Barker, 65 Ind. 595; Meredith v. Crawford, 34 Ind. 399; Toledo & W. Ry. Co. v. Daniels, 21 Ind. 256; Laselle v. Wells, 17 Ind. 33; Lung v. Deal, 16 Ind. 349; Kenworthy v. Williams, 5 Ind. 375; Townsend v. Doe, 8 Blackf. 328.

Iowa. State v. Harding, 81 Iowa 599; Parris v. State, 2 G. Greene 449.

Kansas. Bird & M. Map Co. v. Jones, 27 Kan. 177.

Kentucky. Payne v. Com., 1 Metc. 378.

Nebraska. Hartwig v. Gordon, 37 Neb. 657.

Ohio. Householder v. Granby, 40 Ohio St. 430; Rupp v. Shaffer, 21 Ohio Cir. Ct. R. 643, 12 Ohio Cir. Dec. 154.

Texas. McMahon v. State, 1 Tex. App. 102.

“A judge on the trial of a cause has no authority to affect or change the law, as stated in written instructions, by any statement not in writing. It is error for the court to instruct the jury orally, or to orally explain or modify an instruction.” Bradway v. Waddell, 95 Ind. 174.

Instructions required to be in writing cannot be orally qualified or modified. Dorsett v. Crew, 1 Colo. 18.

It is error to make an oral explanation of a written charge. Mazzia v. State, 51 Ark. 177; People v. Payne, 8 Cal. 341.

Communications from the court by way of instructions, or explaining instructions should be in writing. Peck v. Springfield Traction Co., 131 Mo. App. 134.

An oral preface to an instruction, that the judge had concentrated all there was in the instructions in this one, as embodying all the law necessary for the case, when in fact it did not, is error. McEwen v. Morey, 60 Ill. 32.

and given by the court,⁹³ or to further instructions given after the recall of the jury, or upon a request of the jury for further instructions.⁹⁴

Where the court does not give an instruction on principles of law, but explains orally what he has read, the statute is not violated,⁹⁵ and the withdrawal of an instruction may be made by an oral statement which does not bear upon any question of law or fact involved in the issue.⁹⁶ Also, a statement that does not modify, explain, add to or take from the written instructions is not an instruction which must be written.⁹⁷

§ 54. Subsequent reduction of oral charge to writing.

In some states it is held that an oral instruction is not improper where a written one in the same words is imme-

93—*Strattan v. Paul*, 10 Iowa 139. In a civil action it is error to orally explain or modify an instruction asked by either party, and equally so for the court, on its own motion, to charge the jury orally. *State v. Harding*, 81 Iowa 599.

94—*California*. *People v. Woppner*, 14 Cal. 437.

Georgia. *Bowden v. Achor*, 95 Ga. 243; *Willis v. State*, 89 Ga. 188.

Iowa. *State v. Harding*, 81 Iowa 599.

Kansas. *State v. Stoffel*, 48 Kan. 364, 29 Pac. 685.

Tennessee. *Columbia Veneer & Box Co. v. Cottonwood Lumber Co.*, 99 Tenn. 122.

Where the court finished its charge and one of the jurors asked whether they must believe all the testimony or could disbelieve any part of it, and the court answered orally that they could reject, etc., it was held reversible error. *Dixon v. State*, 13 Fla. 636.

95—*State v. Marion*, 68 Wash. 675, 124 Pac. 125.

An oral statement which merely explains but does not qualify the written charge may be given. *St. Louis & S. F. R. Co. v. Hall*, — Ala. —, 65 So. 33.

96—In reading the instructions to the jury, the judge read one by mistake which he had marked "Refused." He then said to the jury orally that he had read the instruction by mistake, and they should not consider it. Counsel insist that the court erred in making this statement orally. The statement made by the court did not bear upon any question of law or fact involved in the issue, and should not be taken or treated as a part of the instruction. *Ohio & M. Ry. Co. v. Stansberry*, 132 Ind. 533; *Bradway v. Waddell*, 95 Ind. 170; *McCallister v. Mount*, 73 Ind. 559; *Wall v. State*, 10 Ind. App. 530; *Edwards v. Smith*, 63 Mo. 119.

97—*Douglas v. Territory*, 1 Okla. Cr. App. 583, 98 Pac. 1023.

diately given to the jury,⁹⁸ and it has been deemed a sufficient compliance with the statute to charge the jury orally, and afterwards to reduce the charge to writing.⁹⁹

In this connection it may be mentioned that some statutes do not require written instructions when taken down by a reporter.¹

In many jurisdictions, it is held not to be a sufficient compliance with the statute to charge the jury orally, and subsequently reduce the charge to writing,² and certainly, the object of the statute, which is to insure the preservation of the instructions for review exactly as they were delivered, would be defeated if the judge could charge the jury orally, and trust to memory to reproduce it in writing afterwards.³ But this view has been carried to the extent of prohibiting the giving of oral instructions, even where they are taken down by a stenographer, and afterwards accurately tran-

98—*Landt v. McCullough*, 218 Ill. 607, aff'g 121 Ill. App. 328.

99—*National Lumber Co. v. Snell*, 47 Ark. 407; *Yates v. Kinney*, 23 Neb. 648; *Powers v. Hazelton & L. Ry. Co.*, 33 Ohio St. 429.

1—See *People v. Leary*, 105 Cal. 486, 39 Pac. 24; *People v. Ferris*, 56 Cal. 442; *People v. Hersey*, 53 Cal. 575; *Penberthy v. Lee*, 51 Wis. 261.

See also, §§ 42, 43, *ante*.

2—**Arizona.** *Territory v. Kennedy*, 1 Ariz. 505, 25 Pac. 517.

Florida. *Dixon v. State*, 13 Fla. 637; *Long v. State*, 11 Fla. 295.

Indiana. *Widner v. State*, 28 Ind. 394; *Rising-Sun & V. Turnpike Co. v. Conway*, 7 Ind. 187.

Kentucky. *Payne v. Com.*, 1 Mete. 377.

"The judge must commit his instructions to writing, and read them to the jury from the original manuscript; and where this is not done, the error is not cured by subsequently reducing them to writ-

ing." *Territory v. Duffield*, 1 Ariz. 58, 25 Pac. 476.

3—*Dixon v. State*, 13 Fla. 650. In *Toledo & W. R. Co. v. Daniels*, 21 Ind. 260, the court at the very time the objection was made, set out, in a bill of exceptions, the exact words used by him in his oral charge. It was argued that the purpose of the statute, which was to give the party the benefit of a record containing the words used by the court, had been complied with. But the court said: "We are not inclined to adopt that argument. The statute, as we understand it, requires the court, when asked for written instructions, to reduce them to writing, and then give them, as written, to the jury. This construction of the statute, in its strictness, as a rule of practice, imposes no hardship, and, were the rule once relaxed, it is easy to see that the object of it would be defeated."

scribed.⁴ It would seem that, in such a case, the error, if any, should be held to be harmless.⁵

§ 55. Effect of failure to instruct in writing when required.

It has been noted that statutes requiring instructions to be in writing are usually considered mandatory,⁶ and according to such statutes, it is error warranting reversal or a new trial to give oral charges when the statute requires them to be written.⁷

4—**Colorado.** Crawford v. Brown, 21 Colo. 272, 40 Pac. 692.

Georgia. Bowden v. Achor, 95 Ga. 243.

Indiana. Shafer v. Stinson, 76 Ind. 374.

Iowa. State v. Harding, 81 Iowa 599.

Kansas. State v. Bennington, 44 Kan. 583, 25 Pac. 91; Rich v. Lappin, 43 Kan. 666, 23 Pac. 1038; Wheat v. Brown, 3 Kan. App. 431, 43 Pac. 807. But see Union St. Ry. Co. v. Stone, 54 Kan. 83, 37 Pac. 1012.

Contra, State v. Preston, 4 Idaho 215, 38 Pac. 694; Yates v. Kinney, 23 Neb. 648.

Where the court disregarded a request, properly made, to instruct in writing, and caused a stenographer to take down its oral instructions, a failure to object to this mode of preserving the evidence of the instructions did not waive the request, nor did such mode satisfy the statute. Under such a request, the instructions must be written, and given as written. Shafer v. Stinson, 76 Ind. 374. See also, Sutherland v. Venard, 34 Ind. 390. But compare State v. Sipult, 17 Iowa 575.

5—See State v. Preston, 4 Idaho 215, 38 Pac. 694; State v. Sipult, 17 Iowa 575. "Where a simple in-

struction, without complication, is given orally to the jury, * * * and is thereafter accurately reduced to writing by the judge without unnecessary delay, no prejudice could result to the complaining party, and the statute directs that no judgment shall be reversed for an error which does not affect the substantial rights of the party appealing." National Lumber Co. v. Snell, 47 Ark. 407.

6—See § 42, note 4, *ante*.

7—In criminal cases, the giving of oral instructions is reversible error. People v. Cox, 76 Cal. 281, 18 Pac. 332; People v. Carrillo, 70 Cal. 643, 11 Pac. 840.

Judgment reversed because of oral instructions. People v. Sanford, 43 Cal. 29; People v. Ah Fong, 12 Cal. 345.

Oral instruction held error. Dixon v. State, 13 Fla. 637, 650; Long v. State, 11 Fla. 295.

Giving of oral instructions is error. Ellis v. People, 159 Ill. 337; Illinois Cent. R. Co. v. Hammer, 85 Ill. 526; Bates v. Ball, 72 Ill. 108; McEwen v. Morey, 60 Ill. 32; Arcade Co. v. Allen, 51 Ill. App. 305.

Under Code, §§ 2784, 4440, requiring all instructions to be in writing, it is error to instruct orally. State v. Harding, 81 Iowa 599; State v.

Even though it be conceded that the bill of exceptions fairly presents the instructions given, yet, that security against mistakes which the statute awards as a right having been denied, the judgment must be reversed.⁸ The error may, however, have been harmless to appellant, in which case it will not be sufficient ground for a reversal.⁹ This

Birmingham, 74 Iowa 407; Head v. Langworthy, 15 Iowa 235.

Noncompliance with the statute requiring instructions to be in writing in criminal cases (Gen. St. 1901, § 4722) is reversible error. State v. Bennington, 44 Kan. 583, 25 Pac. 91.

In all criminal cases the instructions must be in writing, and it is error to charge orally. Payne v. Com., 1 Metc. (Ky.) 370.

The giving of oral instructions is reversible error. State v. DeMosse, 98 Mo. 340; Hogel v. Lindell, 10 Mo. 483; Walsh v. St. Louis Drayage Co., 40 Mo. App. 339.

Giving of oral instructions is reversible error. Ehrlich v. State, 44 Neb. 810; Hartwig v. Gordon, 37 Neb. 657.

Oral charge in criminal cases where felony is charged is reversible error. Manier v. State, 6 Baxt. (Tenn.) 595; Newman v. State, 6 Baxt. (Tenn.) 164.

In criminal cases it is reversible error to charge orally. Carr v. State, 41 Tex. 543; Trippett v. State, 5 Tex. App. 595; Winfrey v. State, 41 Tex. Cr. App. 538; Kelley v. State (Tex. Cr. App.), 31 S. W. 390; Harkey v. State, 33 Tex. Cr. App. 100, 47 Am. St. Rep. 19.

8—Hardy v. Turney, 9 Ohio St. 400.

9—Arkansas. National Lumber Co. v. Snell, 47 Ark. 407.

California. People v. Leary, 105 Cal. 486, 39 Pac. 24.

Georgia. Fry v. Shehee, 55 Ga. 208.

Illinois. Greathouse v. Summerfield, 25 Ill. App. 296.

Indiana. Mutual Ben. Life Ins. Co. v. Miller, 39 Ind. 475.

Iowa. Hall v. Carter, 74 Iowa 364; State v. Sipult, 17 Iowa 575.

Massachusetts. Com. v. Barry, 11 Allen 263.

Michigan. O'Donnell v. Segar, 25 Mich. 369.

Missouri. Hogel v. Lindell, 10 Mo. 484.

See also, Allen v. Rundle, 50 Conn. 9, 47 Am. Rep. 599.

But see Ray v. Wooters, 19 Ill. 82, wherein it was held that an immaterial modification of a written instruction constituted error. Thus, an oral instruction relating wholly to a conceded matter, although erroneous, is not ground for reversal because not prejudicial. Walsh v. St. Louis Drayage Co., 40 Mo. App. 339.

Where plaintiff made out no case, a judgment for defendant will not be reversed because oral instructions were given. Greathouse v. Summerfield, 25 Ill. App. 296.

Where it plainly appears from the law and the facts disclosed in the record that a new trial would not change the verdict, the giving of an oral instruction is not ground for reversal. Fry v. Shehee, 55 Ga. 208.

Where it cannot be ascertained what the oral instructions were, the

rule is but simple justice, for the oral instructions may have been given without the solicitation of the party obtaining the verdict, or even against his consent;¹⁰ but the mere fact that the oral instructions given were correct will not prevent a reversal.¹¹ In some states it has been held that the judgment will be reversed, even though the instructions were favorable to the appellant,¹² but usually such error is considered harmless.¹³

Where, under the statute, the instructions must be in writing, the giving of oral instructions is error, notwithstanding the fact that "it was impracticable to put the whole charge in writing in the time within which it was necessary to conclude the trial."¹⁴

According to the statutes it has been held reversible error to give oral instructions when not agreed to,¹⁵ or when the written charges were not expressly waived,¹⁶ or to charge

judgment must be reversed. *Aliter* where they were preserved in the bill of exceptions, and were favorable to or did not affect the party complaining. *Hogel v. Lindell*, 10 Mo. 484.

Where the verdict is unanimous error in giving a verbal instruction as to the verdict, and as to a verdict by nine jurors is not reversible. *Baxter v. Magill*, 127 Mo. App. 392.

10—*Hogel v. Lindell*, 10 Mo. 484.

11—*Dorsett v. Crew*, 1 Colo. 18; *City of Atchison v. Jansen*, 21 Kan. 560. It is reversible error whether the oral instruction is in itself right or wrong. *Hardin v. Helton*, 50 Ind. 320.

12—*Widner v. State*, 28 Ind. 394. See also, *Shafer v. Stinson*, 76 Ind. 376.

13—The giving of an oral instruction which is in favor of the party objecting is at most an error with-

out prejudice. *Irving v. People*, 43 Colo. 360, 95 Pac. 940.

14—In such case the court should direct a mistrial. *Jenkins v. Wilmington & W. R. Co.*, 110 N. C. 438.

15—Oral instructions are reversible error where counsel do not agree to an oral charge. *Wettengel v. City of Denver*, 20 Colo. 552, 39 Pac. 343; *Lee v. Stahl*, 9 Colo. 208, 11 Pac. 77.

And such consent must be affirmatively shown. *Dorsett v. Crew*, 1 Colo. 18.

It constitutes reversible error to instruct the jury orally over the objection of counsel. *Tyler v. McKenzie*, 43 Colo. 233, 95 Pac. 943.

16—In criminal cases it is reversible error to charge orally unless written instructions are expressly waived. *Territory v. Kennedy*, 1 Ariz. 505, 25 Pac. 517.

orally when requested to charge in writing.¹⁷ In the latter case, where the statute in force requires instructions to be in writing only in cases where such a request has been made, in the absence of a request the statute has no application,¹⁸ and the common-law rule¹⁹ prevails. Under such circumstances, it is not error to give oral instructions.²⁰ Where

17—*Anderson v. State*, 34 Ark. 257.

Failure to instruct in writing in civil cases when requested (Code Civ. Proc., § 275, subd. 5) is reversible error. *Rich v. Lappin*, 43 Kan. 666, 23 Pac. 1038.

In *Duggan v. State*, 9 Fla. 516, it was held, under Act Jan. 4, 1848, § 8, that a judgment in a criminal case would always be reversed where it did not appear that the charge was reduced to writing and filed in the case. But in the later case of *Luster v. State*, 23 Fla. 339, it was held that the charge might be oral, in the absence of a timely request for a charge in writing.

Under Georgia Code, § 244, failure to charge in writing when requested is reversible error. *Bowden v. Achor*, 95 Ga. 243; *Fry v. Shehee*, 55 Ga. 208.

It is reversible error to charge orally when requested to charge in writing. *Stephenson v. State*, 110 Ind. 358, 59 Am. Rep. 216; *Jaqua v. Cordesman & Egan Co.*, 106 Ind. 141; *Bradway v. Waddell*, 95 Ind. 170; *Smurr v. State*, 88 Ind. 504; *Shafer v. Stinson*, 76 Ind. 374.

The defendant has the positive right to written charges, and reversal is proper when an oral charge is given. *Lesueur v. State*, 176 Ind. 448.

Under Rev. St., § 2133, failure to charge in writing upon a timely re-

quest is reversible error. *State v. Porter*, 35 La. Ann. 535.

Noncompliance with North Carolina Code, § 414, requiring instructions to be in writing when requested, is reversible error. *Jenkins v. Wilmington & W. R. Co.*, 110 N. C. 438; *State v. Connelly*, 107 N. C. 463; *Currie v. Clark*, 90 N. C. 355.

Under Ohio Rev. St. 1890, § 5190, as amended by Act March 3, 1892 (Bates' Ann. St., § 5190), it is error to charge orally after a timely request to charge in writing. *Village of Monroeville v. Root*, 54 Ohio St. 523; *Housholder v. Granby*, 40 Ohio St. 430; *Hardy v. Turney*, 9 Ohio St. 400.

It is reversible error to refuse to charge in writing when requested. *Equitable Fire Ins. Co. v. Trustees C. P. Church*, 91 Tenn. 135.

Refusal to give written charge when requested by both parties held reversible error. *Sharman v. Newsome & Johnston*, 46 Tex. Civ. App. 111.

18—See § 56, *post*, "Waiver or loss of right to written instructions."

19—See § 42, *ante*, "Rule at common law."

20—**Arkansas.** *Anderson v. State*, 34 Ark. 257.

Colorado. *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013.

Florida. *Luster v. State*, 23 Fla. 339.

the appellant has not himself requested written instructions, the failure of the court to instruct in writing, upon the request of the appellee, is not available error.²¹

The violation of the statute is not error when the statute is considered directory,²² and in some states the giving of oral instructions is not reversible error when they are taken down by the reporter.²³ The sufficiency of compliance with the statute has already been considered.²⁴ While, error in making an oral explanation of a written charge may be harmless,²⁵ and it has been held that error in orally modifying a written charge must expressly appear by the bill of exceptions to be available,²⁶ it has also been held that such oral additions to written instructions constitute reversible error, even though such additions are immaterial.²⁷ This, however, is at least doubtful; and where the record discloses that oral explanations were made, and states at length what was said, and it appears that it could not and did not modify the effect of any written charge, it has been held not to be reversible error.²⁸

Indiana. Sutherland v. Hankins, 56 Ind. 343.

Kansas. Davis v. Wilson, 11 Kan. 74.

Louisiana. State v. Chevallier, 36 La. Ann. 85.

Ohio. Blackburn v. State, 23 Ohio St. 146.

21—Jaqua v. Cordesman & Egan Co., 106 Ind. 141. See also, Mutual Ben. Life Ins. Co. v. Miller, 39 Ind. 475. Compare, Toledo & W. Ry. Co. v. Daniels, 21 Ind. 256; Newton v. Newton, 12 Ind. 527.

22—In civil cases, violation of statute is not error, such statute being directory. Parker v. Chancellor, 78 Tex. 524; Galveston, H. & S. A. R. Co. v. Dunlavy, 56 Tex. 256; Reid v. Reid, 11 Tex. 585.

23—Giving of oral instructions in

criminal cases is not reversible error if same are taken down by official reporter. (Penal Code Cal., § 1093.) People v. Leary, 105 Cal. 486, 39 Pac. 24. See also, §§ 42, 43, *ante*.

24—See §§ 45-50, *ante*.

25—See National Lumber Co. v. Snell, 47 Ark. 407.

26—Hauss v. Niblack, 80 Ind. 407.

27—Ray v. Wooters, 19 Ill. 82.

28—O'Donnell v. Segar, 25 Mich. 369. See also, Continental Nat. Bank of New York v. Folsom, 67 Ga. 624, and Fry v. Shehee, 55 Ga. 208.

Oral utterances in precise accord with what is written are not grounds for a venire *de novo*. If, however, it is suggested that they are not in accordance with the written charge, they should be reduced to writing. Currie v. Clark, 90 N. C. 355.

The error in giving an oral modification is not cured by a direction from the court to the jury to consider the oral explanations and illustrations withdrawn,²⁹ nor by subsequently, after the jury have retired, reducing such verbal explanations in writing;³⁰ but the error is cured by recalling the jury, adding the remark in writing to the charge, and then reading it to the jury.³¹

§ 56. Waiver or loss of right to written instructions.

The statutory right to have the jury instructed in writing may be waived by the parties concerned, even in criminal cases.³² Such waiver may result when the parties consent to an oral charge,³³ when the parties fail to make a timely request for written instructions in cases where writ-

29—*Laselle v. Wells*, 17 Ind. 33.

30—*Payne v. Com.*, 1 Metc. (Ky.) 378. See also, § 54, *ante*, "Subsequent reduction of oral charge to writing."

31—*Powers v. Hazelton & L. Ry. Co.*, 33 Ohio St. 429.

32—*Arizona. Territory v. Kennedy*, 1 Ariz. 505, 25 Pac. 517; *Territory v. Gertrude*, 1 Ariz. 74, 25 Pac. 473; *Territory v. Duffield*, 1 Ariz. 58, 25 Pac. 476.

Illinois. Bates v. Ball, 72 Ill. 108.

Indiana. Voght v. State, 145 Ind. 12.

Tennessee. State v. Bungardner, 7 Baxt. 163.

Wisconsin. Penberthy v. Lee, 51 Wis. 261.

Contra, State v. Cooper, 45 Mo. 66; *Smith v. Bowers*, 82 Wash. 80, 143 Pac. 316.

The statutory requirement that instructions shall be written may be waived in felony cases. *State v. Andrews*, 71 Wash. 181, 127 Pac. 1102.

33—*Colorado. Edwards v. Smith*,

16 Colo. 529, 27 Pac. 809; *Keith v. Wells*, 14 Colo. 321, 23 Pac. 991; *Rice v. Goodridge*, 9 Colo. 237, 11 Pac. 91.

Georgia. Continental Nat. Bank of New York v. Folsom, 67 Ga. 624.

Illinois. Bates v. Ball, 72 Ill. 112; *Litzelman v. Howell*, 20 Bradw. 588; *Best v. Wilson*, 48 Ill. App. 352.

Indiana. Voght v. State, 145 Ind. 12; *Mutual Ben. Life Ins. Co. v. Miller*, 39 Ind. 475.

Iowa. State v. Sipult, 17 Iowa 575.

Louisiana. State v. Chevallier, 36 La. Ann. 85.

Massachusetts. Com. v. Barry, 11 Allen 263.

Mississippi. Keithler v. State, 10 Smedes & M. 192.

Nebraska. Fitzgerald v. Fitzgerald, 16 Neb. 413; *Kuhn v. Nelson*, 61 Neb. 224.

Tennessee. State v. Bungardner, 7 Baxt. 163.

Texas. Clark v. State, 31 Tex. 574; *Goode v. State*, 2 Tex. App.

ten instructions are not required unless requested,³⁴ or when a party does not object and save an exception to the oral charge.³⁵ The withdrawal of a request also operates as a waiver.³⁶ As to waiver by consent, it may be said that the

520; *Chamberlain v. State*, 2 Tex. App. 451; *Killman v. State*, 2 Tex. App. 222.

Parties who consent to oral instructions cannot assign error for the failure to give a charge not requested. *Northwestern Elevator & Grain Co. v. Smiley*, 154 Ill. App. 351.

Giving of oral instructions in criminal case is not reversible error if defendant consents or waives his right to written instructions. *People v. Hersey*, 53 Cal. 574; *People v. Kearney*, 43 Cal. 383.

34—**Georgia.** *Jones v. State*, 65 Ga. 507.

Indiana. *Sutherland v. Hankins*, 56 Ind. 343.

Kentucky. *Risk v. Ewing* (Ky.), 60 S. W. 923; *Ferguson v. Fox's Adm'r*, 1 Mete. 86.

Ohio. *Village of Monroeville v. Root*, 54 Ohio St. 523.

Tennessee. *Hardwick v. State*, 6 Lea 230.

35—The failure to object and save an exception to the giving of an oral instruction waives the error.

Alabama. *Louisville & N. R. Co. v. Hall*, 91 Ala. 112, 24 Am. St. Rep. 863.

Colorado. *Jacobs v. Mitchell*, 2 Colo. App. 456, 31 Pac. 235.

Dakota. *Stamm v. Coates*, 4 Dak. 69.

Indiana. *Sutherland v. Venard*, 34 Ind. 390; *Tenbrook v. Brown*, 17 Ind. 410; *Heaston v. Cincinnati & F. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430n.

Iowa. *State v. Sipult*, 17 Iowa 575; *Head v. Langworthy*, 15 Iowa 235.

Kansas. *Bird & M. Map Co. v. Jones*, 27 Kan. 177; *State v. Potter*, 15 Kan. 303; *Prater v. Snead*, 12 Kan. 447.

Michigan. *Garton v. Union City Nat. Bank*, 34 Mich. 279; *Josselyn v. McAllister*, 22 Mich. 300.

Missouri. *State v. DeMosse*, 98 Mo. 340.

North Dakota. *Power v. Larabee*, 2 N. D. 141.

Ohio. *Village of Monroeville v. Root*, 54 Ohio St. 523.

South Dakota. *Frye v. Ferguson*, 6 S. D. 392.

Texas. *Vanwey v. State*, 41 Tex. 639; *Carr v. State*, 41 Tex. 543.

Wisconsin. *Stringham v. Cook*, 75 Wis. 590.

When oral instructions are given to a jury and the defendant does not object and save an exception, he waives his right to have such instructions reduced to writing. *Rea v. State*, 3 Okla. Cr. App. 281, 106 Pac. 982, 105 Pac. 386.

Error in orally modifying a written instruction is waived by failure to save an exception. *Louisville & N. R. Co. v. Hall*, 91 Ala. 112, 124 Am. St. Rep. 863.

36—*Continental Nat. Bank of New York v. Folsom*, 67 Ga. 624; *State v. Hopkins*, 33 La. Ann. 34. Where one party requests written instructions, but afterwards withdraws the request, the other party cannot complain of oral instructions

consent of a defendant to the giving of oral instructions cannot be presumed from his presence and failure to object when such oral instruction is given.³⁷ When a timely request is required, such request should be made at or before the close of the evidence,³⁸ and before the argument is begun,³⁹ and it is too late to make a request after the court has begun to instruct the jury orally.⁴⁰ A rule of court requiring a request for written instructions to be made at or before the commencement of the trial is unreasonable⁴¹ and void, as being repugnant to the statute.⁴²

Objections to the giving of an oral charge must be made at the time the charge is given,⁴³ and such objections come too late when made after the retirement of the jury,⁴⁴ after verdict,⁴⁵ or for the first time upon motion for a new trial.⁴⁶

merely because he did not hear the withdrawal. *Hencke v. Babcock*, 24 Wash. 556, 64 Pac. 755.

37—*People v. Prospero*, 44 Cal. 186; *People v. Chares*, 26 Cal. 78.

38—*Manning v. Gasharie*, 27 Ind. 399; *McJunkins v. State*, 10 Ind. 143; *Jenkins v. Levis*, 23 Kan. 255; *Atchison, T. & S. F. R. Co. v. Franklin*, 23 Kan. 74. But see *Connor v. Wilkie*, 1 Kan. App. 492, 41 Pac. 71.

39—*Indiana*. *Welsh v. State*, 126 Ind. 71, 9 L. R. A. 664; *Powers v. State*, 87 Ind. 144; *McCalment v. State*, 77 Ind. 250; *Chance v. Indianapolis & W. Gravel Road Co.*, 32 Ind. 472.

Kansas. *Atchison, T. & S. F. R. Co. v. Franklin*, 23 Kan. 74.

Ohio. *Village of Monroeville v. Root*, 54 Ohio St. 523; *Blackburn v. State*, 23 Ohio St. 146.

The record must show affirmatively that the request was made before the commencement of the argument in the cause. *Welsh v. State*, 126 Ind. 71, 9 L. R. A. 664.

A request made during the closing argument may be disregarded.

Atchison, T. & S. F. R. Co. v. Franklin, 23 Kan. 74.

40—*Boggs v. Clifton*, 17 Ind. 217; *Cortner v. Amick*, 13 Ind. 463; *Newton v. Newton*, 12 Ind. 527.

41—*Connor v. Wilkie*, 1 Kan. App. 492, 41 Pac. 71.

42—*Laselle v. Wells*, 17 Ind. 33.

43—*State v. Barrow*, 31 La. Ann. 691; *State v. Outs*, 30 La. Ann. 1155; *State v. DeMosse*, 98 Mo. 340; *Vanwey v. State*, 41 Tex. 639.

Where no request for written instructions was made, an objection taken after the giving of oral instructions will not be considered. *Davis v. Wilson*, 11 Kan. 74.

44—*Gibson v. State*, 26 Fla. 109; *Garton v. Union City Nat. Bank*, 34 Mich. 279.

Error in the giving of an oral charge may be waived by failure to object before the retirement of the jury. *Gibson v. State*, 26 Fla. 109.

45—*Josselyn v. McAllister*, 22 Mich. 306.

46—*Vanwey v. State*, 41 Tex. 639; *Goode v. State*, 2 Tex. App. 520; *Franklin v. State*, 2 Tex. App. 8.

The objection, however, must be repeated in the motion for a new trial, or it will be considered as waived.⁴⁷ In a few states it is held that under a statute requiring instructions to be in writing, unless written instructions are waived by consent of parties, the failure to object and save an exception does not operate as a waiver, and the judgment will be reversed unless the record affirmatively shows consent to the oral instructions;⁴⁸ but in other states, under similar statutes, the ordinary rule is applied, and, in the absence of objection, the giving of oral instructions is not reversible error.⁴⁹ It seems that if waiver is induced by any action upon the part of the court or the prosecution, as where the defendant does not dare to insist upon his right to written instructions for fear of prejudicing the jury against him, he will not be bound thereby.⁵⁰

47—*Horbach v. Miller*, 4 Neb. 43, citing *Midland Pac. R. Co. v. McCartney*, 1 Neb. 404; *Wells, Fargo & Co. v. Preston*, 3 Neb. 446; *Mills v. Miller*, 2 Neb. 317.

48—**Arizona.** *Territory v. Gertrude*, 1 Ariz. 74; *Territory v. Duffield*, 1 Ariz. 58.

California. *People v. Sanford*, 43 Cal. 29; *People v. Trim*, 37 Cal. 274; *People v. Chares*, 26 Cal. 78.

Nevada. *People v. Bonds*, 1 Nev. 33.

49—**Mississippi.** *Keithler v. State*, 10 Smedes & M. 192.

Nebraska. *Republican Val. R. Co. v. Arnold*, 13 Neb. 485; *Horbach v. Miller*, 4 Neb. 43.

Texas. *Vanwey v. State*, 41 Tex. 639; *Clark v. State*, 31 Tex. 575; *Goode v. State*, 2 Tex. App. 520; *Franklin v. State*, 2 Tex. App. 8.

⁵⁰—*State v. Hopkins*, 33 La. Ann. 34; *State v. Cooper*, 45 Mo. 66.

“When, on the application of the counsel of an accused on trial for murder, the judge promises to put his charge to the jury in writing,

and up to the close of the trial has failed to do so, the mere fact that the counsel for the accused renounced his right to a written charge, for fear that the additional delay necessary to enable the judge to write out his charge might prejudice the jury against the accused, will not impair the right of the accused to a new trial on the ground that the judge failed to give the written charge.” *State v. Swayze*, 30 La. Ann. 1323, disapproved in *State v. Hopkins*, 33 La. Ann. 34.

In *State v. Bungardner*, 7 Baxt. (Tenn.) 163, the court said that it was the duty of the judge, under the statute, to charge the jury in writing, and that he was guilty of an impropriety in asking the defendant, in the presence of the jury, to waive the performance of this duty; but as it appeared that the defendant, by his counsel, had freely and voluntarily waived a written charge, the court refused to reverse a conviction.

CHAPTER VII.

PROVINCE OF COURT AND JURY.

- § 57. Reasons for distinction between province of court and jury.
- § 58. Statement of rule.
- § 59. What are questions of fact in general.
- § 60. Admissibility, weight and sufficiency of evidence—Credibility of witnesses.
- § 61. Presumptions or inferences of facts.
- § 62. Reasonableness.
- § 63. Negligence cases.
- § 64. Construction of writings.
- § 65. Same—Contracts, deeds, mortgages and miscellaneous writings.
- § 66. Same—Exceptions to rule—Parol evidence to explain writings.
- § 67. Oral contracts and language.
- § 68. Statutes, ordinances and rules.
- § 69. Directing verdict—Civil cases.
- § 70. Same—Criminal cases.
- § 71. Power of jury to judge the law in criminal cases.
- § 72. Rule in England deducible from decisions and text-books.
- § 73. Rule in America and arguments for or against right.
- § 74. Organic and statutory provisions regulating practice.
- § 75. Provisions held to vest jury with right to disregard instructions—Propriety and necessity of instructions.
- § 76. Provisions held not to vest jury with right to disregard instructions.

§ 57. Reasons for distinction between province of court and jury.

The keystone of the Law of Instructions is the distinction between the functions of the two branches of the court, the judge and the jury, a distinction peculiarly emphasized in the United States. In every action at law two different classes of questions arise, one based upon the law and the other upon the facts, the determination of which is vested in separate officers of the court. The science of the law being involved, its application, necessarily, could only be reposed

in one skilled therein, the presiding officer of the court. With respect to the facts, however, there was no such necessity, since presumably any man of intelligence could determine the truth or falsity of evidence as to the common affairs of life, and this added to an age-long distrust of the classes from which the judiciary had been selected during the formative period of the English law, gave rise to the jealously guarded right of a litigant to have the facts in his case determined by a jury of his peers, who were the judges of the facts, as distinguished from the presiding officer of the court, who was the judge of the law. But necessarily, some time during the course of litigation the functions of the two branches of the court must be connected, and the instructions on the law by the trier of the law to the triers of the facts form the medium by which their functions are united. It follows, therefore, that a work on instructions must outline the distinction between questions of law and questions of fact, in other words, the province of the court, and the province of the jury.

§ 58. Statement of rule.

In accordance with the principle laid down in the preceding section, it is settled beyond controversy that all questions of law arising during the course of litigation are exclusively within the province of the court,¹ and in accord-

1—**Alabama.** Drake v. State, 60 Ala. 62; Matthews v. State, 55 Ala. 65; Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159; Wright v. Bolling, 27 Ala. 259; Spivey v. State, 26 Ala. 90; Shaw v. Wallace, 2 Stew. & P. 193.

California. People v. Ivey, 49 Cal. 56.

Illinois. Pennsylvania Co. v. Conlan, 101 Ill. 93; Village of Fairbury v. Rogers, 98 Ill. 554; Chicago & E. I. R. Co. v. Stonecipher, 90 Ill. App.

511; Phillips v. People, 11 Ill. App. 340.
Indiana. Riley v. Watson, 18 Ind. 291.

Iowa. State v. Clough, 111 Iowa 714.

Michigan. George W. Roby Lumber Co. v. Gray, 73 Mich. 356.

Mississippi. Whitney v. Cook, 53 Miss. 551; Myrick v. Wells, 52 Miss. 149.

Missouri. State v. Mitchell, 98 Mo. 657; State v. Forsythe, 89 Mo. 667; Albert v. Besel, 88 Mo. 150.

ance with the same theory the determination of the facts in a case is the exclusive prerogative of the jury.² Questions of law should not be submitted to the jury in any form,³ and such submission, by instructions, is erroneous⁴

South Carolina. *Duren v. Kee*, 41 S. C. 171.

Tennessee. *Ahrens v. Cobb*, 9 Humph. 645; *McCorry v. King's Heirs*, 3 Humph. 267, 39 Am. Dec. 165; *Brady v. Clark*, 12 Lea 323; *Roberts v. Alexander*, 5 Lea 414.

In a jury trial, all questions of law arising in the progress of the case, and the law of the whole case after evidence and argument, must be settled and determined by the court alone. *North v. People*, 139 Ill. 81; *Brady v. Clark*, 12 Lea (Tenn.), 323. See also, *Hyde v. Town of Swanton*, 72 Vt. 242.

An instruction as to the right of a trainman to eject a trespasser by "lawful means" is not prejudicial where there was no question as to the means adopted, and the court assumed, with defendant's acquiescence, that its conduct was unlawful. *Golden v. Northern Pac. R. Co.*, 39 Mont. 435, 34 L. R. A. (N. S.) 1154, 18 Ann. Cas. 886, 104 Pac. 549.

2—**Arizona.** *Lenord v. State*, 15 Ariz. 137, 137 Pac. 412.

Illinois. *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Farnan v. Childs*, 66 Ill. 544; *Mitchinson v. Cross*, 58 Ill. 366; *St. Louis, A. & T. H. R. Co. v. Manly*, 58 Ill. 300; *Phillips v. People*, 11 Ill. App. 340.

Iowa. *Muldowney v. Illinois Cent. R. Co.*, 32 Iowa 176, 7 Am. Rep. 120; *Frederick v. Gaston*, 1 G. Greene 401.

Michigan. *Williams v. Shelden*, 61 Mich. 311; *Sheahan v. Barry*, 27 Mich. 217.

North Carolina. *State v. Simmons*, 143 N. C. 613.

Oklahoma. *Monaghan v. State*, 10 Okla. Cr. App. 89, 134 Pac. 77.

Oregon. *Keen v. Keen*, 49 Ore. 362, 10 L. R. A. (N. S.) 504, 14 Ann. Cas. 45, 90 Pac. 147.

Utah. *State v. Karas*, 43 Utah 506, 136 Pac. 788.

Washington. *Jensen v. Shaw Show Case Co.*, 76 Wash. 419, 136 Pac. 698.

United States. *Chesapeake & O. Canal Co. v. Knapp*, 9 Pet. 541, 9 L. Ed. 222; *Hogan v. Page*, 2 Wall. 605, 17 L. Ed. 854.

3—*Britton v. South Penn Oil Co.*, 73 W. Va. 792.

4—*Dominick v. Randolph*, 124 Ala. 557; *Stewart v. Sonneborn*, 49 Ala. 178; *Tousley v. Pacific Elec. Ry. Co.*, 166 Cal. 457, 137 Pac. 31.

On a prosecution for perjury, it is proper to instruct the jury that the clerk of court had power to administer the oath, as that is a question of law. *State v. Clough*, 111 Iowa 714.

A requested instruction submitting the question whether or not oral representations and statements of sellers of a jack constituted warranties, held properly refused. *Burns v. Limerick*, 178 Mo. App. 145.

Illinois. *People ex rel. Bibb v. Mayor & Common Council of Alton*, 193 Ill. 309, 56 L. R. A. 95; *Bagley v. Grand Lodge A. O. U. W.*, 131 Ill. 498, rev'g 31 Ill. App. 618; *Six v. Sikking*, 158 Ill. App. 230; *Stitzel v.*

even though the court is held by judges not required to be learned in the law.⁵ Therefore, in instructing the jury as to the law of the case, the judge should distinctly separate questions of law from questions of fact,⁶ and the submission of blended questions of law and fact is improper.⁷

"It is of the greatest importance to the administration of justice that each should be made responsible for its proper department, for in this way only can errors of fact and errors of law be traced to their proper source."⁸ It follows that it is proper to refuse and erroneous to give instructions

Miller, 157 Ill. App. 390, rev'd 250 Ill. 72, 34 L. R. A. (N. S.) 1004n, 1912 B 412n; **Cox v. Cleveland, C., C. & St. L. Ry. Co.**, 151 Ill. App. 473; **Beidler v. Fish**, 14 Ill. App. 29; **International Bank v. Bartalott**, 11 Ill. App. 620; **American Ins. Co. v. Crawford**, 7 Ill. App. 29.

Indiana. **Riley v. Watson**, 18 Ind. 291; **Brown v. Langner**, 25 Ind. App. 538.

Iowa. **Erb v. German-American Ins. Co. of New York**, 112 Iowa 357.

Maryland. **Caledonian Ins. Co. v. Traub**, 80 Md. 214.

Michigan. **George W. Roby Lum-ber Co. v. Gray**, 73 Mich. 356.

Mississippi. **Whitney v. Cook**, 53 Miss. 551.

Missouri. **St. Louis, K. C. & N. Ry. Co. v. Cleary**, 77 Mo. 634, 46 Am. Rep. 13; **Turner v. St. Louis & S. F. Ry. Co.**, 76 Mo. 261; **Morgan v. Durfee**, 69 Mo. 469, 33 Am. Rep. 508; **State v. Rayburn**, 31 Mo. App. 385.

Pennsylvania. **Keating v. Orne**, 77 Pa. 89.

Texas. **Green v. Hill**, 4 Tex. 465.

West Virginia. **Britton v. South Penn Oil Co.**, 73 W. Va. 792.

United States. **District of Colum-**

bia v. Robinson, 180 U. S. 92, 45 L. Ed. 440, aff'g 14 App. D. C. 512.

An instruction that "the court will sanction any verdict the jury may return" is erroneous, since it leaves too much to the jury. **Bockoven v. Board Sup'rs Lincoln Tp.**, 13 S. D. 317.

In an action for breach of contract, it is error to instruct the jury to find for the plaintiff, unless they find that defendant had legal cause for his failure to perform. **La Porte v. Wallace**, 89 Ill. App. 517.

An instruction submitting a question of law to the jury is harmless error to a defendant, where the effect is to require the jury to find more than is necessary to be found to entitle the other party to recover. **Wallace v. Prudential Ins. Co. of America**, 174 Mo. App. 110.

5—**Keating v. Orne**, 77 Pa. 89; **Richardson v. Stewart**, 2 Serg. & R. (Pa.) 84.

6—**Rogers v. Broadnax**, 24 Tex. 538. See also, **Smith v. St. Louis, I. M. & S. R. Co.**, 131 C. C. A. 43, 214 Fed. 737.

7—**Potts v. Wright**, 82 Pa. 498.

8—**Tobler v. Pioneer Min. & Mfg. Co.**, 166 Ala. 482.

which take away from the jury the decision of any question of fact.⁹

The province of both court and jury being narrowly defined, neither can properly usurp the prerogatives of the other.¹⁰

The principles are well recognized, but in their application difficulties frequently arise, as shown in the illustrations given in succeeding sections.

§ 59. What are questions of fact in general.

An issue should be submitted to the jury when the facts are in dispute, or if undisputed are such that different impartial minds may fairly draw different conclusions as to the ultimate fact in issue.¹¹

What issues are raised by the pleadings is a question of law which it is the exclusive province of the court to determine,¹² and an instruction leaving the jury to determine the material averments of a declaration is erroneous as submitting a question of law.¹³

9—**Alabama.** *Clark v. Goddard*, 39 Ala. 164, 84 Am. Dec. 777.

Florida. *Baker v. Chatfield*, 23 Fla. 540.

Illinois. *Duzor v. Allen*, 90 Ill. 499; *Hubner v. Feige*, 90 Ill. 208; *Landon v. Chicago & G. T. Ry. Co.*, 92 Ill. App. 216.

Iowa. *Houston v. State*, 4 G. Greene 437.

Kentucky. *Salter v. Myers*, 5 B. Mon. 281.

Maryland. *Burtles v. State*, 4 Md. 273; *Planters' Bank v. Bank of Alexandria*, 10 Gill. & J. 346; *Benson v. Boteler*, 2 Gill, 74.

Massachusetts. *Pettingill v. Porter*, 8 Allen 1, 85 Am. Dec. 671n.

Mississippi. *Myrick v. Wells*, 52 Miss. 149.

Missouri. *Turner v. Loler*, 34 Mo. 461.

New York. *Borrodalle v. Leek*, 9 Barb. 611.

North Carolina. *White v. White*, 15 N. C. 257.

Texas. *Rogers v. Broadnax*, 24 Tex. 538; *Reynolds v. Williams*, 1 Tex. 311.

Virginia. *McRae v. Scott*, 4 Rand. 463.

United States. *Adams v. Roberts*, 2 How. 486, 11 L. Ed. 349; *Jewell v. Jewell*, 1 How. 219, 11 L. Ed. 108.

10—*Mawigh v. Elsey*, 47 Mich. 10; *Howell v. State*, 61 Neb. 391; *Connor v. Johnson*, 59 S. C. 115; *Jensen v. Shaw Show Case Co.*, 76 Wash. 419, 136 Pac. 698.

11—*Bircher v. Modern Brotherhood of America*, 25 S. D. 325.

12—See ch. IX, *post*.

13—*Peoria & P. Terminal Ry. v. Hoerr*, 120 Ill. App. 65.

**§ 60. Admissibility, weight and sufficiency of evidence—
Credibility of witnesses.**

It is the province of the court to determine the competency of evidence offered,¹⁴ but the weight and sufficiency of evidence when admitted is for the jury,¹⁵ and the credibility of the witnesses is exclusively a question for the jury.¹⁶

14—*Clark v. McAtee*, 227 Mo. 152.

15—**Alabama.** *United States Life Ins. Co. v. Lesser*, 126 Ala. 568; *Hudson v. Weir*, 29 Ala. 294.

Illinois. *Lyons v. Chicago City Ry. Co.*, 258 Ill. 75.

Missouri. *Clark v. McAtee*, 227 Mo. 152; *Cape Girardeau Union Mill Co. v. Bruhl*, 51 Mo. 144.

Utah. *Haun v. Rio Grande Western Ry. Co.*, 22 Utah 346, 62 Pac. 908.

English. *Welstead v. Levy*, 1 Moody & R. 138.

Where the case fairly depends upon the sufficiency and weight of the evidence, an instruction that the jury must find for the defendant if they believed the evidence in the case, is properly refused. *United States Life Ins. Co. v. Lesser*, 126 Ala. 568. But where the evidence discloses no conflict and is sufficient to sustain a verdict for the plaintiff, it is not error to instruct the jury to find for the plaintiff if they believe the evidence. *Haltom v. Southern Ry. Co.*, 127 N. C. 255.

The court will not pass upon the weight of evidence in any case. *Putnam v. Phoenix Preferred Acc. Ins. Co.*, 155 Mich. 134.

In a criminal case, it is the province of the jury to weigh the evidence. *People v. Hansen*, 263 Ill. 44.

A requested instruction that positive evidence of witnesses who heard

the gong of an electric car sounded is entitled to greater weight than negative evidence of those who were in a position to hear but did not do so is properly refused, the question being for the jury. *Johnson v. Springfield Traction Co.*, 176 Mo. App. 174.

16—**Alabama.** *Osborn v. State*, 125 Ala. 106; *Brooks v. State*, 8 Ala. App. 277.

Arkansas. *Paxton v. State*, — Ark. —, 170 S. W. 80; *Burgie v. Bailey*, 91 Ark. 383, 18 Ann. Cas. 389.

California. *People v. Luis*, 158 Cal. 185, 110 Pac. 580.

Georgia. *Owen v. Palmour*, 111 Ga. 885; *Watson v. State*, 13 Ga. App. 181.

Illinois. *People v. Hansen*, 263 Ill. 44; *People v. Gray*, 251 Ill. 431; *Gott v. People*, 187 Ill. 249.

Iowa. *Stewart v. Anderson*, 111 Iowa 329.

Missouri. *State v. Adair*, 160 Mo. 391; *State v. Cushenberry*, 157 Mo. 168; *State v. Tate*, 156 Mo. 119; *Craig v. United Rys. Co. of St. Louis*, 175 Mo. App. 616; *Beckermann v. E. H. Kortkamp Jewelry Co.*, 175 Mo. App. 279.

Nebraska. *Howell v. State*, 61 Neb. 391.

Oregon. *State v. Bartlett*, 50 Ore. 440, 19 L. R. A. (N. S.) 802n, 126 Am. St. Rep. 751, 93 Pac. 243.

“Juries are not mere figureheads. They should not, must not and do not give credence to every witness who testifies when there is a conflict in the evidence. If they did, where one or more witnesses testified to a given state of facts and another or others testified the reverse, they could never reach a verdict. They have the right and it is their privilege, if not their duty, to believe a part of the testimony of a witness and not believe another part. They could not properly discharge their functions and ever find a verdict, unless that were true.”¹⁷

It has also been said that if there is anything tending to create distrust in the truthfulness of a witness, the question is for the jury.¹⁸

It is for the jury to judge as to the veracity of witnesses where there is a flat contradiction between their statements,¹⁹ and the truth or falsity of an admission and the weight to be given to it are questions peculiarly within the province of the jury.²⁰ It is a clear invasion of the province of the jury for the court to say that “prominent and strik-

South Carolina. *State v. Taylor*, 57 S. C. 483, 76 Am. St. Rep. 575.

Texas. *Turner v. Grobe*, 24 Tex. (iv. App. 554; *Chavarria v. State* (Tex. Cr. App.), 63 S. W. 312.

Utah. *Haun v. Rio Grande Western Ry. Co.*, 22 Utah, 346, 62 Pac. 908.

Washington. *Money v. Seattle, R. & S. Ry. Co.*, 59 Wash. 120, 109 Pac. 307; *State v. Hill*, 45 Wash. 694, 89 Pac. 160.

West Virginia. *State v. Dickey*, 48 W. Va. 325.

United States. *Connecticut Mut. Life Ins. Co. v. Hillmon*, 46 U. C. A. 668, 107 Fed. 834.

The court should leave the jury perfectly free to pass upon the credibility of the witnesses, determining for themselves the weight to be

given to the testimony. *Lyons v. Chicago City Ry. Co.*, 258 Ill. 75.

17—*Melton v. State*, 71 Tex. Cr. App. 130.

A jury may not arbitrarily discredit a witness nor reject his testimony, but the witness may be discredited and his testimony disbelieved if from all the other facts and circumstances in the case it fairly appears that the witness was mistaken or that his testimony was improbable or untrue. *Condie v. Rio Grande Western R. Co.*, 34 Utah 237, 97 Pac. 120.

18—*Zart v. Singer Sewing Mach. Co.*, 162 Mich. 387.

19—*Bolman v. State*, 2 Okla. Cr. App. 235, 101 Pac. 135.

20—*Ausmus v. People*, 47 Colo. 167, 19 Ann. Cas. 491, 107 Pac. 204.

ing'' contradictions should be attributed to deliberate perjury rather than to the ordinary infirmities of mankind.²¹

Other cases illustrative of the general rules as to the jury being the judges of the weight and credit to be given evidence are those relating to the testimony of young children,²² or accomplices.²³

Evidence of good character of an accused should go to the jury as any other fact, and its influence should be left to the jury without any intimation by the court as to its value.²⁴

The competency of a confession is for the court,²⁵ but the jury are the exclusive judges of its weight and value as evidence.²⁶

In other sections, the question as to power of the court to direct a verdict will be considered.²⁷ In this connection it may be said that it is the province of the court to pass on the question whether the evidence adduced in a trial has enough probative force to raise an issue of fact,²⁸ and the legal sufficiency of evidence to warrant a verdict is a question of law.²⁹

21—State v. Allen, 34 Mont. 403, 87 Pac. 177.

22—The competency of a young child to testify is for the court, but the credit to be given to such testimony is for the jury. State v. Todd, 110 Iowa 631.

23—It is for the jury to determine what weight and credit ought to be given the testimony of an accomplice who is shown to be a bad criminal. People v. Covitz, 262 Ill. 514.

24—Anderson v. State, 97 Miss. 658.

See also, ch. XII, *post*.

25—State v. Roselair, 57 Ore. 8, 109 Pac. 865.

The question whether a confession has been obtained under such circumstances as to render evidence thereof competent or incompetent

is purely one of law. People v. Cahill, 11 Cal. App. 685, 106 Pac. 115.

What circumstances constitute improper influences such as will exclude confessions are questions of law. Thomas v. State, 58 Fla. 122.

The credibility of evidence to prove circumstances constituting improper influences such as will exclude a confession is for the court, and is not reviewable on appeal unless the court has erred in its conclusion of facts. Thomas v. State, 58 Fla. 122.

26—State v. Roselair, 57 Ore. 8, 109 Pac. 865.

27—See §§ 69-70, *post*.

28—State v. Claybaugh, 138 Mo. App. 360.

29—St. Louis, I. M. & S. R. Co. v. Coleman, 97 Ark. 438.

If it is apparent and plain from the evidence that a party is an accomplice, the court should so instruct the jury, but when the evidence presents a question as to whether or not a witness is an accomplice, the issue should be left to the jury.³⁰

§ 61. Presumptions or inferences of facts.

The inferences of facts from other facts in evidence are to be drawn by the jury and not by the court, except when the evidence is uncontradicted, and there is no room for reasonable men to draw different conclusions,³¹ and except in cases when there is a presumption of law resulting from the facts proved, in which case the court may instruct the jury as to the inference to be drawn in the event that they find the existence of the requisite facts.³² And in general it may be said that questions of identity,³³ insanity,³⁴ agency,³⁵ notice,³⁶ intent,³⁷ are for the jury where the evi-

30—*Brown v. State*, 58 Tex. Cr. App. 336.

31—*Florida*. *Danford v. State*, 53 Fla. 4.

Maryland. *Howard v. Carpenter*, 22 Md. 10.

Missouri. *Ross v. Citizens' Ins. Co.*, 7 Mo. App. 575.

Nebraska. *Brownell v. Fuller*, 60 Neb. 558.

South Carolina. *Izlar v. Manchester & A. R. Co.*, 57 S. C. 332.

32—It is proper for the court to instruct the jury what facts are and what are not sufficient to justify a presumption. *Wheeler v. Schroeder*, 4 R. I. 383.

33—*Kentucky*. *Tatum v. Com.*, 22 Ky. L. Rep. 927.

Missouri. *State v. Babb*, 76 Mo. 504; *Miller v. Marks*, 20 Mo. App. 369.

New Hampshire. *State v. Perkins*, 70 N. H. 330.

Wisconsin. *Begg v. Begg*, 56 Wis. 534.

34—*State v. Geier*, 111 Iowa 706; *State v. Nelson*, 36 Nev. 403, 136 Pac. 377; *State v. Jones*, 126 N. C. 1099.

Evidence as to mental condition of a defendant held so conflicting as to leave the matter a proper subject for the determination of the jury. *State v. Grendahl*, 131 Iowa 602.

35—*Nash v. Classen*, 163 Ill. 409, aff'g 55 Ill. App. 356; *Robinson v. Walton*, 58 Mo. 380.

36—*Saltmarsh v. Bower*, 22 Ala. 221; *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 417; *Muldrow v. Robison*, 58 Mo. 331; *Van Hook v. Walton*, 28 Tex. 59.

37—*Michigan*. *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460.

New Hampshire. *State v. Hayes*, 59 N. H. 450.

dence is conflicting and questions of fact are presented. And this is true also of such questions as waiver³⁸ and interest.³⁹

§ 62. Reasonableness.

Ordinarily an issue as to the reasonableness or unreasonableness of anything is regarded as a mixed question of law and fact,⁴⁰ but where the facts are clear and undisputed, it is to be regarded as a question of law.⁴¹ Thus this rule applies to the questions of reasonable notice,⁴² reasonable regulations,⁴³ reasonable time⁴⁴ and the like.

§ 63. Negligence cases.

In negligence cases, it is the province of the jury to find the facts or make the deductions where the testimony is conflicting upon any material point or where more than one inference may be drawn from it.⁴⁵ But if the facts are undisputed or are found by the jury, and are susceptible of but one reasonable inference, the court may take the case from the jury and decide it as a question of law, or

New Jersey. *Betts v. Francis*, 30 N. J. L. 152.

Oregon. *Winter v. Norton*, 1 Ore. 42.

Pennsylvania. *Dunn v. Rothermel*, 112 Pa. 272; *Jones v. Brownfield*, 2 Pa. 55.

38—*Currie v. Continental Casualty Co.*, 147 Iowa 281, 140 Am. St. Rep. 300.

39—In an action for goods sold, an instruction leaving the question of interest, except the rate thereof, wholly to the judgment of the jury, indicating no time or event from which it should be calculated, is erroneous. *Buchanan v. Caine*, — Ind. App. —, 106 N. E. 885.

40—*Kroll v. Close*, 82 Ohio St. 190, 28 L. R. A. (N. S.) 571n.

41—*Kroll v. Close*, 82 Ohio St. 190, 28 L. R. A. (N. S.) 571n.

42—*Kroll v. Close*, 82 Ohio St. 190, 28 L. R. A. (N. S.) 571n.

43—*Kroll v. Close*, 82 Ohio St. 190, 28 L. R. A. (N. S.) 571n.

44—*Kroll v. Close*, 82 Ohio St. 190, 28 L. R. A. (N. S.) 571n.

Ordinarily, what is a reasonable time within which an act should be done is a question of fact for the jury, but where no inference of unreasonable delay can be properly drawn from the evidence by a reasonable mind, there is no issue of fact to be submitted to the jury. *Luhn v. Fordtran*, 53 Tex. Civ. App. 148.

What is a reasonable time is a question of law. *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938.

45—*Russell v. Carolina Cent. R. Co.*, 118 N. C. 1098.

instruct the jury that if the facts are found which exclude any other inference, to answer the issue accordingly.⁴⁶

In the large majority of the states and in the federal courts, negligence is treated as a question of fact for the jury.⁴⁷ In some jurisdictions in which negligence is treated as a question of law, the facts alone being for the jury, it is proper to give an instruction that if the jury find certain facts grouped therein there is no negligence.⁴⁸ But this form of an instruction is held objectionable in other jurisdictions, unless all the material elements of the case are

46—Ruffin v. Atlantic & N. C. R. Co., 142 N. C. 120.

Ordinarily, negligence is a question of fact for the jury, and it is only when the standard of duty is fixed and certain, or where the negligence is so clear that no verdict could make it otherwise, that the question becomes one of law. *Neeley v. Louisville & S. I. Traction Co.*, 53 Ind. App. 659.

The question whether a defendant exercised ordinary care is for the jury unless but one view could be entertained concerning it. *Munro v. St. Louis & S. F. R. Co.*, 155 Mo. App. 710.

47—Ruffin v. Atlantic & N. C. R. Co., 142 N. C. 120.

The existence of the fact of negligence is a question for the jury when the evidence is conflicting.

Illinois. *Wimmer v. Chicago Rys. Co.*, 185 Ill. App. 523; *Chicago & E. I. R. Co. v. Snedaker*, 223 Ill. 395, aff'g 122 Ill. App. 262.

Indiana. *Central Indiana Ry. Co. v. Wishard*, — Ind. App. —, 104 N. E. 593.

Texas. *Pecos & N. T. Ry. Co. v. Welshimer*, — Tex. Civ. App. —, 170 S. W. 263; *Galveston-Houston Elec. Ry. Co. v. Stautz*, — Tex. Civ.

App. —, 166 S. W. 11; *Houston Belt & Terminal Ry. Co. v. Montello*, — Tex. Civ. App. —, 165 S. W. 540.

Utah. *Haun v. Rio Grande Western Ry. Co.*, 22 Utah 346, 62 Pac. 908.

United States. *Escanaba Mfg. Co. v. O'Donnell*, 129 C. C. A. 184, 212 Fed. 648.

In an action for injuries to a passenger on a street car, it was erroneous to instruct that the defendant was bound to stop the car "by a gradual slowing down of speed," since the effect was to tell the jury that a failure to stop in such manner was negligence. *Wimmer v. Chicago Rys. Co.*, 185 Ill. App. 523.

In an action against a railroad for injuries received by a conductor, the questions as to whether semaphore wires were properly constructed, guarded against, and cared for, were for the jury, the evidence being conflicting. *Chicago & E. I. R. Co. v. Snedaker*, 223 Ill. 395, aff'g 122 Ill. App. 262.

48—*Emry v. Raleigh & G. R. Co.*, 109 N. C. 589. Overruled in *Russell v. Carolina Cent. R. Co.*, 118 N. C. 1098. And see *Ruffin v. Atlantic & N. C. R. Co.*, 142 N. C. 120.

included, as it excludes from the jury the duty of drawing such reasonable inferences as the testimony will justify.⁴⁹

An instruction which merely defines "negligence" is proper.⁵⁰

Whether a personal injury has been inflicted by gross or wanton negligence is a question of fact to be determined by the jury, and is largely dependent upon the particular circumstances of each case.⁵¹

Contributory negligence is a question of fact if reasonable minds might arrive at different conclusions from the evidence as to the negligence of the injured party, but it becomes a question of law where the undisputed evidence establishes that the accident resulted from the negligence of the injured party.⁵²

Where the law raises a duty, the question whether it was properly performed or not is one of fact, but whether under the facts the law raises a duty is a question of law.⁵³

The great weight of authority is to the effect that if an injury is caused by the needless violation of a valid and reasonable rule promulgated for the benefit of employees, the court is warranted in pronouncing the act negligence as a matter of law.⁵⁴

49—*Ruffin v. Atlantic & N. C. R. Co.*, 142 N. C. 120.

An instruction telling the jury what acts constitute negligence is erroneous, that being a question for the jury. *Illinois Cent. R. Co. v. Hicks*, 122 Ill. App. 349; *Landon v. Chicago & G. T. R. Co.*, 92 Ill. App. 216.

It is error for the court to group certain facts and instruct that they constitute negligence, the question being for the jury. *Texas & P. Ry. Co. v. Browder*, — *Tex. Civ. App.* —, 144 S. W. 1042.

50—*St. Louis & S. F. Ry. Co. v. Lane*, — *Tex. Civ. App.* —, 118 S. W. 847.

51—*Heidenreich v. Bremner*, 260 Ill. 439.

52—*Porter v. Chicago City Ry. Co.*, 187 Ill. App. 28.

Where there is no dispute about the facts concerning the care and caution of a woman in entering a dark entrance of a building, and the case rests solely on her statements and the surrounding circumstances, which are not in dispute as to her exercise of care, the question of contributory negligence is one of law for the court. *Sauter v. Hinde*, 183 Ill. App. 414.

53—*Joy v. Chicago, B. & Q. R. Co.*, 263 Ill. 465.

54—*Cleveland, C. & St. L. R. Co. v. Gossett*, 172 Ind. 525.

There are, however, a great many circumstances attending the violation of rules which modify the act and give it such character with respect to negligence as to make it a question of fact for the jury,⁵⁵ as where observance of a rule is impossible, or impracticable, or where the employee has no knowledge of the rule, or if it is ambiguous, or where compliance with the rule is in conflict with some other paramount duty.⁵⁶

The manner of constructing permanent structures of a railroad company has been held a question of engineering which should not be submitted to the jury.⁵⁷

Where the facts are not in dispute and all reasonable men would readily agree as to the conclusions to be drawn from the admitted facts, the question as to who are fellow-servants becomes one of law.⁵⁸

Where the testimony as to whether a servant assumes the risks that cause an injury is susceptible of more than one inference, the question is for the jury.⁵⁹

What constitutes proximate cause of injury is ordinarily a question of fact for the jury, to be determined from a consideration of all the attending facts and circumstances shown in evidence, but it becomes a question of law when the facts are not only not disputed, but are also such that there can be no difference in the judgment of reasonable men in the inference to be drawn therefrom.⁶⁰

55—Cleveland, C., C. & St. L. R. Co. v. Gossett, 172 Ind. 525.

56—Cleveland, C., C. & St. L. R. Co. v. Gossett, 172 Ind. 525.

57—Baltimore & O. S. W. R. Co. v. McOsker, 44 Ind. App. 255.

The law which requires a railroad to furnish reasonably safe machinery and tracks does not apply to engineering questions. *Baltimore & O. S. W. R. Co. v. McOsker*, 44 Ind. App. 255.

58—*Foster v. T. A. Cummings Foundry Co.*, 181 Ill. App. 291.

In an action for injuries to a

molder who was struck on the head by the I-beam of a crane, which at times was used in moving molds which plaintiff was making, but at the time of the injury the plaintiff had not signaled for the crane, held that the plaintiff and the operator of the crane were not at the time of the injury fellow-servants as a matter of law. *Foster v. T. A. Cummings Foundry Co.*, 181 Ill. App. 291.

59—*Murphy v. Atlanta & C. A. L. R. Co.*, 86 S. C. 410.

60—*Schultz v. Henry Ericsson*

§ 64. Construction of writings.

The construction and the determination of the legal effect of written instruments are questions of law,⁶¹ and the con-

Co., 264 Ill. 156, aff'g 182 Ill. App. 487.

The question of proximate cause is a question of fact for the jury where an issue is formed and a trial had, with evidence on that issue, but where the question is presented by a demurrer to the declaration, followed by a judgment on the pleadings, it becomes a question of law. *Cada v. The Fair*, 187 Ill. App. 111.

61—Alabama. *Jones v. Pullen*, 66 Ala. 306; *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52; *Price v. Mazange*, 31 Ala. 701; *Holman v. Crane*, 16 Ala. 571.

California. *Moore v. Trott*, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578; *Carpentier v. Thirston*, 24 Cal. 268.

Florida. *Solary v. Stultz*, 22 Fla. 263.

Georgia. *Williams v. Waters*, 36 Ga. 454.

Illinois. *Nash v. Classen*, 163 Ill. 409, aff'g 55 Ill. App. 356; *Jordan v. Easter*, 2 Ill. App. 73.

Indiana. *Robbins v. Spencer*, 121 Ind. 594; *Brown v. Langner*, 25 Ind. App. 538.

Iowa. *Daly v. W. W. Kimball Co.*, 67 Iowa 132; *Chandler v. Keiler*, 44 Iowa 371.

Kansas. *Aaron v. Missouri & K. Tel. Co.*, 84 Kan. 117, 114 Pac. 211; *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542.

Kentucky. *Thomas' Ex'r v. Thomas*, 15 B. Mon. 178.

Maine. *Nash v. Drisco*, 51 Me. 417.

Maryland. *McHenry v. Marr*, 39 Md. 510.

Massachusetts. *Smith v. Faulkner*, 12 Gray 257.

Michigan. *Gage v. Meyers*, 59 Mich. 300.

Minnesota. *Van Eman v. Stanchfield*, 8 Minn. 518 (Gil. 460).

Mississippi. *Benson v. Benson*, 24 Miss. 625; *Randolph v. Govan*, 14 Smedes & M. 9.

Missouri. *Caldwell v. Dickson*, 26 Mo. 60.

New Hampshire. *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309.

New Jersey. *Rogers v. Colt*, 21 N. J. L. 704.

New York. *Brady v. Cassidy*, 104 N. Y. 155; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341, 57 Am. Rep. 729.

North Carolina. *Sellers v. Johnson*, 65 N. C. 104.

Oregon. *State v. Moy Looke*, 7 Ore. 54.

Pennsylvania. *Watson v. Blaine*, 12 Serg. & R. 131, 14 Am. Dec. 669.

South Carolina. *Jones v. Swearingen*, 42 S. C. 58; *Mowry v. Stogner*, 3 S. C. 251.

Tennessee. *Rice v. Crow*, 6 Heisk. 28; *Ahrens v. Cobb*, 9 Humph. 645.

Texas. *Soell v. Hadden*, 85 Tex. 182; *Hunton v. Nichols*, 55 Tex. 217; *Carlisle v. State* (Tex. Cr. App.), 56 S. W. 365; *Howell v. Hanrick* (Tex. Civ. App.), 24 S. W. 823; *McCormick v. Cheveral*, 2 Posey Unrep. Cas. 146.

Vermont. *Wason v. Rowe*, 16 Vt. 525.

Virginia. *Washington Southern*

struction adopted by the court must be accepted and followed by the jury,⁶² wherefore, instructions which submit to the jury the construction of writings are erroneous, and should not be given,⁶³ especially where the court has been requested to construe the writing and direct the jury as to its effect.⁶⁴

The reasons in favor of this rule are self-evident. If the jury were permitted to construe written instruments, no paper would have any certain legal significance, as it would depend upon the peculiar notions of each particular jury under whose supervision it might be brought.⁶⁵ And unless

Ry. Co. v. Lacey, 94 Va. 460; Burke v. Lee, 76 Va. 386.

Washington. Tolmie v. Dean, 1 Wash. T. 46.

62—Neilson v. Harford, 8 Mees. & W. 823, per Parke. B.

63—**Alabama.** Jones v. Pullen, 66 Ala. 306; Claghorn v. Lingo, 62 Ala. 230; Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140.

Florida. Solary v. Stultz, 22 Fla. 263.

Illinois. Jordan v. Easter, 2 Ill. App. 73.

Indiana. Brown v. Langner, 25 Ind. App. 538.

Iowa. Chandler v. Keiler, 44 Iowa 371.

Maryland. Hatch v. Pendergast, 15 Md. 251.

Mississippi. Fairly v. Fairly, 38 Miss. 280.

Tennessee. Rice v. Crow, 6 Heisk. 28, holding that it is error to leave to the jury the question whether or not specifications referred to in a contract were a part thereof.

"If the meaning of a written paper be disputed, it is the province of the court to construe it, upon application by either party for that purpose; but until the court has de-

cided its true construction, each party has the right to put upon its language such interpretation as the words employed will warrant. Nor is there any limitation upon the power of the court to construe instruments whilst the cause is being tried. It is most convenient to decide such questions in advance of the argument, but, if they arise pending the discussion, the court has the right to settle them by instructions before the jury retire." McHenry v. Marr, 39 Md. 510.

The error is harmless, and not ground for reversal, if the jury put the proper construction upon the instrument. Brooks v. Standard Fire Ins. Co., 11 Mo. App. 350; Martineau v. Steele, 14 Wis. 273.

64—Kendrick v. Cisco, 13 Lea (Tenn.) 247.

"It is the right of every suitor to have the opinion of the court on such matters as, by the law of the land, the court is bound to decide, and one of these matters is the construction of written contracts." Denison's Ex'r v. Wertz, 7 Serg. & R. (Pa.) 376.

65—Cook's Lessee v. Carroll, 6 Md. 104.

the court shall construe written instruments after the meaning of the words in which they are couched has been ascertained by the jury, "there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all effectually." ⁶⁶

§ 65. Same—Contracts, deeds, mortgages and miscellaneous writings.

In accordance with the rule enunciated in the preceding section, all written contracts of whatever nature are to be construed by the court,⁶⁷ and it is proper to refuse instruc-

66—*Neilson v. Harford*, 8 Mees. & W. 822, per Parke, B. See also, to same effect, *Denison's Ex'r v. Wertz*, 7 Serg. & R. (Pa.) 376.

67—*Alabama*. *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150.

Arkansas. *Wilkes v. Stacy*, — Ark. —, 169 S. W. 796; *Paepcke-Leicht Lumber Co. v. Talley*, 106 Ark. 400; *Estes v. Boothe*, 20 Ark. 590.

California. *Luckhart v. Ogden*, 30 Cal. 548.

Illinois. *Graham v. Sadlier*, 165 Ill. 95, aff'g 60 Ill. App. 522; *Keeler v. Herr*, 157 Ill. 57; *Standard Mfg. Co. v. Slaughter*, 122 Ill. App. 479; *Peoria Grape Sugar Co. v. Frazer*, 26 Ill. App. 60.

Indiana. *Reid v. Klein*, 138 Ind. 484; *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 62.

Iowa. *Grasmier v. Wolf*, — Iowa —, 90 N. W. 813; *Merrill v. Packer*, 80 Iowa 542; *Fairbanks v. Jacobs*, 69 Iowa 265; *Rohrabacher v. Ware*, 37 Iowa 85.

Kansas. *Slatten v. Konrath*, 1 Kan. App. 636, 42 Pac. 399.

Michigan. *Tompkins v. Gardner & Spry Co.*, 69 Mich. 58.

Minnesota. *Van Eman v. Stanchfield*, 8 Minn. 518 (Gil. 460).

Missouri. *Comfort v. Ballingal*, 134 Mo. 289; *Chapman v. Kansas City, C. & S. R. Co.*, 114 Mo. 542.

New York. *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470, 25 Am. Rep. 221.

North Carolina. *Sellers v. Johnson*, 65 N. C. 104.

South Carolina. *State v. Williams*, 32 S. C. 123.

Tennessee. *Knoxville, C. G. & L. R. Co. v. Beeler*, 90 Tenn. 549.

Texas. *Linch v. Paris Lumber & Grain Co. (Tex.)*, 14 S. W. 701; *Lary v. Young (Tex. Civ. App.)*, 27 S. W. 908.

Wisconsin. *Cohn v. Stewart*, 41 Wis. 527.

"It would be a dangerous principle to establish, where parties have reduced their contracts to writing, and defined the meaning by plain and unequivocal language, to subject their interpretation to the arbitrary and capricious judgment of

tions which submit to the jury the determination of the meaning and effect of a written contract,⁶⁸ and error to leave the construction of a contract to the jury.⁶⁹ The error will not operate to reverse, however, if in the judgment complained of substantial justice has been done,⁷⁰ or where the jury construe the contract correctly.⁷¹ But if the court erroneously interprets the terms of a contract, this will, in general, be a sufficient ground for reversal.⁷²

It is for the court to determine whether letters introduced in evidence constitute a contract,⁷³ and, if so, to construe it and explain to the jury its legal effect,⁷⁴ as where the terms of a contract of sale are evidenced by letters and telegrams.⁷⁵

persons unfamiliar with legal principles and settled rules of construction." *Brady v. Cassidy*, 104 N. Y. 155.

68—*Peoria Grape Sugar Co. v. Frazer*, 26 Ill. App. 60; *Baltimore & O. R. Co. v. Resley*, 7 Md. 297; *Ford v. Dyer*, 148 Mo. 528.

69—Iowa. *Merrill v. Packer*, 80 Iowa 542; *Andrews v. Tedford*, 37 Iowa 314; *Rohrabacher v. Ware*, 37 Iowa 85.

Michigan. *Tompkins v. Gardner & Spry Co.*, 69 Mich. 58.

Missouri. *Miller v. Dunlap*, 22 Mo. App. 97; *Spalding v. Taylor*, 1 Mo. App. 34.

Utah. *Bailey v. Spalding-Livingston Investments Co.*, 43 Utah 535, 136 Pac. 962.

70—*Empire State Surety Co. v. Schillinger Bros.*, 167 Ill. App. 632.

A submission of the contract to the jury for construction will not operate to reverse where the court would have been obliged to construe it adversely to the complaining party. *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150.

71—*Missouri*. *Comfort v. Balingal*, 134 Mo. 289.

Tennessee. *Knoxville, C. G. & L. R. Co. v. Beeler*, 90 Tenn. 548; *Roberts v. Alexander*, 5 Lea 412.

Wisconsin. *Martineau v. Steele*, 14 Wis. 273.

72—*American Ins. Co. v. Butler*, 70 Ind. 1; *Stroh v. Hess*, 1 Watts & S. (Pa.) 147.

73—*Lea v. Henry*, 56 Iowa 662.

74—*California*. *Luckhart v. Ogden*, 30 Cal. 548.

Massachusetts. *Smith v. Faulkner*, 12 Gray 251.

Michigan. *Battershall v. Stephens*, 34 Mich. 68.

Missouri. *Falls Wire Mfg. Co. v. Broderick*, 12 Mo. App. 378.

United States. *Goddard v. Foster*, 17 Wall. 123, 21 L. Ed. 589.

It cannot be left to the jury to interpret and construe it. *Battershall v. Stephens*, 34 Mich. 68.

75—Where the terms of a contract of sale are evidenced by letters and telegrams, it is the duty of the court to construe the contract and declare its terms to the jury. *Mann v. Urquhart*, 89 Ark. 239.

The determination of the meaning and legal effect of a deed is also a question of law,⁷⁶ and it is error to submit such construction to the jury, although the error may be harmless when the jury correctly construe the deed.⁷⁷

The sufficiency of certificates of acknowledgment,⁷⁸ the construction of mortgages⁷⁹ and the question whether an instrument is or is not a mortgage⁸⁰ are also for the court; and it is erroneous to submit to the determination of the jury the sufficiency of the description in a chattel mortgage.⁸¹

A number of cases further illustrating the rule that the construction of writings is for the court will be found in the notes,⁸² the various instruments involved being ar-

76—Alabama. Humes v. Bernstein, 72 Ala. 546.

California. Stark v. Barrett, 15 Cal. 361.

Illinois. Montag v. Linn, 23 Ill. 551.

Indiana. Symmes v. Brown, 13 Ind. 318.

Iowa. State v. Delong, 12 Iowa 453.

Kentucky. Venable v. McDonald, 4 Dana 336.

Maine. Bonney v. Morrill, 52 Me. 252.

Missouri. Hancock v. Whybark, 66 Mo. 672; Huth v. Carondelet Marine Railway & Dock Co., 56 Mo. 202.

New Hampshire. Dean v. Erskine, 18 N. H. 81.

New Jersey. Smith v. Clayton, 29 N. J. L. 357.

North Carolina. Hurley v. Morgan, 18 N. C. 425, 28 Am. Dec. 579.

Oregon. Johnson v. Shively, 9 Ore. 333.

Texas. Gardner v. Stell, 34 Tex. 561; Sullivan v. Fant, — Tex. Civ. App. —, 160 S. W. 612.

Virginia. Addington v. Etheridge, 12 Grat. 436; Poage v. Bell, 3 Rand. 586.

United States. Brown v. Huger, 21 How. 305, 16 L. Ed. 125.

77—Woodman v. Chesley, 39 Me. 45; **Morse v. Weymouth**, 28 Vt. 824.

78—Questions as to the sufficiency of certificates of acknowledgment are for the court. Sullivan v. Fant, — Tex. Civ. App. —, 160 S. W. 612.

79—St. John v. Bumpstead, 17 Barb. (N. Y.) 100; **Merritt v. Kitchin**, 121 N. C. 148; **United States v. Hodge**, 6 How. (U. S.) 279, 12 L. Ed. 437.

80—Fairbanks v. Bloomfield, 2 Duer (N. Y.) 349.

81—Austin v. French, 36 Mich. 200.

82—Affidavits. Long v. Rodgers, 19 Ala. 321.

Assignment of bonds. De Graaf v. Wyckoff, 13 Daly (N. Y.) 366.

Assignment for benefit of creditors. Sheldon v. Dodge, 4 Denio (N. Y.) 217.

Awards. Squires v. Anderson, 54 Mo. 197; **Moore v. Miller**, 4 Serg. & R. (Pa.) 279, in which it was held that "whether the arbitrators have authority to act in reference to any

ranged alphabetically. It may also be added that the construction of documentary evidence is a question of law,⁸³ and public records must be construed by the court, when offered in evidence.⁸⁴ It is also the province of the court

particular subject-matter, or whether their award conforms to the directions and powers given them by the submission, and the proper construction to be given to the award when made," are questions for the determination of the court.

Bills of lading. *Armstrong v. Chicago, St. P. & K. C. Ry. Co.*, 62 Mo. App. 639.

Bonds. *Butler v. State*, 5 Gill & J. (Md.) 511.

Entries in corporate books. *Richmond Trading & Manufacturing Co. v. Farquar*, 8 Blackf. (Ind.) 89.

Guaranty contracts. An instruction submitting the question whether there was a material alteration of a contract of guaranty is erroneous where the jury may under such charge determine that the filling in of blanks constitutes a material alteration. *F. W. Cook Brewing Co. v. Goldblatt*, 184 Ill. App. 266.

Indorsements on negotiable paper. *Sweeny v. Easter*, 1 Wall. (U. S.) 166, 17 L. Ed. 681.

Insurance policies. *Lapeer Co. Farmers' Mut. Fire Ins. Ass'n v. Doyle*, 30 Mich. 159; *St. Louis Gas-light Co. v. American Fire Ins. Co.*, 33 Mo. App. 348.

Leases. *Dumn v. Rothermel*, 112 Pa. 272.

Notices of protest. *Platt v. Drake*, 1 Doug. (Mich.) 296.

Partnership agreements. *Kingsbury v. Tharp*, 61 Mich. 216.

Patents. *Neilson v. Harford*, 8 Mees. & W. 806.

Receipts. *Union Bank v. Heyward*, 15 S. C. 296.

Summons. *Alabama Great Southern R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403.

Town plats. *Hanson v. Eastman*, 21 Minn. 509.

Wills. It is the duty of the court to construe wills, and tell the jury the proper interpretation thereof. *Sullivan v. Honacker*, 6 Fla. 372; *Willson v. Whitfield*, 38 Ga. 269; *Downing v. Bain*, 24 Ga. 372; *Roe v. Taylor*, 45 Ill. 485; *Magee v. McNeil*, 41 Miss. 17, 90 Am. Dec. 354; *Sartor v. Sartor*, 39 Miss. 760; *Underhill v. Vandervoort*, 56 N. Y. 242; *Green v. Collins*, 28 N. C. 139.

The court must determine whether or not an instrument is a will. *Stanley v. Samples*, 2 Posey Unrep. Cas. (Tex.) 126. In this case it was held that "where the terms of an instrument showed it to be a will, the court should have so instructed the jury, and it was error to submit to them the question whether it was a will or a deed."

83—*Branch Bank at Mobile v. Boykin*, 9 Ala. 320; *Turner v. First Nat. Bank of Madison*, 78 Ind. 19; *Ivey v. Williams*, 78 Tex. 685; *Beaumont Pasture Co. v. Cleveland* (Tex. Civ. App.), 26 S. W. 93.

84—*Shook v. Blount*, 67 Ala. 301; *Sims v. Boynton*, 32 Ala. 353, 70 Am. Dec. 540; *State v. Prine*, 25 Iowa 231; *State v. Anderson*, 30 La. Ann. 557; *Adams v. Betz*, 1 Watts (Pa.) 425, 26 Am. Dec. 79, in which it was held that, where "the defendant

to construe judicial opinions,⁸⁵ and when a judicial record is offered in evidence, and admitted and laid before the jury, it is the duty of the court to state to them what it proves, and their duty in respect to the facts so proved.⁸⁶ So, it is proper for the trial judge to construe the order of the court in a former cause allowing a certain per cent. of moneys collected.⁸⁷

It is also a question of law, and not of fact, whether or not a written commission appointing a special policeman entitles him to carry a pistol.⁸⁸

§ 66. Same—Exceptions to rule—Parol evidence to explain writings.

As exceptions to the general rule that writings must be construed by the court, it may be stated that if such writings are introduced in evidence for the sole purpose of showing some extrinsic fact, and not as dispositive instruments, the inference to be drawn therefrom is for the jury and not for the court.⁸⁹ When documents are offered in

relies on a decree of the chancery court to show a release of the plaintiff's cause of action, the court must construe the decree, and determine from its face whether it was intended to operate as a release," and that it was erroneous to submit this question to the jury.

85—*Brady v. Clark*, 12 Lea (Tenn.) 323.

86—*Gallup v. Fox*, 64 Conn. 491.

87—*State v. Corbin*, 16 S. C. 539.

88—*Carlisle v. State* (Tex. Cr. App.), 56 S. W. 365.

89—*Maine. State v. Patterson*, 68 Me. 475.

Maryland. Keefer v. Mattingly, 1 Gill. 182.

Missouri. Wilson v. Board Education of Lee's Summit, 63 Mo. 142; *Primm v. Haren*, 27 Mo. 205; *Mantz v. Maguire*, 52 Mo. App. 146.

Pennsylvania. Reynolds v. Richards, 14 Pa. 205; *McKean v. Hagenblast*, 2 Grant Cas. 466.

Where a writing is offered in evidence merely to prove some other fact, "it is generally but a link in a chain of evidence, the accompanying evidence being mostly, or altogether, oral. When that occurs, the jury have to pass upon the whole transaction, of which the writing is but a part. The question, then, is not so much what the document means, but what inference shall be drawn from its meaning, and what effect it shall have towards proving the point at issue. The writing and all the concomitant evidence go to the jury together. * * * It [the court] may pronounce what meaning the writing is or is not capable of, and whether it is not relevant to

evidence as a foundation of inferences of fact, whether inferences can be drawn is for the jury. The most authentic documents, when offered for such a purpose, become no more than letters or a written correspondence which, when offered to prove a fact, are to be interpreted by a jury.⁹⁰

There is also a large class of writings where the meaning of particular words, phrases, characters or abbreviations must be shown by evidence outside of the writing, and there may be extrinsic circumstances of one kind or another affecting the interpretation which may be shown by oral testimony. Thus, the terms of a writing may be expressed by words of science or art, which require the evidence of experts to explain, or the words or terms used may be ambiguous or uncertain and not to be understood except by reference to and in connection with the surrounding circumstances. And in such cases it has been held that very much must be left to the jury,⁹¹ that "an admixture of parol with written evidence draws the whole to the jury,"⁹² and that even the construction of the writing is a question of fact for the jury.⁹³

But the better rule, and the one in accordance with the great weight of authority, is that when parol evidence is necessary to determine the words or terms in a written instrument, such evidence must be addressed to the jury whose duty it is to determine the meaning of the doubtful words or terms; but the court determines the meaning and effect of the instrument, with such light as the verdict may

the issue; still the value and effect of such evidence is a question of fact for the jury." *State v. Patterson*, 68 Me. 475.

90—*Primm v. Haren*, 27 Mo. 205.

91—*Sewall v. Henry*, 9 Ala. 31; *First Nat. Bank of Springfield v. Dana*, 79 N. Y. 116; *Gardner v. Clark*, 17 Barb. 551.

92—*Joseph Bros. Co. v. Schonthal*

Iron & Steel Co., 99 Md. 382; *Foster v. Berg*, 104 Pa. 328; *Watson v. Blaine*, 12 Serg. & R. 131, 14 Am. Dec. 669; *Sidwell v. Evans*, 1 Pen. & W. 383, 21 Am. Dec. 387.

93—*Jennings v. Sherwood*, 8 Conn. 122; *Ginsburg v. Cutler & S. Lumber Co.*, 85 Mich. 439; *Harper v. Kean*, 11 Serg. & R. (Pa.) 278.

afford on the question submitted to the jury.⁹⁴ The court has no right to take from the jury the determination of the meaning of the doubtful words or terms;⁹⁵ but it will be equally erroneous to submit to the jury the construction of the entire contract.⁹⁶ The court may pursue two courses,

94—**Arkansas.** Paepke-Leicht Lumber Co. v. Talley, 106 Ark. 400.

Illinois. Salt Fork Coal Co. v. Eldridge Coal Co., 170 Ill. App. 268.

Indiana. H. G. Olds Wagon Works v. Coombs, 124 Ind. 65.

Maine. State v. Patterson, 68 Me. 473.

Maryland. Osceola Tribe No. 11 v. Rost, 15 Md. 296.

Massachusetts. Cunningham v. Washburn, 119 Mass. 227.

Michigan. Curtis v. Martz, 14 Mich. 505.

Missouri. Thetford v. General A. A. Corp., 140 Mo. App. 254; Philibert v. Burch, 4 Mo. App. 470.

Nebraska. Meyer v. Shamp, 51 Neb. 424.

New York. Gardner v. Clark, 17 Barb. 538.

North Carolina. Silverthorn v. Fowle, 49 N. C. 362; Festerman v. Parker, 32 N. C. 474.

Pennsylvania. Evans v. Negley, 13 Serg. & R. 220.

South Carolina. Mowry v. Stogner, 3 Rich. 251.

Tennessee. Kendrick v. Cisco, 13 Lea 248.

Texas. Long v. McCauley, 3 S. W. 689.

Wisconsin. Helmholtz v. Everingham, 24 Wis. 266; Ganson v. Madigan, 15 Wis. 158.

United States. West v. Smith, 101 U. S. 263, 25 L. Ed. 809; Goddard v. Foster, 17 Wall. 123, 21 L. Ed. 589; Etting v. Bank of United States, 11 Wheat. 59, 6 L. Ed. 419.

Where oral evidence is admissible to explain the meaning of the terms or words used, the question may be submitted to the jury to determine in what sense they were used. Paepke-Leicht Lumber Co. v. Talley, 106 Ark. 400.

95—Philibert v. Burch, 4 Mo. App. 470. In this case it was held that "where a written instrument is so ambiguous in its terms that it may be considered either a guaranty or a direct undertaking according to the circumstances under which it was given, and the testimony as to these circumstances is conflicting, it is error to give instructions based upon the assumption that the contract was a direct undertaking; but the question of direct undertaking or guaranty should be directly submitted to the jury, on proper instructions."

It is the province of the court to construe a contract unambiguous in its terms. Veitch v. Jenkins, 107 Va. 68.

96—Mowry v. Stogner, 3 Rich. (S. C.) 251. In this case, which was a proceeding "to recover possession of land, the plaintiffs gave in evidence, as a muniment of their title, a deed of doubtful construction, and defendants were allowed to give parol evidence of the acts and declarations of the parties to the deed, for the purpose of explaining the construction. The plaintiffs requested the presiding judge to charge upon the construction of the

either of which is proper. As was said in one case: "The court may first inform the jury as to the law, or the jury may first inform the court as to the facts, as may be most practicable."⁹⁷ In other words, "the facts may be found by a special verdict, and then the court interpret the writing in view of such finding."⁹⁸ "Or the case may go to the jury with hypothetical instructions from the court to render a verdict one way if certain facts are found, and another way if the facts are found differently."⁹⁹ Where the contract is not wholly in writing, but rests partly in parol, and the parol evidence is conflicting, it is for the jury to determine what the contract really was.¹ Whether or not a written contract has been altered by parol is a question for the jury.² So where the meaning of words is affected by a custom or usage of trade, it is for the jury to say in what sense they were used by the parties.³

§ 67. Oral contracts and language.

When the existence and terms of a contract rest upon verbal communications it is necessarily a question of fact

deed, which was refused, and he left the question of construction wholly to the jury, as depending upon the parol evidence. *Held*, that in this there was error, and new trial granted."

97—*State v. Patterson*, 68 Me. 474.

98—*State v. Patterson*, 68 Me. 474; *Fruin v. Crystal Ry. Co.*, 89 Mo. 397; *Hutchison v. Bowker*, 5 Mees. & W. 535, 540.

99—*Alabama. Humes v. Bernstein*, 72 Ala. 546.

Indiana. Zenor v. Johnson, 107 Ind. 69.

Maine. State v. Patterson, 68 Me. 473.

Massachusetts. Cunningham v. Washburn, 119 Mass. 227; *Eaton v. Smith*, 20 Pick. 150.

Michigan. Curtis v. Martz, 14 Mich. 506.

Missouri. Edwards v. Smith, 63 Mo. 119.

Nebraska. Coquillard v. Hovey, 23 Neb. 622.

North Carolina. Silverthorn v. Fowle, 49 N. C. 362; *Festerman v. Parker*, 32 N. C. 474.

Texas. Long v. McCauley, 3 S. W. 692; *Taylor v. McNutt*, 58 Tex. 71.

Wisconsin. Helmholtz v. Everingham, 24 Wis. 266.

United States. West v. Smith, 101 U. S. 263, 25 L. Ed. 809.

English. Neilson v. Harford, 8 Mees. & W. 822.

1—*Edwards v. Goldsmith*, 16 Pa. 48; *Bolekow v. Seymour*, 17 C. B. (N. S.) 107.

2—*Boyce v. Martin*, 46 Mich. 239.

3—*Eaton v. Smith*, 20 Pick.

for the jury,⁴ and it is erroneous to take away this question from them,⁵ although the error is harmless and not ground for reversal, if the jury would have found the same facts as the court found.⁶ The function of the jury in this class of cases is not merely to determine the words and expressions used by the parties, but to find the understanding and intention of the parties. "The question * * * is single, and cannot be separated so as to refer one part to the jury and another part to the judge; but in its entirety the question is one of fact."⁷ But the court is to construe oral as well as written contracts after a jury have determined that an oral contract existed, and what were the terms orally agreed upon,⁸ and it is error to permit the jury to determine the

(Mass.) 150; *Hutchison v. Bowker*, 5 Mees. & W. 535.

4—Illinois. *Chichester v. White-leather*, 51 Ill. 259.

Iowa. *Walthelm v. Artz*, 70 Iowa 609; *Carl v. Knott*, 16 Iowa 379.

Maine. *Houghton v. Houghton*, 37 Me. 72.

Michigan. *Hughes v. Tanner*, 96 Mich. 113; *McKenzie v. Sykes*, 47 Mich. 294.

Missouri. *Smith v. Hutchinson*, 83 Mo. 683; *Judge v. Leclair*, 31 Mo. 127; *Workingmen's Banking Co. v. Blell*, 57 Mo. App. 413.

Montana. *De Sandro v. Missoula Light & Water Co.*, 48 Mont. 226, 136 Pac. 711.

New Hampshire. *Folsom v. Plumer*, 43 N. H. 469.

New Jersey. *Smalley v. Hendrickson*, 29 N. J. L. 373.

New York. *De Ridder v. McKnight*, 13 Johns. 294.

North Carolina. *Festerman v. Parker*, 32 N. C. 474; *Massey v. Belisle*, 24 N. C. 170; *Young v. Jeffreys*, 20 N. C. 220.

Pennsylvania. *Codding v. Wood*,

112 Pa. 371; *Tobin v. Gregg*, 34 Pa. 446.

Tennessee. *McGregor v. Penn*, 9 Yerg. 74.

5—*Tobin v. Gregg*, 34 Pa. 446.

6—*Beebe v. Koshnic*, 55 Mich. 604.

7—*McKenzie v. Sykes*, 47 Mich. 294. See also, *Herbert v. Ford*, 33 Me. 90; *Copeland v. Hall*, 29 Me. 93; *Murphy v. Bedford*, 18 Mo. App. 279; *Fuller v. Bradley*, 25 Pa. 120.

8—Massachusetts. *Short v. Woodward*, 13 Gray 86; *Wilmarth v. Knight*, 7 Gray 294.

Michigan. *Barton v. Gray*, 57 Mich. 623.

Missouri. *Belt v. Goode*, 31 Mo. 128; *Judge v. Leclair*, 31 Mo. 127.

New Jersey. *Smalley v. Hendrickson*, 29 N. J. L. 372.

New York. *De Ridder v. McKnight*, 13 Johns. 294.

North Carolina. *Rhodes v. Chesson*, 44 N. C. 336.

Pennsylvania. *Codding v. Wood*, 112 Pa. 371.

Wisconsin. *Diefenback v. Stark*, 56 Wis. 462, 43 Am. Rep. 719.

effect of the agreement.⁹ The instructions as to the legal effect of an oral contract should be hypothetical in form, based upon assumed facts, the existence of which the jury are to pass upon.¹⁰ The construction of oral words depends largely upon the circumstances under which they were uttered, and hence it may be error to take the question from the jury.¹¹

§ 68. Statutes, ordinances and rules.

The determination of the existence and proper construction of statutes are questions of law,¹² and an instruction which permits the jury to construe the provisions of a statute is erroneous.¹³ Thus, it is erroneous to give an instruction permitting a jury to determine whether a master has violated a statute as to guarding machinery, without stating the obligations imposed on the employer by the statute,¹⁴ or to leave to a jury the question of whether or not the common law or the Employers' Liability Act should apply to an issue.¹⁵ Also, the question as to whether or not

The effect of a parol agreement when its terms are given and their meaning fixed is as much a question of law as the construction of a written instrument. *Young v. Jeffreys*, 20 N. C. 220.

9—*Diefenback v. Stark*, 56 Wis. 462, 43 Am. Rep. 719.

10—*Barton v. Gray*, 57 Mich. 623.

11—An instruction that the words, "Take this away, and put it where nobody will see it," even though defendant suspected that the package contained offensive articles, would not justify him in disposing of it, because his instructions were not to throw it away, was held erroneous because the construction to be placed on the words depended upon other conversations at the time, and the nature and contents of the package, and was a question for the

jury. *People v. Van Dusen*, 165 N. Y. 33.

12—*Carpenter v. People*, 8 Barb. (N. Y.) 610; *Gallatin Turnpike Co. v. State*, 16 Lea (Tenn.) 36; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204; *Town of South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154.

13—*St. Louis, I. M. & S. R. Co. v. State*, 102 Ark. 205; *Belt v. Marriott*, 9 Gill (Md.) 334; *Carpenter v. People*, 8 Barb. (N. Y.) 603; *Goode v. State*, 16 Tex. App. 411.

14—*McDaniel v. Lebanon Lumber Co.*, 71 Ore. 15, 140 Pac. 990.

15—*Oberlin v. Oregon-Washington R. & Nav. Co.*, 71 Ore. 177, 142 Pac. 554.

In an action for personal injuries, where the case was within the Employers' Liability Act (L. Ore. 1911, p. 16), it was the duty of the court

a written instrument complies with a statute which requires it is a question of law for the court, because its decision depends entirely on the construction of the statute and of the written instrument.¹⁶

What constitutes doing business in the state, in an action against a foreign corporation, has been held a mixed question of law and fact,¹⁷ but the determination of the existence and terms of a treaty is a question of law.¹⁸

As to foreign laws, the weight of authority is to the effect that evidence to prove the existence of a foreign law is to be addressed to the jury, and that they, and not the court, are to pass on the question of its existence,¹⁹ although there are some decisions in which it is held or said that evidence to show the existence of foreign laws is to be addressed to the court.²⁰ Where the existence of a foreign law has been

to instruct the jury as to the application of such act, and not leave the jury to say what questions were under the common law. *Hoag v. Washington-Oregon Corporation*, — Ore. —, 144 Pac. 574.

16—*Missouri*, *K. & T. R. Co. v. United States*, 101 C. C. A. 143, 178 Fed. 15.

17—*Chicago, R. I. & P. Ry. Co. v. Neil P. Anderson & Co.*, — Tex. Civ. App. —, 130 S. W. 182.

18—*Harris v. Doe*, 4 Blackf. (Ind.) 369; *Roberts v. Lucas*, 1 Wash. T. 205.

19—*California*. *People v. Tufts*, 167 Cal. 266, 139 Pac. 78.

Connecticut. *Lockwood v. Crawford*, 18 Conn. 361.

Maryland. *Cecil Bank v. Barry*, 20 Md. 287, 83 Am. Dec. 553.

Massachusetts. *Ely v. James*, 123 Mass. 44; *Knapp v. Abell*, 10 Allen 485.

Missouri. *Wear v. Sanger*, 91 Mo. 348; *Charlotte v. Chouteau*, 33 Mo. 194.

North Carolina. *Hooper v. Moore*, 50 N. C. 130; *Moore v. Gwynn*, 27 N. C. 190; *State v. Jackson*, 13 N. C. 563.

Ohio. *Alexander v. Pennsylvania Co.*, 48 Ohio St. 634; *Raymond v. Ross*, 40 Ohio St. 343; *Niagara County Bank v. Baker*, 15 Ohio St. 68; *Ingraham v. Hart*, 11 Ohio 255.

South Carolina. *State v. Whittle*, 59 S. C. 297.

No court takes judicial notice of the laws of another state or of a foreign country, in the absence of statute providing that this shall be done, and their existence must be proved as a fact. *People v. Tufts*, 167 Cal. 266, 139 Pac. 78; *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Hooper v. Moore*, 50 N. C. 130; *State v. Whittle*, 59 S. C. 297.

20—*Maryland*. *Wilson v. Carson*, 12 Md. 75.

New Hampshire. *Hall v. Costello*, 48 N. H. 179; *Pickard v. Bailey*, 26 N. H. 152.

New York. *Monroe v. Douglass*,

established, it is the duty of the court to interpret it, and instruct the jury as to its meaning and application,²¹ especially where the evidence is conflicting as to the requirements of such law.²² The sister states of the Union are foreign to each other, within the meaning of the rule under consideration.²³

The question as to whether a city ordinance is in force is for the court,²⁴ and such ordinance is to be proved by evidence addressed to the court, and not to the jury.²⁵ The construction of municipal ordinances is also a question for

1 Seld. 447; *Dollfus v. Frosch*, 1 Denio 367; *Lincoln v. Battelle*, 6 Wend. 475.

See also, *Trasher v. Everhart*, 3 Gill & J. (Md.) 234, where it was said: "It is, in general, true that foreign laws are facts which are to be found by the jury; but this general rule is not applicable to a case in which the foreign laws are introduced for the purpose of enabling the court to determine whether a written instrument is evidence. In such case, the evidence always goes, in the first instance, to the court, which, if the evidence be clear and uncontradicted, may and ought to decide what the foreign law is, and, according to its determination on that subject, admit or reject the instrument of writing as evidence to the jury. It is offered to the court to determine a question of law,—the admissibility or inadmissibility of certain evidence to the jury."

21—*Alabama*. *Inge v. Murphy*, 10 Ala. 897.

Maryland. *Cecil Bank v. Barry*, 20 Md. 287, 83 Am. Dec. 553.

Missouri. *Cobb v. Griffith & Adams Sand, Gravel & Transportation*

Co., 87 Mo. 90; *Charlotte v. Chouteau*, 33 Mo. 194.

North Carolina. *Moore v. Gwynn*, 27 N. C. 191. Compare *Holman v. King*, 7 Metc. (Mass.) 384.

Though what is the law of another state is a fact to be proved as other facts, it is not a charge on the facts for the court to construe the language of documentary evidence, such as a statute of another state. *State v. Whittle*, 59 S. C. 297.

22—Where the evidence is conflicting as to the requirements of a foreign law, it is the duty of the court to assist the jury in reaching a just conclusion by analyzing the testimony and showing its possible application to the theories of the respective parties. *People v. Tufts*, 167 Cal. 266, 139 Pac. 78.

23—See generally, the cases cited *supra*, this section.

24—*Brun v. Chicago City Ry. Co.*, 183 Ill. App. 129; *Plummer v. Indianapolis Union Ry. Co.*, — Ind. App. —, 104 N. E. 601.

25—*Roulo v. Valcour*, 58 N. H. 347; *Hall v. Costello*, 48 N. H. 176. See also, *Chicago, R. I. & P. R. Co. v. Jones*, 13 Ill. App. 634.

the court,²⁶ and it is error to submit to the jury, without construction by the court, an ordinance, the meaning of which is, as to the point in controversy, not perfectly clear.²⁷

It is also the province of the court to construe the rules and regulations of a city board of trade,²⁸ or the by-laws and resolutions of a corporation,²⁹ or the charters of corporations,³⁰ or the constitution and by-laws of an association.³¹

The sufficiency of compliance with rules in negligence cases as a question of fact has already been referred to.³²

§ 69. Directing verdict—Civil cases.

The power is vested in the court in proper cases to determine whether the evidence offered tends to support the allegations of the party.³³ This right should be cautiously exercised, but in some cases it is the duty of the court to direct a verdict when requested; and a failure to do so will be error.³⁴ And this power operates as an important qualification of the rule that the determination of questions of

26—**Alabama.** *Barnes v. City of Mobile*, 19 Ala. 707.

Illinois. *City of Peoria v. Calhoun*, 29 Ill. 317; *Pennsylvania Co. v. Frana*, 13 Ill. App. 91.

Iowa. *Platt v. Chicago, B. & Q. Ry. Co.*, 74 Iowa 127.

Missouri. *Barton v. City of Odessa*, 109 Mo. App. 76.

Virginia. *Washington Southern Ry. Co. v. Lacey*, 94 Va. 460.

A valid ordinance stands on the same footing as a statute. An instruction which leaves it to the jury to determine the application of an ordinance to the circumstances, and its legal effect, is erroneous. *Pennsylvania Co. v. Frana*, 13 Ill. App. 91.

27—*Sadler v. Peoples*, 105 Fed. 712.

28—*Wright v. Fonda*, 44 Mo. App.

634; *Higgins v. McCrea*, 116 U. S. 671, 29 L. Ed. 764.

29—*Jumper v. Commercial Bank of Columbia*, 48 S. C. 430. The reasonableness and validity of a by-law or regulation of a corporation is a question of law for the court to determine, and it is error to submit it to a jury. *City of St. Louis v. Weber*, 44 Mo. 547; *Neier v. Missouri Pac. Ry. Co.*, 12 Mo. App. 26.

30—*Selma, M. & M. R. Co. v. Anderson*, 51 Miss. 829.

31—*Johnson v. Miller*, 63 Iowa 529, 50 Am. Rep. 758.

32—See § 63, *ante*.

33—*Tobler v. Pioneer Min. & Mfg. Co.*, 166 Ala. 482.

34—*Tobler v. Pioneer Min. & Mfg. Co.*, 166 Ala. 482.

The duty in reference to directing

fact rests exclusively within the province of the jury. The right rests upon the principle that where, as a matter of law, the evidence is insufficient to support a verdict for one party, no question of fact is presented for the jury, and therefore the court may direct a verdict for the other party.³⁵ The test of the right is whether the court would be bound to set aside a verdict as against the evidence if rendered against the party in whose favor the verdict is directed.³⁶ It is proper to direct a verdict against the party

a verdict should be cautiously exercised. *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227; *Gunn v. City of Jacksonville*, — Fla. —, 64 So. 435.

In some jurisdictions, the practice of directing a verdict is not looked upon with favor, and is very strictly limited.

Illinois. *Deshler v. Beers*, 32 Ill. 368, 83 Am. Dec. 274.

Tennessee. *Ayres v. Moulton*, 5 Cold. 154; *Jones v. Cherokee Iron Co.*, 14 Lea 157; *Robinson v. Louisville & N. R. Co.*, 2 Lea 596.

Texas. *Reynolds v. Williams*, 1 Tex. 311.

Virginia. *Keel v. Herbert*, 1 Wash. 203.

35—*Fox v. Spring Lake Iron Co.*, 89 Mich. 387; *Schuykill & D. Improvement Co. v. Munson*, 14 Wall. (U. S.) 442, 20 L. Ed. 867; *Parks v. Ross*, 11 How. (U. S.) 362, 13 L. Ed. 730.

Where there is no conflict in the evidence, no dispute as to the facts, there is nothing to submit to the jury, and the court should direct the jury as to the particular verdict they should find in accordance with the undisputed evidence. *Merrill v. Missouri Bridge & Iron Co.*, 69 Ore. 585, 140 Pac. 439.

36—**Alabama.** *Georgia Pac. Ry. Co. v. Propst*, 90 Ala. 1.

Arkansas. *Catlett v. St. Louis, I. M. & S. Ry. Co.*, 57 Ark. 461, 38 Am. St. Rep. 254.

California. In *re Morey's Estate*, 147 Cal. 495, 82 Pac. 57; *Los Angeles Farming & Milling Co. v. Thompson*, 117 Cal. 594, 49 Pac. 714; *Downing v. Murray*, 113 Cal. 455, 45 Pac. 869; *Davis v. California St. Cable R. Co.*, 105 Cal. 131, 38 Pac. 647; *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *Meyer v. Lovdal*, 6 Cal. App. 369, 92 Pac. 322.

Illinois. *Libby, McNeill & Libby v. Cook*, 222 Ill. 206, aff'g 123 Ill. App. 574; *Bartelott v. International Bank*, 119 Ill. 259; *Simmons v. Chicago & T. R. Co.*, 110 Ill. 340; *Packer v. Sheppard*, 127 Ill. App. 598.

Indiana. *Oleson v. Lake Shore & M. S. Ry. Co.*, 143 Ind. 405, 32 L. R. A. 149.

Iowa. *Reeder v. Dupuy*, 96 Iowa 729; *Beckman v. Consolidation Coal Co.*, 90 Iowa 252.

Massachusetts. *Brooks v. Inhabitants of Somerville*, 106 Mass. 271.

Michigan. *Hathaway v. Judie*, 95 Mich. 241.

Minnesota. *Giermann v. St. Paul, M. & M. Ry. Co.*, 42 Minn. 5.

Missouri. *Powell v. Missouri Pac. Ry. Co.*, 76 Mo. 80.

having the burden of proof, where no evidence has been introduced to support his theory of the case,³⁷ or where the evidence raises no material question of fact for the jury's determination.³⁸ Thus, when the plaintiff has introduced his evidence, and it does not tend to prove his cause of action, the court may refuse to hear evidence of the defend-

Nebraska. Iowa Hog & Cattle Powder Co. v. Ford, 87 Neb. 708.

North Dakota. Bowman v. Ep-
pinger, 1 N. D. 21.

Oklahoma. Jones v. First State Bank of Bristow, 39 Okla. 784, 136 Pac. 737.

Pennsylvania. Holland v. Kindre-
gan, 155 Pa. 156.

South Dakota. Peet v. Dakota Fire & Marine Ins. Co., 1 S. D. 462.

West Virginia. Vance v. Virginia Poncehontas Coal Co., — W. Va. —, 82 S. E. 1081; Butcher v. Sommer-
ville, 67 W. Va. 261.

Wisconsin. Joeckel v. Joeckel, 56 Wis. 436.

United States. Keyes v. Grant, 118 U. S. 25, 30 L. Ed. 54; Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780.

37—**Alabama.** Finney v. State, 10 Ala. App. 39.

California. White v. Warren, 120 Cal. 322, 52 Pac. 723, 49 Pac. 129; Heilbron v. Heinlen, 72 Cal. 376, 14 Pac. 24; Corwin v. Patch, 4 Cal. 204.

Florida. Gunn v. City of Jack-
sonville, — Fla. —, 64 So. 435.

Illinois. City of East St. Louis v. O'Flynn, 119 Ill. 200, 59 Am. Rep. 795; Pyncheon v. Day, 118 Ill. 9.

Indiana. Martin v. Martin, 118 Ind. 227.

Iowa. Allen v. Wheeler, 54 Iowa 628; Murphy v. Chicago, R. I. & P. R. Co., 45 Iowa 661; Atkinson v. Blair, 38 Iowa 156.

Kansas. Coon v. Atchison, T. & S. F. Ry. Co., 75 Kan. 282, 89 Pac. 682; MacRitchie v. Johnson, 49 Kan. 321, 30 Pac. 477.

Massachusetts. Morley v. East-
ern Exp. Co., 116 Mass. 97.

Michigan. People v. Montague, 71 Mich. 318; Dondero v. Frumveller, 61 Mich. 440.

Missouri. Corby v. Butler, 55 Mo. 398; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431.

Nebraska. Slayton v. Fremont, E. & M. V. R. Co., 40 Neb. 840.

North Carolina. Everett v. Wil-
liams, 152 N. C. 117.

Oklahoma. Homeland Realty Co. v. Robison, 39 Okla. 591, 136 Pac. 585.

Texas. American Machinery Co. v. Haley, — Tex. Civ. App. —, 165 S. W. 83; Dayton Lumber Co. v. Stockdale, 54 Tex. Civ. App. 611.

United States. McLeod v. Fourth Nat. Bank of St. Louis, 122 U. S. 528, 30 L. Ed. 1237; Howard v. Milwaukee & St. P. Ry. Co., 101 U. S. 837, 25 L. Ed. 1081.

A verdict should be directed for the plaintiff where the defendant's evidence considered most favorably to him, together with all legitimate inferences that may be drawn from it, utterly fails to present a de-
fense. Homeland Realty Co. v. Robi-
son, 39 Okla. 591, 136 Pac. 585.

38—**Paxton v. State**, — Ark. —, 170 S. W. 80.

ant, and if properly requested direct the jury to find against the plaintiff,³⁹ but it is only in the absence of all evidence against the defendant that the court should direct a verdict in his favor.⁴⁰ And it is always error and not within the discretion of the court to leave a question to the jury in respect of which there is no evidence.⁴¹ Likewise, when the facts in the case are undisputed and the evidence, with all the inferences which the jury can rightfully draw from it, does not as a matter of law have any tendency to establish the proposition which is essential to the maintenance of the action, it is the duty of the judge, if properly requested, to so instruct the jury;⁴² but if there is any evidence which tends to establish the plaintiff's cause, it is error for the court to withdraw the case from the jury or to direct a verdict, because it is not for the court to judge of the sufficiency of the evidence.⁴³

The line between the duties of the court and those of the

39—*Tobler v. Pioneer Min. & Mfg. Co.*, 166 Ala. 482.

40—*Tobler v. Pioneer Min. & Mfg. Co.*, 166 Ala. 482.

41—*Tobler v. Pioneer Min. & Mfg. Co.*, 166 Ala. 482.

If there is none to support the theory of fact assumed, the court should not let the case go to the jury. *Tobler v. Pioneer Min. & Mfg. Co.*, 166 Ala. 482.

42—*Tobler v. Pioneer Min. & Mfg. Co.*, 166 Ala. 482; *Martin v. Ward*, 69 Cal. 129, 10 Pac. 276.

It is proper to direct a verdict for the plaintiff where there is no substantial conflict in the evidence as to facts determinative of the case, or where the facts are admitted. *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227.

It is proper to direct a verdict where there is no evidence of some

fact the existence of which is essential to his case.

California. *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635.

Illinois. *Huschle v. Morris*, 131 Ill. 587; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474, 59 Am. Rep. 810n; *Alexander v. Cunningham*, 111 Ill. 511; *Frazer v. Howe*, 106 Ill. 563; *Harrigan v. Chicago & I. R. Co.*, 53 Ill. App. 344.

Indiana. *Baker v. Bundy*, 55 Ind. App. 272.

Nebraska. *Campbell v. Roe*, 32 Neb. 345.

New York. *Neil v. Thorn*, 88 N. Y. 270; *Heyne v. Blair*, 62 N. Y. 19.

Pennsylvania. *Baird v. Schuylkill River East Side R. Co.*, 154 Pa. 463.

Vermont. *Noyes v. Rockwood*, 56 Vt. 647.

43—*Tobler v. Pioneer Min. & Mfg. Co.*, 166 Ala. 482.

jury should be observed,⁴⁴ and questions should be submitted to the jury where the evidence is conflicting and the determination of the fact depends upon the weight of the evidence or the credibility of witnesses,⁴⁵ and where inferences of fact are to be drawn, unless the case is such that there is no room for reasonable men to draw different conclusions.⁴⁶ If there is some legal evidence tending to sup-

44—*Tobler v. Pioneer Min. & Mfg. Co.*, 166 Ala. 482.

45—*Arkansas. McDonnell v. St. Louis Southwestern R. Co.*, 98 Ark. 334.

Colorado. Colorado Coal & Iron Co. v. John, 5 Colo. App. 213, 38 Pac. 399.

Florida. Gunn v. City of Jacksonville, — Fla. —, 64 So. 435.

Illinois. Moore v. Aurora, E. & C. R. Co., 246 Ill. 56, aff'g 150 Ill. App. 484; *Chicago, B. & Q. R. Co. v. Payne*, 59 Ill. 534; *Gallagher v. Kilkeary*, 29 Ill. App. 415.

Indiana. Baker v. Bundy, 55 Ind. App. 272.

Iowa. Orr v. Cedar Rapids & M. C. Ry. Co., 94 Iowa 423; *Platt v. Chicago, St. P., M. & O. Ry. Co.*, 84 Iowa 694.

Michigan. Lau v. Fletcher, 104 Mich. 295; *Wisner v. Davenport*, 5 Mich. 501.

Nebraska. Hiatt v. Brooks, 17 Neb. 33.

New York. Lever v. Foote, 82 Hun 393.

Oklahoma. Gamble v. Riley, 39 Okla. 363, 135 Pac. 390.

Wisconsin. Dirimple v. State Bank, 91 Wis. 601.

United States. Moulou v. American Life Ins. Co., 101 U. S. 708, 25 L. Ed. 1077.

Where the declaration states a good cause of action and the evidence though conflicting tends to

support the declaration, it is not error to refuse to take the case from the jury. *Moore v. Aurora, E. & C. R. Co.*, 246 Ill. 56, aff'g 150 Ill. App. 484.

46—*Alabama. Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329.

Iowa. Milne v. Walker, 59 Iowa 186.

Michigan. Stevens v. Pendleton, 85 Mich. 137; *Teipel v. Hilsendegren*, 44 Mich. 461.

Nebraska. Suiter v. Park Nat. Bank, 35 Neb. 372.

New York. Heyne v. Blair, 62 N. Y. 19.

South Dakota. Knight v. Towles, 6 S. D. 575.

Texas. Wall v. Wilson, — Tex. Civ. App. —, 145 S. W. 655.

The court may direct a verdict where the facts are so clear and convincing that there is no room for fair and reasonable minds to reach different conclusions. *Mitchell v. Stanton*, — Tex. Civ. App. —, 139 S. W. 1033; *Sovereign Camp of Woodmen of the World v. Jackson*, — Tex. Civ. App. —, 138 S. W. 1137.

When the evidence is such that reasonable minds may differ as to the conclusion to be drawn therefrom, it would be error for the court to instruct a verdict. *Gulf, C. & S. F. Ry. Co. v. Wafer*, — Tex. Civ. App. —, 130 S. W. 712.

port a material issue, or to sustain the plaintiff's case, it should be submitted to the jury,⁴⁷ and in many cases it is held that even a scintilla of evidence to support a finding of fact is sufficient to necessitate its submission to the jury;⁴⁸ but such doctrine is considerably modified, if not overruled by later cases,⁴⁹ and the better authority is to the effect that if the evidence is so insufficient to support a verdict for plaintiff that if returned it must be set aside, a verdict may be directed for defendant. The question of the existence of any legal evidence (not a scintilla merely) upon which a verdict for the party having the burden of proof might be based is a question of law.⁵⁰ It is proper to direct a verdict for the plaintiff where the answer sets up no legal

47—If there is any evidence, circumstantial or otherwise, fairly tending to support a material issue, it is the duty of the court to submit it to the jury. *Bolt v. State Sav. Bank of Manchester, Iowa*, — Tex. Civ. App. —, 145 S. W. 707.

Where there is some legal evidence, though it be slight, to sustain the issues on the part of the plaintiff, the trial court must submit the case to the jury. *Beaver v. Mason, Ehrman & Co.*, — Ore. —, 143 Pac. 1000.

48—**Arkansas.** *Little Rock & Ft. S. Ry. Co. v. Henson*, 39 Ark. 413.

Kansas. *Kelley v. Ryus*, 48 Kan. 120, 29 Pac. 144.

Kentucky. *American Dist. Tel. Co. v. Oldham*, 148 Ky. 320, 1913 E 392n.

Missouri. *Charles v. Patch*, 87 Mo. 450; *Workingmen's Banking Co. v. Blell*, 57 Mo. App. 410.

New York. *Colt v. Sixth Ave. R. Co.*, 49 N. Y. 671.

Pennsylvania. *Fitzwater v. Stout*, 16 Pa. 22.

South Dakota. *Haugen v. Chicago, M. & St. P. Ry. Co.*, 3 S. D. 394.

Texas. *Reynolds v. Williams*, 1 Tex. 311.

United States. *Hickman v. Jones*, 9 Wall. 197, 19 L. Ed. 551; *Schuchardt v. Allen*, 1 Wall. 359, 17 L. Ed. 642; *Dwyer v. St. Louis & S. F. R. Co.*, 52 Fed. 87.

49—See the cases cited, *supra*, this section. Also to the effect that a mere scintilla of evidence does not force a submission to the jury, see *Libby, McNeill & Libby v. Cook*, 222 Ill. 206, aff'g 123 Ill. App. 574; *Woodman v. Illinois Trust & Savings Bank*, 211 Ill. 578; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, rev'g 73 Ill. App. 231; *Werk v. Illinois Steel Co.*, 154 Ill. 427, aff'g 54 Ill. App. 302; *Finley v. West Chicago St. Ry. Co.*, 90 Ill. App. 368; *Kinnare v. Klein*, 88 Ill. App. 304.

50—**Arkansas.** *Catlett v. St. Louis, I. M. & S. Ry. Co.*, 57 Ark. 461, 38 Am. St. Rep. 254.

Illinois. *Bartelott v. International Bank*, 119 Ill. 259.

Mississippi. *Illinois Cent. R. Co. v. Boehms*, 70 Miss. 11.

or equitable defense,⁵¹ and a material variance may amount to a failure of proof, in which case a verdict may be directed.⁵²

§ 70. Same—Criminal cases.

In a criminal case the weight of authority is to the effect that it is never proper to direct a verdict of guilty,⁵³ although there are cases to the contrary;⁵⁴ and it has been held that a direction to find a defendant guilty should never be given except as the result of finding from the evidence

New York. *Bagley v. Bowe*, 105 N. Y. 171, 59 Am. Rep. 488.

Pennsylvania. *Holland v. Kindregan*, 155 Pa. 156.

Wisconsin. *Jones v. Chicago & N. W. Ry. Co.*, 49 Wis. 352.

United States. *Schuykill & D. Improvement Co. v. Munson*, 14 Wall. 442, 20 L. Ed. 867; *Hathaway v. East Tennessee, V. & G. R. Co.*, 29 Fed. 489.

But compare *Denny v. Williams*, 5 Allen (Mass.) 1; *Carver v. Detroit & S. Plank Road Co.*, 61 Mich. 584; *Spiro v. Felton*, 73 Fed. 91.

51—*Craig Milling Co. v. Cromer*, 85 S. C. 350.

52—*Ferguson v. Tucker*, 2 Har. & G. (Md.) 182; *Strahle v. First Nat. Bank of Stanton*, 47 Neb. 319; *Tracy v. Ames*, 4 Lans. (N. Y.) 500.

53—**Alabama.** *Nonemaker v. State*, 34 Ala. 211; *Huffman v. State*, 29 Ala. 40.

Florida. *McCray v. State*, 45 Fla. 80.

Georgia. *Tucker v. State*, 57 Ga. 503.

Kansas. *State v. Wilson*, 62 Kan. 621, 52 L. R. A. 679, 64 Pac. 23.

Michigan. *People v. McCord*, 76 Mich. 200.

Missouri. *State v. Picker*, 64 Mo. App. 126.

Montana. *State v. Sloan*, 35 Mont. 367, 89 Pac. 829; *State v. Koch*, 33 Mont. 490, 8 Ann. Cas. 804, 85 Pac. 272.

North Carolina. *Everett v. Williams*, 152 N. C. 117; *State v. Hill*, 141 N. C. 769; *State v. Riley*, 113 N. C. 648.

South Carolina. *State v. Sanders*, 52 S. C. 580.

Tennessee. *Shipp v. State*, 128 Tenn. 499.

United States. *United States v. Taylor*, 11 Fed. 470.

Rev. St. Florida 1892, § 1088, as to direction of verdict, applies only to civil cases. *McCray v. State*, 45 Fla. 80.

In a prosecution for felony, where a plea of not guilty is interposed, it is not permissible for the court to direct a verdict of guilty or to pass on any question of fact unfavorable to the defendant, even though the evidence is uncontradicted or conclusive. *Shipp v. State*, 128 Tenn. 499.

54—See *Wilson v. State*, — Ark. —, 169 S. W. 795; *Bobo v. State*, 105 Ark. 462, where a verdict of guilty of unlawfully selling intoxicating liquor was directed. See also, *People v. Neumann*, 85 Mich. 98; *People v. Ackerman*, 80 Mich. 588.

beyond a reasonable doubt all the facts which are necessary to establish his guilt.⁵⁵

In most states it is proper to direct a verdict of not guilty where the evidence is insufficient to support a conviction, and it is error to refuse to do so.⁵⁶ Where there is some evidence of guilt, the court may, of course, decline to direct an acquittal, and may leave the question to the jury;⁵⁷ and whatever the state's evidence may be, the court is not bound to direct an acquittal until the conclusion of all the testimony.⁵⁸

§ 71. Power of jury to judge the law in criminal cases.

In criminal cases, some misunderstanding has existed as to the respective functions of the court and jury. This is due to a misconstruction of the early English decisions, erroneous *dicta* in our own decisions, and also to speculative arguments of eminent lawyers as well as the statements of

55—*People v. Lemen*, 231 Ill. 193, rev'g 133 Ill. App. 295.

56—Iowa. *State v. Smith*, 28 Iowa 565.

Kentucky. *Saylor v. Com.*, 158 Ky. 768.

Ohio. *Baker v. State*, 31 Ohio St. 314.

Texas. *Gann v. State*, 42 Tex. Cr. App. 133.

Utah. *State v. Karas*, 43 Utah, 506, 136 Pac. 788.

West Virginia. *State v. Flanagan*, 48 W. Va. 115.

Contra, *People v. Roberts*, 114 Cal. 67, 45 Pac. 1016; *People v. Daniels*, 105 Cal. 262, 38 Pac. 720. "Under no circumstances is the court authorized in a criminal case to direct a jury to return any particular verdict. It can simply advise them to do so—an advice which they are not bound to follow." *People v. Stoll*, 143 Cal. 689, 77 Pac. 818.

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"There can be no nonsuit in a criminal case. * * * The proper practice is to ask the court to direct an acquittal." *State v. Hyde*, 22 Wash. 551, 61 Pac. 719. Where the information fails to state a crime, the proper practice is to discharge the jury from further consideration of the case, and not to direct a verdict of not guilty. *State v. Dennison*, 60 Neb. 157.

57—Illinois. *Gott v. People*, 187 Ill. 249.

Kentucky. *Com. v. Foster*, 22 Ky. L. Rep. 1711.

North Carolina. *State v. Costner*, 127 N. C. 566, 80 Am. St. Rep. 809; *State v. Utley*, 126 N. C. 997.

North Dakota. *State v. Moeller*, 20 N. D. 114.

Washington. *State v. Hyde*, 22 Wash. 551, 61 Pac. 719.

58—*Com. v. George*, 13 Pa. Super. Ct. 542.

early English text writers. And accordingly the claim is not infrequently made, even at this late date, that the jury are the judges of the law in the sense that they may disregard the instructions and determine the cause according to their own notion of what the law is. There are decisions of the American courts which so hold, but these decisions have without exception been overruled, and the law definitely settled to the contrary.

In several states, however, statutes and constitutional provisions exist whereby the jury are the judges of the law.⁵⁹ But in all other states it is no longer open to question that the jury are bound by their oath to adopt and follow the instructions given by the court as the law of the case.

§ 72. Rule in England deducible from decisions and text-books.

The uniform holding of the English courts is that the jury are bound to adopt the instructions of the court as containing a true exposition of the law governing the case, and that they act in violation of their oath if they fail to do so.⁶⁰

59—See § 74, *post*.

60—Rex v. Dean of St. Asaph, 3 Term R. 428, and note; Rex v. Nutt, 1 Barnard. 306; Rex v. Oneby, 2 Ld. Raym. 1493, 2 Strange, 766; Tutchin's Case, 14 How. State Tr. 1095; Rex v. Wilkes, 4 Burrows, 2527; Rex v. Woodfall, 5 Burrows, 2661; Owen's Case, 18 How. State Tr. 1203; Rex v. Poole, Hardw. 23; Fuller's Case, 14 How. State Tr. 517; Bushell's Case, Vaughan, 135; Hood's Case, J. Kelyng, 50; Lilburne's Case, 4 Cobbett, State Tr. 1269; Wharton's Case, Yel. 24; Rex v. Clerk, 1 Barnard. 304; Sidney's Case, 9 Cobbett, State Tr. 818; Throckmorton's Case, 1 State Tr. 901; Miller's Case, 20 How. State

Tr. 870; King v. Withers, 3 Term R. 428; Stockdale's Case, cited in dissenting opinion of Lewis, C. J., in *People v. Croswell*, 3 Johns. Cas. (N. Y.) 408.

On the trial of Colonel Lilburn for treason in 1649, the court refused to permit him to read to the jury from a law book. Being angry at this, he exclaimed: "You that call yourselves judges of the law are no more but Norman intruders, and, in deed and in truth, if the jury please, are no more but cyphers, to pronounce their verdict." Thereupon Jermin, J., said: "Was there ever such a damnable blasphemous heresy as this, to call the judges of the law cyphers?" He then charged

Some of the English decisions, especially in cases of criminal libel, have been cited in support of the theory that the jury are the judges of the law in the sense that they may disregard the instructions, but it is believed that there is not a single English decision in which it is so held, though there may be *dicta* in a few decisions which would seem to support the theory. On the contrary, there are at least two authentic instances where the acquittal of a defendant in disregard of the instructions resulted in the imprisonment and fine of the jury.⁶¹

The statements of early text writers and commentators have frequently been cited as showing that the jury might disregard the instructions of the court and determine the law as well as the facts, but an examination of such authorities will show that the jury not only did not possess such right, but were subject to punishment for disobeying the instructions.

A very explicit statement to the effect that the jury were not bound by the instructions is found in the work on the English constitution by De Lolme,⁶² but the author cites

the jury that they were not judges of the law, and that they "ought to take notice of it, that the judges that are sworn, that are twelve in number, they have ever been the judges of the law from the first time that ever we can read or hear that the law was truly expressed in England; and the jury are only judges * * * of matters of fact." Lilburne's Case, 4 Cobbett, State Tr. 1379.

In *Rex v. Poole*, Hardw. 28, Lord Hardwicke denied the right of the jury to disregard the instructions, and said: "The thing that governs greatly in this determination is that the point of law is not to be determined by juries. Juries have a power by law to determine matters of fact only; and it is of the great-

est consequence to the law of England and to the subject that these powers of the judge and jury are kept distinct; that the judge determine the law, and the jury the fact; and, if ever they come to be confounded, it will prove the confusion and destruction of the law of England."

61—See *Wharton's Case*, Yel. 24; *Throckmorton's Case*, 1 State Tr. 901.

62—"As the main object of the institution of the trial by jury is to guard the accused persons against all decisions whatsoever by men invested with any permanent official authority, it is not only a settled principle that the opinion which the judge delivers has no weight but such as the jury choose to give it,

no authority in support of his position, and his statement is not entitled to much weight.⁶³

It has also been frequently contended that the right of the jury to decide the law upon the general issue was vested in them by the English constitution, because of the words of the statute of Westminster II, ch. 30 (13 Edw. I [A. D. 1285]), which provided "that the justices assigned to take assizes shall not compel the jurors to say precisely whether it be disseisin or not, so that they do show the truth of the deed, and require aid of the justices. But if they, of their own head, will say that it is disseisin, their verdict shall be admitted at their own peril."

But it has been held that the reasonable construction of such statute is that "if the jury undertake to decide the law they shall be subject to such penalty as may be imposed upon them for exceeding their jurisdiction,"⁶⁴ and Glanville says that the assize could not determine upon the law connected with disseisin.⁶⁵ Littleton, whose treatise was

but their verdict must, besides, comprehend the whole matter in trial, and decide as well upon the fact as upon the point of law that may arise out of it; in other words, they must pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law." De Lolme's *Const. Eng.* p. 175. Also in *State v. Croteau*, 23 Vt. 14, 54 Am. Dec. 90, which was overruled in *State v. Burpee*, 65 Vt. 1, 36 Am. St. Rep. 775, a well considered opinion reviewing all the authorities.

63—The decisions of courts of justice furnish the most certain and authoritative evidence of what the rules of common law are. Bl. Comm. 69-73; 1 Kent, Comm. 473.

One of our courts has very properly said, in criticism of De Lolme's statement, that this work, strictly

speaking, was only an essay. Its author "must be regarded simply as a learned foreigner, and sometimes showing that want of thoroughness and precision which even a learned man may display when writing on subjects which his previous education had not particularly fitted him to appreciate, and especially when discussing such a subject as the common law of England." *Pierce v. State*, 13 N. H. 546.

64—*Pierce v. State*, 13 N. H. 536; *State v. Burpee*, 65 Vt. 1, 19 L. R. A. 145, 36 Am. St. Rep. 775.

65—Glanville (liber 13, cc. 20, 21) states that if the demandant object to put himself upon the grand assize, he must show some cause why the assize shall not proceed. If the objection be admitted, the assize shall thereby cease, so that the matter shall be verbally pleaded and deter-

written between the years 1461 and 1463, says that if the jurors will take upon themselves the knowledge of the law upon the matter, they may give their verdict generally, as put in their charge.⁶⁶ Lord Coke, who wrote nearly two centuries later, says: "Although the jury, if they will take upon them (as Littleton here saith) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do, for, if they do mistake the law, they run into the danger of an attainr." ⁶⁷ This clearly denies the right of the jury "to take upon them the knowledge of the law," as Littleton quaintly expresses it, for, if they had this right, they could not "run into the danger of an attainr." It may be further remarked that Coke did not understand Littleton as laying down the limits of the duties of jurors, or as meaning to go any further than to allude to the statute.⁶⁸

mined in court, because it is then a question of law, etc. If the assize could not determine questions of law, it would be most groundless assumption to say that they could be determined by the jury, who were to find only collateral facts out of the points of assize. The citation of Glanville is a strong authority against the right of the jury to decide the law upon the general issue involving law and the facts. *Pierce v. State*, 13 N. H. 536; *State v. Burpee*, 65 Vt. 1, 19 L. R. A. 145, 36 Am. St. Rep. 775.

66—Littleton, *Tenures*, § 368.

Gilchrist, J., of the New Hampshire Supreme Court, comments on this passage as follows: "It is to be remembered that Littleton, in the section cited, was not examining the rights or powers of juries. He was discussing matters very different. The passage was introduced in explaining the pleadings in real actions relative to estates upon condition. His remarks are, in brief, that, after an estate tail is determined for de-

fault of issue, the donor may enter by force of the condition. But in the pleadings he must vouch a record, or show a writing under seal, proving the condition; but though no writing was ever made of the condition, a man may be aided upon such condition by a verdict taken at large upon an assize of novel disseisin, for as well as the jurors may have connasance of the lease, they also as well may have connasance of the condition which was declared and rehearsed upon the lease. And in all actions where the justices will take the verdict at large, there the manner of the whole entry is put in issue." Then follows the statement quoted: "An extended examination of the rights of juries would have been foreign to the particular matter in hand, and it was necessary for him merely to state the effect of a general verdict relative to estates upon condition." *Pierce v. State*, 13 N. H. 546.

67—Co. Litt. 228a.

68—*Pierce v. State*, 13 N. H. 542.

In Blackstone's Commentaries it is said: "And such public or open verdict may be either general—guilty, or not guilty—or special,—setting forth all the circumstances of the case, and praying the judgment of the court; whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they doubt the matter of law, and therefore choose to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper to so hazard a breach of their oaths; and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attain at the suit of the king, but not at the suit of the prisoner." ⁶⁹

§ 73. Rule in America and arguments for or against right.

The doctrine that in criminal cases the jury should have the right to determine the law and the facts was recognized in the American Colonies as early as 1735.⁷⁰ Immediately

69—4 Bl. Comm. 361.

70—The trial of John Peter Zenger for libel, before James De Lancey, Chief Justice, in the Province of New York, August 4, 1735, is reported, as follows: Mr. Chief Justice: "All words are libelous, or not, as they are understood. Those who are to judge of the words must judge whether they are scandalous or ironical, tend to the breach of the peace, or are seditious. There can be no doubt of it." Mr. Hamilton, attorney for the defendant, said: "I thank your honour. I am glad to find the court of this opinion. Then it follows, that those twelve men (the jurors) must understand the words in the information to be scandalous, that is to say, false; for I think it is not pretended they are of the ironical sort; and when they understand the words to

be so, they will say we are guilty of publishing a false libel, and not otherwise." Mr. Chief Justice: "No, Mr. Hamilton, the jury may find that Mr. Zenger printed and published those papers, and leave it to the court to judge whether they are libelous. You know this is very common. It is the nature of a special verdict, where the jury leave the matter of law to the court." Mr. Hamilton: "I know, may it please your honour, the jury may do so; but I do likewise know that they may do otherwise. I know they have the right, beyond all dispute, to determine both the law and the fact; and where they do not doubt of the law, they ought to do so." 17 Howell's St. Tr. 675, 706. Also in *State v. Daley*, 54 Ore. 514, 103 Pac. 502.

preceding the Revolution, the arbitrary temper and unauthorized acts of the judges holding office directly from the crown made the independence of the jury, in law as well as in fact, a matter of great popular importance.⁷¹

The doctrine was recognized for some time after the adoption of the Federal Constitution, but the fear that a judge elected by popular vote might encroach upon the rights of personal liberty in the trial of criminal actions has been very much dispelled, except possibly in causes involving political questions, and at the present time, in the absence of constitutional or statutory provisions making the jury in a criminal action the judges of the law and the facts, the doctrine referred to rarely obtains.⁷² The American decisions in which it has either been held or said that the jury are not bound to follow the instructions of the court, have been overruled, either expressly or impliedly, by subsequent decisions in the same jurisdictions,⁷³ and

71—*Williams v. State*, 32 Miss. 389, 66 Am. Dec. 615.

72—*Williams v. State*, 32 Miss. 389, 66 Am. Dec. 615; *State v. Daley*, 54 Ore. 514, 104 Pac. 1, 103 Pac. 502. As to constitutional and statutory provisions, see § 74, *post*.

73—*State v. Snow*, 18 Me. 348, overruled in *State v. Wright*, 53 Me. 343; *People v. Croswell*, 3 Johns. Cas. (N. Y.) 375 (the court were evenly divided on the question in this case, but subsequent New York cases have uniformly denied the right of the jury to disregard the instructions, as is shown by the cases cited in the following note): *Kane v. Com.*, 89 Pa. St. 522, 33 Am. Rep. 787n (all other Pennsylvania decisions take the opposite view); *Butler v. State*, 7 Baxt. (Tenn.) 36 (all other Tennessee cases take the opposite view); *State v. Freeman*, 63 Vt. 496; *State v. Meyer*, 58 Vt.

463; *State v. Croteau*, 23 Vt. 14, 54 Am. Dec. 90; *State v. Wilkinson*, 2 Vt. 480, 21 Am. Dec. 560 (the Vermont cases are expressly overruled by the case of *State v. Burpee*, 65 Vt. 1, 19 L. R. A. 145, 36 Am. St. Rep. 802n, in a well-considered opinion, reviewing all the authorities); *Doss v. Com.*, 1 Grat. (Va.) 557 (overruled in *Brown v. Com.*, 86 Va. 466); *United States v. Wilson*, Baldw. 78, Fed. Cas. No. 16,730 (all other federal cases maintain the contrary doctrine).

The doctrine was recognized in Massachusetts in *Com. v. Kneeland*, 20 Pick. 206; *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534; but later rejected in *Com. v. Porter*, 10 Mete. 263; *Com. v. Anthes*, 5 Gray 185.

In *Sparf & Hansen v. United States*, 156 U. S. 51, 39 L. Ed. 343, Mr. Justice Harlan in a masterly manner discusses this question, and

there is no longer any doubt existing as to the jury's duty in the premises.⁷⁴

says: "But upon principle, where the matter is not controlled by express constitutional or statutory provisions, it cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court."

74—Alabama. *Washington v. State*, 63 Ala. 135, 35 Am. Rep. 8; *Batre v. State*, 18 Ala. 119; *State v. Jones*, 5 Ala. 666.

Arkansas. *Sweeney v. State*, 35 Ark. 586; *Winkler v. State*, 32 Ark. 360; *Edwards v. State*, 22 Ark. 253; *Pleasant v. State*, 13 Ark. 539.

California. *People v. Ivey*, 49 Cal. 56; *People v. Anderson*, 44 Cal. 70.

Delaware. *State v. Jeandell*, 5 Har. 475.

Florida. *Lewton v. Hower*, 35 Fla. 58.

Iowa. *State v. Miller*, 53 Iowa 154.

Kentucky. *Montee v. Com.*, 3 J. J. Marsh. 132.

Maine. *State v. Stevens*, 53 Me. 548; *State v. Wright*, 53 Me. 328.

Michigan. *People v. Waldvogel*, 49 Mich. 337; *People v. Mortimer*, 48 Mich. 37; *Hamilton v. People*, 29 Mich. 174.

Minnesota. *State v. Rheams*, 34 Minn. 18.

Mississippi. *Williams v. State*, 32 Miss. 389, 66 Am. Dec. 615.

Missouri. *Massey v. Tingle*, 29 Mo. 437; *Hardy v. State*, 7 Mo. 303.

Nebraska. *Parrish v. State*, 14 Neb. 60.

New Hampshire. *Lord v. State*, 16 N. H. 325, 41 Am. Dec. 729; *Pierce v. State*, 13 N. H. 536.

New York. *Duffy v. People*, 26 N. Y. 591; *Carpenter v. People*, 8 Barb.

603; *Safford v. People*, 1 Parker Cr. Cas. 474.

Ohio. *Adams v. State*, 29 Ohio St. 412; *Montgomery v. State*, 11 Ohio 424; *Robbins v. State*, 8 Ohio St. 167.

Pennsylvania. *Com. v. McManus*, 143 Pa. 64; *Harrison v. Com.*, 123 Pa. 508; *Com. v. Goldberg*, 4 Pa. Super. Ct. 142; *Pennsylvania v. Bells, Addison*, 159.

South Carolina. *State v. Jones*, 29 S. C. 201; *State v. Drawdy*, 14 Rich. 90.

Tennessee. *Hannum v. State*, 90 Tenn. 647; *Harris v. State*, 7 Lea 554; *McGowan v. State*, 9 Yerg. 195.

Texas. *Nels v. State*, 2 Tex. 280; *Johnson v. State*, 5 Tex. App. 423.

Vermont. *State v. Burpee*, 65 Vt. 1, 19 L. R. A. 145, 36 Am. St. Rep. 775.

Virginia. *Brown v. Com.*, 86 Va. 466; *Dejarnette v. Com.*, 75 Va. 867; *Com. v. Garth*, 3 Leigh 761.

West Virginia. *State v. Dickey*, 48 W. Va. 325.

United States. *Mobile & O. R. Co. v. Wilson*, 22 C. C. A. 101, 76 Fed. 127; *United States v. Keller*, 19 Fed. 636; *United States v. Morris*, 1 Curt. 23, Fed. Cas. No. 15,815; *United States v. Shive, Baldw.* 510, Fed. Cas. No. 16,278; *Stettinius v. United States*, 5 Cranch, C. C. 573, Fed. Cas. No. 13,387; *United States v. Great-house*, 4 Sawy. 457, Fed. Cas. No. 15,254.

"This humane provision in favor of the accused * * * was never designed to abridge the peculiar province of the court in the instructions to the jury on questions of law. Its object was wholly different.

Accordingly, it is proper to instruct the jury that they are bound to follow the instructions of the court.⁷⁵ It has been held, however, that where the charge directs the jury that they are judges of the law, and have the right to disregard the instructions of the court, the defendant cannot complain of the error, because it is in his favor.⁷⁶

The judges of courts are selected with a view to their knowledge of the law, and jurors with a view to their practical good sense on matters of fact. * * * It is the duty of the jury, therefore, to regard the law as determined by the court, and this duty is required by the obligations of the juror's oath; and in the proper and conscientious discharge of their duty, a jury cannot, or, in other words, have no right to, determine that the court has erred in its instructions as to the law, and therefore to disregard the law as laid down to them by the court." *Robbins v. State*, 8 Ohio St. 167.

"The power of the jury to find a general verdict upon the general issue in a criminal case does not imply a right to decide the law of the case. The power is the same in a civil case, and yet it has never been supposed that the power of the jury, in a civil case, to render a general verdict on the general issue, was a right or implied a right to decide the law of the case. The right and the power of the jury, whatever they may be, as to deciding the law of the case, are exactly alike in both classes of cases. In both, the right and the power of the court are the same to set aside the verdict, if against the defendant, on the ground that it was a verdict against law. * * * The most that can be said is that the jury

have the power of rendering a general verdict upon the general issue, either according to law or against law, but no one can suppose that they have a right to render a verdict against law." *Stettinius v. United States*, 5 Cranch, C. C. 593, Fed. Cas. No. 13,387.

Chief Justice Shaw, of Massachusetts, has well said: "The true glory and excellence of the trial by jury is this: That the power of deciding fact and law is wisely divided; that the authority to decide questions of law is placed in a body well qualified, by a suitable course of training, to decide all questions of law; and another body, well qualified for the duty, is charged with deciding all questions of fact, definitely; and whilst each, within its own sphere, performs the duty intrusted to it, such a trial affords the best possible security for a safe administration of justice and the security of public and private rights." *Com. v. Anthes*, 5 Gray (Mass.) 198.

75—Iowa. *State v. Miller*, 53 Iowa 156.

Ohio. *Robbins v. State*, 8 Ohio St. 167.

Tennessee. *Harris v. State*, 7 Lea 553; *Dale v. State*, 10 Yerg. 555.

United States. *Mobile & O. R. Co. v. Wilson*, 22 C. C. A. 101, 76 Fed. 127.

76—Hannum v. State, 90 Tenn.

The principal argument in favor of the doctrine that the jury have the right to disregard the court's instructions is that this is necessary for the preservation of the liberty of the citizen, and the protection of innocence against the consequences of partiality and undue bias in favor of the prosecution.⁷⁷ The reasoning of Justice Kent sustains such argument,⁷⁸ but it will be noted that a similar contention was disposed of with scant courtesy by Lord Mansfield in the *Dean of St. Asaph's Case*,⁷⁹ and the argument has been

647; *Harris v. State*, 7 Lea (Tenn.) 556.

No authority was cited in support of this holding, and in neither case was there any attempt made to state the reasons therefor. On principle, it is believed that the court was in error. It may readily be imagined that under such an instruction the jury might adopt a rule of law more prejudicial than that laid down by the court, in case of widespread popular prejudice against the prisoner.

77—See *State v. Croteau*, 23 Vt. 14, 54 Am. Dec. 90.

78—"It is not likely often to happen that the jury will resist the opinion of the court on the matter of law. That opinion will generally receive its due weight and effect; and in civil cases it can, and always ought to, be ultimately enforced by the power of setting aside the verdict; but in human institutions, the question is not whether every evil contingency can be avoided, but what arrangement will be productive of the least inconvenience. And it appears to be most consistent with the permanent security of the subject that in criminal cases the jury should, after receiving the advice and assistance of the judge as to

the law, take into their consideration all the circumstances of the case, and the intention with which the act was done, and to determine upon the whole whether the act done be or be not within the meaning of the law. This distribution of power, by which the court and jury mutually assist and mutually check each other, seems to be the safest, and consequently the wisest, arrangement in respect to the trial of crimes. The constructions of judges on the intention of the party may often be (with the most upright motives) too speculative and refined, and not altogether just in their application to every case. Their rules may have too technical a cast, and become, in their operation, severe and oppressive. To judge accurately of motives and intentions does not require a master's skill in the science of law. It depends more on a knowledge of the passions, and of the springs of human action, and may be the lot of ordinary experience and sagacity." *People v. Crosswell*, 3 Johns. Cas. (N. Y.) 376.

79—"Jealousy of leaving the law to the court, as in other cases, is now, in the present state of things, puerile rant and declamation. The judges are totally independent of

held without weight in a well considered Vermont case.⁸⁰

It will also be noted that Justice Kent seems to overlook entirely the fact that if the defendant is prejudiced by the instructions he has an ample remedy by appeal. He also overlooks the fact that jurors have no such knowledge of or training in law as would enable them to determine questions of law intelligently,⁸¹ and uncertainty in the law would result from permitting the jury to disregard the instructions.⁸² Another reason is that, in case of conviction, the

the ministers that may happen to be, and of the king; their temptation is rather to the popularity of the day." *Rex v. Dean of St. Asaph*, 3 Term R. 428, and note.

80—"When examined in the light of facts, this argument is without weight. This is a 'government of the people, by the people, and for the people.' In this state, the making of constitutions and the enacting of laws is vested in the people. However elected or appointed, our judges are the servants of the people, to administer justice according to law and equity, and it would be sufficient to say that they have never been recreant to the trust imposed upon them. Whenever a rule of law as administered by the courts becomes obnoxious to the people, or they think it detrimental to their best interests, they have only to exercise their power to abolish or modify it to rid themselves of it." *State v. Burpee*, 65 Vt. 1, 19 L. R. A. 145, 36 Am. St. Rep. 775, overruling *State v. Croteau*, 23 Vt. 14, 54 Am. Dec. 90.

81—*Indiana*. *Townsend v. State*, 2 Blackf. 158.

Maine. *State v. Wright*, 53 Me. 339.

Massachusetts. *Com. v. Anthes*, 5 Gray 235.

New Hampshire. *Pierce v. State*, 13 N. H. 570.

New York. *Duffy v. People*, 26 N. Y. 591.

United States. *United States v. Morris*, 1 Curt. 23, Fed. Cas. No. 15,815.

English. *Rex v. Dean of St. Asaph*, 3 Term R. 428, and note.

It can hardly be supposed that men drawn each term from other occupations, who make no pretensions to legal knowledge, and who are not responsible, even to impeachment, for their acts, will be more learned, sound and safe expositors of the principles of law than the judges. *Pierce v. State*, 13 N. H. 570.

In the case of the *Dean of St. Asaph*, Lord Mansfield said: "Upon the reason of the thing, and the eternal principles of justice, the jury ought not to assume the jurisdiction of law; they do not know—are not presumed to know—anything of the matter; they do not understand the language in which it is conceived, or the meaning of the terms; they have no rule to go by but their passions and wishes." *Rex v. Dean of St. Asaph*, 3 Term R. 428, and note.

82—*Maine*. *State v. Wright*, 53 Me. 339.

defendant may obtain ample redress on appeal if the court has stated the law incorrectly in the instructions, while, on the other hand, if the jury take the decision of the law into their own hands, and wrongfully acquit the defendant, the state has no redress against their error, because the decision of the jury is final in case of an acquittal.⁸³ Suppose, however, that the jury, under excitement or popular prejudice, wrongfully convict the defendant. It has been well said that, if the jury are to decide all the law, their decisions can never be reversed, since there are no means of ascertaining their decision upon a question of law so as to bring it into

Massachusetts. *Com. v. Anthes*, 5 Gray 185.

Michigan. *Hamilton v. People*, 29 Mich. 173.

Nebraska. *Parrish v. State*, 14 Neb. 63.

New Hampshire. *Pierce v. State*, 13 N. H. 570.

Pennsylvania. *Pennsylvania v. Bell, Addison*, 156.

Tennessee. *Harris v. State*, 7 Lea 538.

United States. *United States v. Greathouse*, 4 Sawy. 457, Fed. Cas. No. 15,254; *United States v. Battiste*, 2 Sumn. 240, Fed. Cas. No. 14,545.

English. *Rex v. Dean of St. Asaph*, 3 Term R. 428, and note.

The interpretation of the law can have no permanency or uniformity, nor can it become generally known, except through the action of the courts. *Hamilton v. People*, 29 Mich. 173.

"The decisions of one jury furnish no rule for the action of another." *Pierce v. State*, 13 N. H. 570.

If the jury are judges of the law, there is no method of determining with certainty what they have held it to be. *Parrish v. State*, 14 Neb. 63.

"This can never be known, therefore can never be established as precedent to guide future juries, even if worth preservation. * * * The worst feature still of all this is that in cases of the most intelligent and upright juries, conscious of their want of legal knowledge, the instructions of the court will be followed; but in cases of ignorant and corrupt juries (and such are possible, at least) we are always likely to have the law as given by the court disregarded, and the crude or corrupt conclusions of ignorance or corruption made the standard for decision. The most competent juries to judge of the law will never be likely to assume such responsibility. The most incompetent and corrupt will be the sole practical repositories for the exercise of this high judicial prerogative. No such rule having such results can possibly be sound, either in theory or practice, but can only be evil, and that continually." *Harris v. State*, 7 Lea (Tenn.) 553.

83—*State v. Jeandell*, 5 Har. (Del.) 475; *State v. Drawdy*, 14 Rich. (S. C.) 90; *Stettinius v. United States*, 5 Cranch, C. C. 573, Fed. Cas. No. 13,387; *Rex v. Dean of St. Asaph*, 3 Term. R. 428, and note.

review before an appellate court.⁸⁴ To permit the jury to decide the law to be contrary to what they are told in the instructions has also been declared a violation of the Federal Constitution, and a number of the state courts have also held that it is a violation of the state constitutional provisions.⁸⁵ So, it has been urged as a reason against the practice, that if the jury find the law contrary to the direction of the court, the court is bound to set aside the verdict, and that it is not possible for the jury to have a right to do what the court is bound to undo.⁸⁶ In conclusion, it may be stated that such a rule would be contrary to a vast preponderance of judicial authority, both in this country and in England.⁸⁷

§ 74. Organic and statutory provisions regulating practice.

In several states constitutional and statutory provisions state that the jury are the judges of the law and the facts in criminal cases,⁸⁸ but the courts differ widely as to the effect of such provisions.

84—*Stettinius v. United States*, 5 Cranch, C. C. 573, Fed. Cas. No. 13,387; *Freeman, J., in Harris v. State*, 7 Lea (Tenn.) 556.

85—*State v. Wright*, 53 Me. 329; *Com. v. Anthes*, 5 Gray (Mass.) 236; *United States v. Morris*, 1 Curt. 23, Fed. Cas. No. 15,815; *State v. Burpee*, 65 Vt. 1, 36 Am. St. Rep. 775. In this case it was said: "The doctrine that jurors are judges of the law in criminal cases is repugnant to articles 4 and 10 of ch. 1 of the constitution of Vermont, which guaranty to every person within this state 'a certain remedy' for all wrongs, conformably to the laws, and that he shall not be 'deprived of his liberty except by the laws of the land.'" So, in *Com. v. Anthes*, 5 Gray (Mass.) 236, it was said: "The judiciary department was in-

tended to be permanent and coextensive with the other departments of government, and, as far as practicable, independent of them; and therefore it is not competent for the legislature to take the power of deciding the law from this judiciary department, and vest it in other bodies of men,—juries,—occasionally and temporarily called to attend courts, for the performance of very important duties * * * very different from those of judges, and requiring different qualifications."

86—*Townsend v. State*, 2 Blackf. (Ind.) 151.

87—*State v. Wright*, 53 Me. 329.

88—**Connecticut.** "The court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law

§ 75. Provisions held to vest jury with right to disregard instructions—Propriety and necessity of instructions.

In Illinois it has been held that the jury are the judges of the law as well as of the facts,⁸⁹ and are not bound by the law as given by the court.⁹⁰ But it is also stated that the jury should not disregard the instructions unless they are prepared to state on their oaths that they are better judges

and the facts, without any direction how to find their verdict." Gen. St. 1912, § 1516.

Georgia. "The jury in all criminal cases shall be the judges of the law and the facts." Const. art. 1, § 2, par. 1; Pen. Code, § 1033.

Illinois. "Juries in all criminal cases shall be judges of the law and the facts." J. & A. Ann. St., ¶ 4130.

Indiana. "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Const. art. 1, § 64; Burn's Ann. St. 1914, § 2136, subd. 5.

Louisiana. "The jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge." Const. art. 179.

In charging the jury in criminal cases, the judge must limit himself to giving them a knowledge of the law applicable to the case. Const. & Rev. L. 1902, § 991.

Maryland. "In the trial of all criminal cases, the jury shall be the judges of law, as well as of fact." Const. art 15, § 5.

Massachusetts. "In all trials for criminal offenses it shall be the duty of the jury to try, according to established forms and principles of law, all causes which shall be com-

mitted to them, and, after having received the instructions, of the court, to decide at their discretion, by a general verdict, both the facts and the law involved in the issue, or to find a special verdict, at their election; but it shall be the duty of the court to superintend the course of the trials, to decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon all collateral and incidental proceedings, and also to charge the jury and to allow bills of exception." Rev. L. 1902, ch. 219, § 13.

Oregon. In all criminal cases whatever, the jury shall have the right to determine the law and the facts, under the direction of the court, as to the law. Const. art. 1, § 16.

89—Wohlford v. People, 148 Ill. 296; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320n, petition for writ of error dismissed 123 U. S. 131, 31 L. Ed. 80; Davison v. People, 90 Ill. 223; Mullinix v. People, 76 Ill. 211; Adams v. People, 47 Ill. 376; Schnier v. People, 23 Ill. 17.

90—Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320n, petition for writ of error dismissed 123 U. S. 131, 31 L. Ed. 80; Fisher v. People, 23 Ill. 283; Schnier v. People, 23 Ill. 17.

of the law than the court,⁹¹ and in a late decision it was held that the effect of such rule has been to render the statute nugatory.⁹² In Illinois it is customary to give the jury instructions on the law of the case,⁹³ as well as to instruct them that they are not bound by the court's instructions.⁹⁴

In Indiana it has been held that the jury are the judges of the law and evidence,⁹⁵ and that the instructions of the court as to the law of the case are merely advisory, and without binding force on the jury,⁹⁶ being given not to bind

91—*Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320n, petition for writ of error dismissed 123 U. S. 131, 31 L. Ed. 80; *Davison v. People*, 90 Ill. 221; *Mullinix v. People*, 76 Ill. 211; *Fisher v. People*, 23 Ill. 283.

92—"The statute which makes the jury the judges of the law and the facts has been often severely criticized by the profession, and justly so. Instead of resorting to the legislature to repeal it, the courts have from time to time qualified it, until finally it has been rendered absolutely nugatory. No honest and intelligent jury would, upon reflection, say that by their study and experience they were better qualified to judge of the law than the court, and certainly if they must be 'convinced, upon a deep and confident conviction, that the court is wrong and they are right,' they would never hesitate to follow the law as given by the court, and the statute is thereby rendered meaningless. The legislature should have repealed it long ago." *Juretic v. People*, 223 Ill. 484.

93—See *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320n, petition for writ of error dismissed 123 U. S. 131, 31 L. Ed. 80; *Mullinix v. People*, 76

Ill. 211; *Schnier v. People*, 23 Ill. 17.

94—See *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320n, petition for writ of error dismissed 123 U. S. 131, 31 L. Ed. 80; *Davison v. People*, 90 Ill. 221; *Mullinix v. People*, 76 Ill. 211.

95—*Walker v. State*, 136 Ind. 663; *Bird v. State*, 107 Ind. 154; *Fowler v. State*, 85 Ind. 538; *McDonald v. State*, 63 Ind. 544; *McCarthy v. State*, 56 Ind. 203; *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369; *Williams v. State*, 10 Ind. 503.

96—*Bird v. State*, 107 Ind. 154; *Nuzum v. State*, 88 Ind. 599; *Powers v. State*, 87 Ind. 144; *Keiser v. State*, 83 Ind. 234; *McDonald v. State*, 63 Ind. 544; *Williams v. State*, 10 Ind. 503.

An instruction that the jurors are "the exclusive and sole judges of what facts have been proven. * * * You may also determine the law for yourselves, and by that is not meant that you have the right to set aside the law and make your own law. You determine the law as it is enacted by the Legislature and considered and interpreted by the higher court of record, and in that way you have a right to determine the law for yourselves, but not to

the consciences of the jury but merely to "enlighten their judgments."⁹⁷ The jury are not bound by decisions of the supreme court, and may decide the law to be different from that enunciated by such decisions,⁹⁸ and the right of the jury to declare a statute unconstitutional seems to be recognized in an early case where it was held that the court's refusal to permit counsel to argue to the jury the constitutionality of a statute was erroneous.⁹⁹ The jury may also determine whether the facts stated in an indictment constitute a public offense, but have no right to determine the sufficiency in form of the indictment, or that it was not properly found and returned.¹

It has, however, been held that the constitutional provision could not be rightfully construed to mean that the jury are the *sole* judges of the law in every respect in a criminal cause,² and it is unquestionably the duty of the jury to give careful and respectful consideration to the instructions of the court,³ especially if they are in doubt as to what the law of the case may be.⁴ Also they should not disregard

make your own law," is merely advisory as to the manner of determining the law and is not erroneous. *Lesueur v. State*, 176 Ind. 448.

97—*Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171; *Bissot v. State*, 53 Ind. 408.

98—*Fowler v. State*, 85 Ind. 538; *Keiser v. State*, 83 Ind. 236. In this case it was said: "The decisions of the supreme court are no more binding upon juries in such cases than the charge of the judge trying the cause. Both may well aid the jury in determining the law applicable to the case, but neither source of information is legally binding upon them, if they choose to determine the law for themselves."

99—*Lynch v. State*, 9 Ind. 541.

1—*Hudelson v. State*, 94 Ind. 426,

48 Am. Rep. 171; *Daily v. State*, 10 Ind. 536.

2—See *Anderson v. State*, 104 Ind. 467, where an instruction which informed the jury that, "even if all facts alleged in the indictment are established beyond a reasonable doubt, you have still the right to determine whether or not such facts, when so established, constitute a public offense under the laws of the state, and, if you determine that they do not, you have the right to acquit the defendant," was held properly refused as implying an unnecessarily extreme construction of the constitutional right of a jury in a criminal case.

3—*Anderson v. State*, 104 Ind. 467; *Keiser v. State*, 83 Ind. 236; *McDonald v. State*, 63 Ind. 544.

4—*Bird v. State*, 107 Ind. 154.

the instructions without proper reason,⁵ and it is customary to caution the jury in this respect.⁶

Instructions should be given as to the law of the case,⁷ and it is not only proper for the court to instruct the jury that they are judges of the law as well as of the facts,⁸ but it is the duty of the court, under statutory provisions, to do so,⁹ and a refusal of an instruction to this effect,¹⁰ or the giving of an instruction that the jurors must be governed by the instructions, constitutes reversible error.¹¹ If the jury follow an erroneous instruction, to the injury of a defendant, the judgment should be reversed.¹²

In Maryland it has been held that the jury have the right in criminal cases to disregard the instructions,¹³ and in one of the decisions it was said that the constitutional provision making juries judges of the law as well as the facts "is merely declaratory, and has not altered the pre-existing law regulating the powers of the court and jury in criminal cases." On this point the court is in error, for it has been shown that at common law the jury have no right to disregard the court's instructions.¹⁴ In that state it is held that the provision making the jury judges of the law gives them no right to determine the constitutionality of a statute, and that it is proper for the court to prevent counsel from arguing that question before the jury.¹⁵ It seems to be well settled in that state that the court is not obliged to instruct

5—Blaker v. State, 130 Ind. 203.

6—Blaker v. State, 130 Ind. 203; Bird v. State, 107 Ind. 154; Keiser v. State, 83 Ind. 236.

7—Parker v. State, 136 Ind. 284.

8—Walker v. State, 136 Ind. 666; Powers v. State, 87 Ind. 144; Fowler v. State, 85 Ind. 538.

9—Hudelson v. State, 94 Ind. 426, 48 Am. Rep. 171.

10—McCarthy v. State, 56 Ind. 203.

11—McDonald v. State, 63 Ind. 544.

12—Hudelson v. State, 94 Ind. 429, 48 Am. Rep. 171; Clem v. State, 42 Ind. 420, 13 Am. Rep. 369.

13—Beard v. State, 71 Md. 275, 4 L. R. A. 675n, 17 Am. St. Rep. 536; Forwood v. State, 49 Md. 531; Wheeler v. State, 42 Md. 563; Franklin v. State, 12 Md. 236.

14—Franklin v. State, 12 Md. 236. See also, §§ 72, 73, *ante*.

15—Franklin v. State, 12 Md. 236.

the jury, even when requested by counsel or jury,¹⁶ but the giving of advisory instructions as to the law of the case is proper,¹⁷ and it is customary to instruct that the jury are not bound by the court's instructions.¹⁸ A defendant is entitled to correct instructions, if any are given, and is entitled to except to erroneous instructions,¹⁹ and if the jury follow an erroneous instruction to the defendant's injury, the judgment should be reversed.²⁰

In Connecticut, where there is special legislation on the subject, it is also probable that the jury may disregard the

16—*Swann v. State*, 64 Md. 423; *Broll v. State*, 45 Md. 356; *Franklin v. State*, 12 Md. 246.

"It is impossible that the legislature contemplated giving the right to parties in criminal cases to have instructions upon the law and the legal effect of the evidence, and exceptions to such rulings, in the face of the constitutional provision under which juries are at liberty to treat such instructions with utter disregard, and to find their verdict in direct opposition to them." *Broll v. State*, 45 Md. 360.

"Both before and since the constitutional declaration upon the subject, it was and has been the practice of judges in some parts of the state to decline to give instructions to the jury in criminal cases under any circumstances, while in other parts of the state it has been the practice for the judges to give advisory instructions when requested so to do. It seems to have been regarded as entirely a matter of discretion with the judge, there being no positive duty requiring him to pursue the one course or the other." *Beard v. State*, 71 Md. 275, 4 L. R. A. 675n, 17 Am. St. Rep. 536.

17—Though the jury are the judges of the law, they are un-

learned, and the court has the ultimate power of setting aside their verdict if they should misapply the law, to the injury of the accused. *Beard v. State*, 71 Md. 275, 4 L. R. A. 675n, 17 Am. St. Rep. 536; *Forwood v. State*, 49 Md. 531; *Wheeler v. State*, 42 Md. 563.

The practice of instructing the jury, notwithstanding the fact that they may disregard the instructions, "is founded on the soundest practical reason and good sense. For though the juries are made judges of the law, they are unlearned, and not infrequently composed, in part at least, of persons wholly uninstructed as to the laws under which they live. When sworn upon the panel, it becomes their duty to decide the case according to the established rules of law of the state, and not according to any capricious rules of their own. * * * To enable them to accomplish that object, no proper light should be withheld from them." *Beard v. State*, 71 Md. 275, 4 L. R. A. 675n, 17 Am. St. Rep. 536.

18—*Swann v. State*, 64 Md. 423; *Wheeler v. State*, 42 Md. 563.

19—*Beard v. State*, 71 Md. 275, 4 L. R. A. 675n, 17 Am. St. Rep. 536.

20—*Swann v. State*, 64 Md. 423.

instructions of the court,²¹ and the decisions would seem to indicate that the jury have the right to declare statutes unconstitutional.²²

In Oregon, the constitution confers upon the jury, in all criminal cases, the right to determine the law and the facts "under the direction of the court as to the law," thereby restricting the authority of the jury to a much greater extent than is prescribed in the states previously mentioned. Notwithstanding the restricted application of such doctrine, the jury have the power to disregard instructions and find a

21—See *State v. Buckley*, 40 Conn. 247. See also, *State v. Thomas*, 47 Conn. 546, 36 Am. Rep. 98n. But see *State v. McKee*, 73 Conn. 18, 49 L. R. A. 542, 84 Am. St. Rep. 124, wherein it was held that the jury in a criminal case are not the judges of the constitutionality of the statute upon which the complaint is based.

22—In the first case, the trial court, after telling the jury that they were the judges of the law as well as the facts, instructed them as follows: "But the jury are the judges of the law under the same obligations that attach to the judge on the bench. They are not authorized to say that that is not law which is the law of the state. The supreme court has decided that section to be constitutional. * * * Will you say it is unconstitutional, when they say it is constitutional? The next case to be tried may be a civil case, the law applicable to which may have been decided by the same supreme court; you would not suffer your private views and interests to influence you to disregard the law thus decided. * * * If you decide that to be unconstitutional which the supreme court

holds to be constitutional, you will disturb the foundations of law. But after all, you are the judges of the law, and if, on your consciences, you can say this section is unconstitutional, then you ought to acquit the accused." The reviewing court saw no error in this very contradictory instruction, and in concluding their opinion said: "The jury could not have understood that they were bound by the opinion of the court as in civil cases, for at the close they were distinctly told that they were the judges of the law, and that, if they conscientiously believed that the act was unconstitutional, they ought to acquit the accused. We do not advise a new trial." From this quotation it would seem that the reviewing court considered that the jury had the right to declare a statute unconstitutional. *State v. Buckley*, 40 Conn. 247.

In a subsequent case, the trial court gave a similar instruction, which was, in substance, as follows: That the jury were the judges of the law and fact, and had the right to declare a statute unconstitutional if they so considered it, but that they were as much bound by the law as the judge on the

defendant not guilty.²³ "Though such power of the jury is recognized, their right, in the trial of a criminal action, to ignore the charge of the court, may well be doubted, for if an instruction misstates the law applicable to the facts involved, and the defendant is found guilty, the error which has been committed can be corrected on appeal. If, however, the jury assuming to be the judges of the law, contrary to the direction of the court, return a verdict of not guilty in a criminal action, the public necessarily sustains an injury which cannot be legally corrected."²⁴

In a later case it was held that in order to effectuate the clause "under the direction of the court as to the law," it is the plain duty of the jury to accept and apply the law as given them by the court, and that the power to disobey the directions of the court does not imply either a legal or moral right to do so.²⁵

bench, and that it was not to be presumed that they would be guilty of such an absurdity as to declare a statute unconstitutional which the court had declared constitutional. Counsel contended that the supreme court had never held the statute constitutional, and that the court misled the jury and prevented them from freely exercising their right to judge for themselves of the validity of the statute. The reviewing court brushed aside the objection by saying that the court had in fact decided the question as to the validity of the statute, and declined to grant a new trial. *State v. Thomas*, 47 Conn. 546, 36 Am. Rep. 98n.

If the jury are judges of the law in the broad sense that they may decide the law to be directly contrary to what the court has told them in the instructions, it is hardly an extension of this right to hold them entitled to pass on the consti-

tutionality of a statute, and the court which holds that the jury may disregard the instructions of the trial judge, but cannot pass on the constitutionality of a statute, seems to be guilty of an inconsistency.

23—*State v. Daley*, 54 Ore. 514, 104 Pac. 1, 103 Pac. 502.

Such a verdict cannot be set aside, and necessarily discharges the defendant under the former jeopardy provision (Const. Ore. art. 1, § 12). *Id.*

24—*State v. Daley*, 54 Ore. 514, 104 Pac. 1, 103 Pac. 502.

25—An instruction to the jury, concluding as follows: "In which event they are the judges of the law and the fact, and are under no obligation to take it from the court whatever," held not in harmony with the constitution or with the former holdings of the court. *State v. Wong Si Sam*, 63 Ore. 266, 127 Pac. 683.

See also, *State v. Walton*, 53 Ore.

§ 76. Provisions held not to vest jury with right to disregard instructions.

In Georgia all the earlier decisions affirm, in the most unmistakable terms, the right of the jury to disregard the instructions and determine the law for themselves,²⁶ but the last decision upholding such right was handed down in 1862.²⁷

Thereafter the decisions, the first of which was made in 1871, laid down the contrary doctrine, without any reference to the rule of the earlier decisions, and it is now well settled that the instructions given by the court are the law of the case, to be adopted by the jury and applied to the facts, without reference to what their own opinions of the law may be.²⁸ The provision on this subject, which was merely statutory until 1877, was incorporated into the constitution during that year. In commenting on this it was said, in one decision: "The constitution of 1877 * * * simply re-enacts, in identical language, the provisions of the Code thereon. It emphasizes it by inserting it in the constitution; but it put it there subject to the construction which had been put on the same words in the Code."²⁹

However much the practice of permitting juries to disregard the court's instructions is to be deprecated, it seems to the writer that a provision that "the jury in all criminal

557, 102 Pac. 173, 101 Pac. 389, 99 Pac. 431; *State v. Reed*, 52 Ore. 377, 97 Pac. 627.

26—*McDaniel v. State*, 30 Ga. 853; *Dickens v. State*, 30 Ga. 383; *Golden v. State*, 25 Ga. 527; *McPherson v. State*, 22 Ga. 478; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *McGuffie v. State*, 17 Ga. 497. See also, dictum in *Holder v. State*, 5 Ga. 441.

If it is the misfortune of the jury "to differ conscientiously from the court, it is not only their right, but their duty, to find a verdict according to the opinion which they entertain of the law. And instead of

being guilty of perjury in doing so, they are guilty of perjury if they do not, for, in this case, their finding is not their verdict." *McDaniel v. State*, 30 Ga. 853.

27—*McDaniel v. State*, 30 Ga. 853; *Dickens v. State*, 30 Ga. 383.

28—*Rouse v. State*, 136 Ga. 356; *Hunt v. State*, 81 Ga. 140; *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480; *Ridenhour v. State*, 75 Ga. 382; *Malone v. State*, 66 Ga. 539; *Robinson v. State*, 66 Ga. 517; *Hill v. State*, 64 Ga. 470; *Anderson v. State*, 42 Ga. 9.

29—*Hill v. State*, 64 Ga. 470.

cases shall be the judges of the law and the facts,"³⁰ clearly and unmistakably confers on the jury the right to determine the law independently, and in disregard of the court's instructions, that a contrary construction furnishes an excellent example of judicial legislation, and that the early decisions have placed the proper construction on these statutes.

In Louisiana the court is required by statute to instruct the jury as to the law applicable to the case.³¹ There are also provisions, both constitutional and statutory, on the power of the jury to judge the law,³² but the decisions conflict as to their proper meaning.³³ The present rule is that

30—Const. Ga., art. 1, § 2, par. 1; Code Ga. 1882, § 5018.

31—State v. King, 135 La. 117; State v. Carroll, 134 La. 965; State v. Tisdale, 41 La. Ann. 338; State v. Tally, 23 La. Ann. 677.

32—See § 74, *ante*.

33—In State v. Ballerio, 11 La. Ann. 81, the court refused to reverse for a refusal to instruct the jury that they "are the judges of the law as well as the facts;" that the "judge is to explain the law, and they are bound to listen to and weigh such explanation with due care and attention, although not bound to admit it as conclusive of the law should they differ in opinion from the judge," saying: "The question is whether, after a sound and strictly legal charge, the court so far erred in refusing to add the above instructions as to authorize us to set aside the verdict. We think not."

In State v. Scott, 11 La. Ann. 429, the judgment was reversed because the court instructed that "the jury are not the judges of the law and fact in a criminal case, but must take the law as laid down by the

court." This instruction was characterized as absolutely erroneous, and in the syllabus the court said that it was safe, as a general rule, to regard the court's exposition of the law as conclusive, but that they are not bound to do so, and in extreme cases may disregard the court's instructions.

These two decisions are difficult to construe, and have been cited by the supreme court, both in support of the proposition that the jury ought, as a general rule, to follow the instructions, but is under no compulsion to do so (State v. Tally, 23 La. Ann. 677), and also to support the proposition that, while the jury has the power to disregard the instructions, yet in so doing it would violate its oath and duty (State v. Matthews, 38 La. Ann. 795).

In State v. Jurché, 17 La. Ann. 71, the trial judge declined to instruct the jury "that, in finding a verdict, they were the judges of the law and facts," and gave the following instructions: The jury "were the sole judges of the facts proved. It was their duty to apply the law as laid down by the court. That the jury

“the jury is bound to accept the law as laid down by the judge, and that, while it has power to disregard it, yet in doing so it would violate its oath and duty.”³⁴ Notwithstanding the fact that it is now considered the duty of the jury to adopt the instructions of the court as the law of the case, it is nevertheless held to be the duty of the trial judge to instruct the jury that they are judges of the law and the facts, and reversible error for him to refuse such an instruction.³⁵ But it is also held that after giving such an instruction, the court must explain the modified sense in which they are so;³⁶ that is to say, they should be directed to take and apply the law as laid down by the court.³⁷

This judicial juggling commends itself to reason in an equal degree with the old nursery jingle in which a mother gave her daughter permission to go swimming on condition that she did not go near the water.

In Massachusetts, in one case decided before the enactment of the present statute regulating the question, there are expressions to the effect that the jury have the right to disregard the court's instructions, and determine the law according to their own ideas,³⁸ but this view was repudiated

had the power, but not the right, to disregard the charge of the judge.” The reviewing court cited the two decisions first mentioned and reversed the decision, saying: “It, doubtless, would be a safe rule for the jury to take the law from the judge as their guide, but they are not bound to do so.”

Relying on this decision, the judgment in the next case was reversed because the trial judge refused to instruct that the jury were the judges of both the law and the facts. *State v. Saliba*, 18 La. Ann. 35.

Then follows a decision handed down in 1871 in which it was held that the jury ought, as a rule, to follow the instructions, but are not

bound to do so. *State v. Tally*, 23 La. Ann. 677.

34—*State v. Desforbes*, 47 La. Ann. 1167; *State v. Callahan*, 47 La. Ann. 444; *State v. Brown*, 41 La. Ann. 410; *State v. Tisdale*, 41 La. Ann. 341; *State v. Cole*, 38 La. Ann. 846; *State v. Matthews*, 38 La. Ann. 795; *State v. Vinson*, 37 La. Ann. 792; *State v. Ford*, 37 La. Ann. 465; *State v. Johnson*, 30 La. Ann. 904.

35—*State v. Vinson*, 37 La. Ann. 792.

36—*State v. Tisdale*, 41 La. Ann. 338; *State v. Ford*, 37 La. Ann. 444; *State v. Johnson*, 30 La. Ann. 904.

37—*State v. Ford*, 37 La. Ann. 444.

38—*Com. v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534.

in the first decision made after the enactment of the statute. In this case it was said that at common law the jury had no such right, and the court held that this right was not and could not be conferred by the statute.³⁹ This holding has been adhered to in subsequent decisions,⁴⁰ and it has been held proper to instruct the jury that it is their duty to take the law from the court, and to conform their judgment and decision to its instructions, so far as they understood them, in applying the law to the facts to be found by them.⁴¹

39—Com. v. Anthes, 5 Gray 29; Com. v. Rock, 10 Gray (Mass.), (Mass.), 202. 4.

40—Com. v. Marzynski, 149 Mass. 41—Com. v. Anthes, 12 Gray 68; Com. v. Anthes, 12 Gray (Mass.), (Mass.), 29.

CHAPTER VIII.

RELATION OF INSTRUCTIONS TO PLEADINGS AND EVIDENCE.

- § 77. Conformity of instructions to pleading and evidence—In general.
- § 78. Same—Illustrations.
- § 79. Limiting instructions to issues raised by pleadings.
- § 80. Same—Illustrations.
- § 81. Same—Criminal cases.
- § 82. Necessity of basing instructions on evidence.
- § 83. Same—Incompetent evidence.
- § 84. Same—Withdrawn or excluded evidence.
- § 85. Same—Stating exceptions to general rules announced in other instructions.
- § 86. Same—Sufficiency of evidence to support instructions.
- § 87. Same—Illustrations of rule.
- § 88. Same—Violation of rule as ground for reversal.
- § 89. Necessity of concrete application to facts of case.

§ 77. Conformity of instructions to pleading and evidence —In general.

It is a general rule that the instructions must be predicated upon the pleadings and the evidence in a case.¹

1—**Florida.** Gracy v. Atlantic Coast Line R. Co., 53 Fla. 350.

Illinois. Healea v. Keenan, 244 Ill. 484; East St. Louis Packing & Provision Co. v. Hightower, 92 Ill. 139 and see cases *post*, this note.

Indiana. Indianapolis Traction & Terminal Co. v. Hensley, — Ind. —, 6 N. C. C. A. 750, 105 N. E. 474; Plummer v. Indianapolis Union Ry. Co., — Ind. App. —, 104 N. E. 601.

Iowa. Tullis v. H. S. Chase & Co., 162 Iowa 264; George v. Swafford, 75 Iowa 491.

Kentucky. Bowlin v. Archer, 157 Ky. 540.

Missouri. Riley v. City of Independence, 258 Mo. 671, 7 N. C. C. A. 191; Miller v. Kansas City Western R. Co., 180 Mo. App. 371.

Nebraska. Swift & Co. v. Holoubek, 60 Neb. 784.

Oklahoma. Kirk v. Territory, 10 Okla. 46, 60 Pac. 797.

South Dakota. Barker v. Coats, 34 S. D. 291.

Texas. St. Louis Southwestern Ry. Co. of Texas v. Evans, — Tex. Civ. App. —, 158 S. W. 1179; Texas & P. Ry. Co. v. Scruggs, 23 Tex. Civ. App. 712.

Utah. Smith v. Clark, 37 Utah

When a charge is merely a statement of an abstract principle of law, which under the pleadings and evidence can have no application to the case, it should not be given, and may be properly refused.²

The reason for the rule is that instructions which are not

116, 26 L. R. A. (N. S.) 953, 1912 B 1366n, 106 Pac. 653.

West Virginia. Wilhelm v. Parkersburg, M. & I. R. Co., — W. Va. —, 82 S. E. 1089.

It is an elementary rule of practice that instructions should be confined to the issues presented by the pleadings and evidence. Bowlin v. Archer, 157 Ky. 540.

Instructions must be based on the allegations in the declarations. McCabe v. Atchison, T. & S. F. Ry. Co., 154 Ill. App. 380; Dignan v. Anderson, 152 Ill. App. 522; Swanson v. Chicago City Ry. Co., 148 Ill. App. 135, aff'd 242 Ill. 388.

Instructions must be applicable to the pleadings. Brenton v. Newlin, 161 Ill. App. 168.

The theory of the instructions must follow that advanced by the pleadings. Allen v. Quercus Lumber Co., 182 Mo. App. 280.

Instructions must be within the purview both of the pleadings and the evidence. Degonia v. St. Louis, I. M. & S. R. Co., 224 Mo. 564.

A charge should not authorize a finding of liability on grounds not pleaded. St. Louis Southwestern Ry. Co. of Texas v. Evans, — Tex. Civ. App. —, 158 S. W. 1179.

2—**Alabama.** Thomas v. State, 126 Ala. 4.

California. People v. Hartman, 130 Cal. 487, 62 Pac. 823.

Illinois. Herrin & S. R. Co. v. Nolte, 243 Ill. 594; Lyons v. Joseph T. Ryerson & Son, 242 Ill. 409, rev'g

148 Ill. App. 284; Sibert v. Shoal Creek Coal Co., 181 Ill. App. 11; Hardin v. City of Moline, 179 Ill. App. 101; Schneider v. Chicago Rys. Co., 177 Ill. App. 334; Stack v. East St. Louis & S. Ry. Co., 152 Ill. App. 613; German-American Bank of Bloomington v. Owens, 143 Ill. App. 211; Chicago City Ry. Co. v. Reddick, 139 Ill. App. 160.

Kansas. State v. Goff, 62 Kan. 104, 61 Pac. 683, 10 Kan. App. 286, 61 Pac. 680.

Missouri. Fisher v. Central Lead Co., 156 Mo. 479; Lyons v. Carter, 84 Mo. App. 483.

Montana. Cuerth v. Arbogast, 48 Mont. 209, 136 Pac. 383; State v. Trosper, 41 Mont. 442, 109 Pac. 858.

Nebraska. Booth v. Andrus, 91 Neb. 810.

Oklahoma. Kennedy v. Goodman, 39 Okla. 470, 135 Pac. 936.

Texas. McKinney v. Thedford, — Tex. Civ. App. —, 166 S. W. 443.

Washington. Cook v. Danaher Lumber Co., 61 Wash. 118, 112 Pac. 245.

Wisconsin. Brunette v. Town of Gagen, 106 Wis. 618.

As a general proposition the court should not instruct in the abstract. Cook v. Danaher Lumber Co., 61 Wash. 118, 112 Pac. 245.

The proper office of an instruction is to submit questions of fact and not mere abstract propositions of law. Seago v. Paul Jones Realty Co., 185 Mo. App. 292.

applicable to the case, though abstractly correct, do not help the jury,³ and are apt to be misleading.⁴

A proposition may be correct in a sense and yet be inapplicable to the issues and misleading to the jury,⁵ and such instructions should be refused unless based on the facts of the case.⁶

3—*Nesbit v. Webb*, 115 Va. 362.
Abstract propositions should not be given for they afford the jury no aid. *Edwards v. Lee*, 147 Mo. App. 38.

4—**Florida.** *Florala Saw Mill Co. v. Smith*, 55 Fla. 447.

Illinois. *Connolly v. People's Gas, Light & Coke Co.*, 260 Ill. 162; *Sibert v. Shoal Creek Coal Co.*, 181 Ill. App. 11.

Missouri. *Seago v. Paul Jones Realty Co.*, 185 Mo. App. 292; *Grout v. Central Elec. R. Co.*, 151 Mo. App. 330.

Ohio. *Holmes v. Ashtabula Rapid Transit Co.*, 10 Ohio Cir. Dec. 638.

Texas. "Abstract propositions do not usually make the issue clear to the minds of the jurors." *Britain v. State*, 52 Tex. Cr. App. 169.

Wisconsin. *Collins v. City of Janesville*, 107 Wis. 436.

5—*Harmon v. Pohle*, 55 Ind. App. 439.

It is error to instruct on a subject not at issue, though in the abstract the rule of law announced is sound. *Oberlin v. Oregon-Washington R. & Nav. Co.*, 71 Ore. 177, 142 Pac. 554.

6—An instruction, though correct in law, should be refused unless there is a basis for it in the facts of the case, and the evidence or the pleadings make the instruction pertinent.

Alabama. *Pearson v. Adams*, 129

Ala. 157; *Thomas v. State*, 126 Ala. 4.

Georgia. *City Council of Augusta v. Owens*, 111 Ga. 464.

Illinois. *Hide & Leather Nat. Bank v. Alexander*, 184 Ill. 416, aff'g 82 Ill. App. 484; *Louisville, N. A. & C. Ry. Co. v. Shires*, 108 Ill. 617.

Iowa. *Sample v. Rand*, 112 Iowa 616; *Borland v. Chicago, M. & St. P. Ry. Co.*, 78 Iowa 94.

Kentucky. *Louisville & N. R. Co. v. Mattingly*, 22 Ky. L. Rep. 489; *The Blue Wing v. Buckner*, 12 B. Mon. 246.

Massachusetts. *Phillips v. Cornell*, 133 Mass. 546.

Michigan. *Henry C. Hart Mfg. Co. v. Mann's Boudoir Car Co.*, 65 Mich. 564.

Missouri. *De Donato v. Morrison*, 160 Mo. 581; *Bender v. Dungan*, 99 Mo. 126; *Gibson v. German-American Town Mut. Ins. Co.*, 85 Mo. App. 41; *Kaw Brick Co. v. Gogsett*, 82 Mo. App. 546.

Nevada. *Schafer v. Gilmer*, 13 Nev. 330.

North Carolina. *Porter v. White*, 128 N. C. 42.

Ohio. *Stewart v. Southard*, 17 Ohio, 402, 49 Am. Dec. 463.

South Carolina. *Long v. Hunter*, 58 S. C. 152.

Texas. *Missouri Pac. Ry. Co. v. Mitchell*, 75 Tex. 77; *Abernathy v. Southern Rock Island Plow Co.* (Tex. Civ. App.), 62 S. W. 786; *Houston*

If the rule stated is not applicable it ought not to be given; and if it is applicable it ought to be made so by the court that the jurors will understand its meaning.⁷ The giving of instructions not warranted by the pleadings and evidence is erroneous,⁸ and will warrant reversal if the jury were misled.⁹

& T. C. R. Co. v. George (Tex. Civ. App.), 60 S. W. 313; City of Dallas v. Beeman, 23 Tex. Civ. App. 315.

7—State v. Trosper 41 Mont. 442, 109 Pac. 858.

A jury of laymen ought not to be charged with making the application of an abstract proposition themselves. State v. Trosper, 41 Mont. 442, 109 Pac. 858.

8—California. People v. Tapia, 131 Cal. 647, 63 Pac. 1001; Sargent v. Linden Min. Co., 55 Cal. 204.

Colorado. Gibbs v. Wall, 10 Colo. 153, 14 Pac. 216; Matheson v. Kuhn, 15 Colo. App. 477, 63 Pac. 125.

Georgia. City Council of Augusta v. Owens, 111 Ga. 464.

Illinois. Chicago & A. R. Co. v. Bragonier, 119 Ill. 51; Chicago & A. R. Co. v. Robinson, 106 Ill. 142; Wabash R. Co. v. Stewart, 87 Ill. App. 446.

Indiana. Rapp v. Kester, 125 Ind. 79.

Iowa. Scott v. Chicago Great Western Ry. Co., 113 Iowa 381; State v. Kissock, 111 Iowa 690; Van Bergen v. Eulberg, 111 Iowa 139.

Kansas. First Nat. Bank of Arkansas City v. Skinner, 10 Kan. App. 517, 62 Pac. 705.

Minnesota. Wilcox v. Chicago, M. & St. P. R. Co., 24 Minn. 269.

Missouri. Haynes v. Town of Trenton, 108 Mo. 123; Pryor v. Metropolitan St. Ry. Co., 85 Mo. App. 367.

North Carolina. Johnson v. Bell, 74 N. C. 355.

Texas. Pullman Co. v. Hoyle, 52 Tex. Civ. App. 534; Stacy v. Greenwade, 26 Tex. Civ. App. 277; Duck v. St. Louis & S. W. Ry. Co. (Tex. Civ. App.), 63 S. W. 891; Western Union Tel. Co. v. Burgess (Tex. Civ. App.), 60 S. W. 1023; Dallas Rapid Transit Ry. Co. v. Campbell (Tex. Civ. App.), 26 S. W. 884; Ballew v. State (Tex. Cr. App.), 34 S. W. 616.

West Virginia. Britton v. South Penn. Oil Co., 73 W. Va. 792.

Wisconsin. McCann v. Ullman, 109 Wis. 574.

"It is prejudicial and reversible error to give an instruction founded upon a ground of liability not alleged in the declaration." Britton v. South Penn Oil Co., 73 W. Va. 792.

9—Where an instruction is outside of the case made by the pleadings and evidence, or submits issues not raised thereby, this will be a ground for reversal unless it is clear that the jury were not misled:

Missouri. Edwarda v. St. Louis, K. & S. Ry. Co., 79 Mo. App. 257.

South Carolina. Mason v. Southern Ry. Co., 58 S. C. 70, 53 L. R. A. 913, 79 Am. St. Rep. 826.

Texas. Love v. Wyatt, 19 Tex. 312; People's Building, Loan & Savings Ass'n v. Elliott (Tex. Civ. App.), 33 S. W. 545.

Virginia. Reed v. Com., 98 Va. 817.

The giving of an instruction not

“When instructions not authorized by the pleadings are given it is presumed that the complaining party was injured, because it must be assumed that he relied upon the fact that the issues would be confined to the statements of the pleadings,”¹⁰ and the harmful effect of such an erroneous instruction cannot be obviated merely by a correct instruction upon the same subject, but the attention of the jury must be specifically called to the previous error, and it must be expressly withdrawn.¹¹

Whether an instruction is to be considered as abstract is to be determined from the evidence as well as the instructions as a whole.¹²

§ 78. Same—Illustrations.

The trial judge is required to charge the jury to the extent of stating the evidence and the law arising thereon, and it is error to say, in an action, involving a controversy over the value of a hog: “Take the case, gentlemen, and settle it as between man and man.”¹³

Where the plaintiff relies in his pleadings on an express warranty, the court should limit recovery to a breach of such warranty; and it is error to instruct as to an implied warranty, as the tendency is to confuse the jury.¹⁴

Where no issue is raised by the pleadings and evidence as to the rental value of a sawmill, it is proper to refuse an

referring to the negligence charged is not reversible error where the jury are not misled as to what negligence is charged. *Cleveland, C., C. & St. L. R. Co. v. Surrells*, 115 Ill. App. 615.

10—*Western & A. R. Co. v. Sellers*, — Ga. App. —, 83 S. E. 445.

11—*Western & A. R. Co. v. Sellers*, — Ga. App. —, 83 S. E. 445.

12—*Cook v. Danaher Lumber Co.*, 61 Wash. 118, 112 Pac. 245.

Where a prayer or prayers neither point nor refer to the pleadings, the

question as to whether the prayer should be granted depends, not upon the state of the pleadings, but upon the evidence to which alone they refer. *Birney v. New York & W. Printing Tele. Co.*, 18 Md. 341, 81 Am. Dec. 607n.

13—*Blake v. Smith*, 163 N. C. 274.

14—*Burgess v. Felix*, 42 Okla. 193, 140 Pac. 1180. See also, *Gibbs v. Wall*, 10 Colo. 153, 14 Pac. 216; *Kennedy v. Goodman*, 39 Okla. 470, 135 Pac. 936.

instruction that such rental value may be considered in determining the rental value of land.¹⁵

An instruction as to actual damages for suing out an attachment is properly refused where no actual damages for the levy were claimed.¹⁶

In negligence cases, it is improper to give instructions involving the doctrine of the last clear chance, when not applicable to the facts in the case,¹⁷ and the same rule applies to the defense of contributory negligence¹⁸ or accident.¹⁹

It is also error to give an instruction submitting the issue whether plaintiff was a passenger, where this was not claimed by the pleadings or shown by the evidence.²⁰

An instruction to find for the plaintiff "if they believe from the evidence that the defendant is guilty of the acts of negligence complained of in the declaration" is misleading where there is no evidence to support the first count of the declaration.²¹

And in an action for injuries to a passenger, an instruction as to negligence in "increasing the speed" of the car,

15—*Fairchild v. Wilson*, — Tex. Civ. App. —, 168 S. W. 409.

16—*Bennett v. Foster*, — Tex. Civ. App. —, 161 S. W. 1078.

17—A requested instruction involving the doctrine of the last clear chance is properly refused when not applicable to the facts in a case. *Snow v. Indianapolis & E. R. Co.*, 47 Ind. App. 189.

The court does not err in failing to instruct on the doctrine of last clear chance, when that doctrine is not presented by the issues or evidence. *Plummer v. Indianapolis Union Ry. Co.*, — Ind. App. —, 104 N. E. 601.

18—Instructions on contributory negligence, correct in form, may be properly refused where such defense is not pleaded. *Bartley v. Marino*,

— Tex. Civ. App. —, 158 S. W. 1156.

Where contributory negligence is neither pleaded nor proved, error cannot be predicated on the omission from the instructions of reference to it. *Graham v. Sly*, 177 Mo. App. 348.

19—Error cannot be predicated on the refusal of an instruction to the effect that if an injury was caused by inevitable accident, plaintiff could not recover, where no such situation was disclosed by the pleadings or evidence. *Dunn v. Orchard Land Co.*, 68 Ore. 97, 136 Pac. 872.

20—*Missouri, K. & T. Ry. Co. v. Rodgers* (Tex. Civ. App.), 35 S. W. 412.

21—*J. J. Newman Lumber Co. v. Dantzler*, — Miss. —, 64 So. 931.

implying that the car was in motion when plaintiff alighted, was properly refused, where the pleadings and evidence claimed that the car "started with a jerk."²²

In an action for injuries sustained in a collision with a train, where excessive speed of the train was not an issue in the case, an instruction on such subject was properly refused.²³

An instruction that, "if you further find from all the evidence that said car, placed and left where you may find from the evidence it was placed and left, was an object apt to frighten horses of ordinary gentleness, * * * then you would be warranted in finding that defendant was guilty of negligence," is erroneous when it was not alleged that the car, placed as it was, was apt to frighten horses of ordinary gentleness.²⁴

The practice of submitting negligence of a defendant in general terms where specific acts of negligence are relied upon in the petition has been held reversible error,²⁵ but it has also been held not error to submit the specific issues involved and follow it with the abstract law covering the issue.²⁶

In an action for damages for the killing of a horse by a train at a crossing, where the pleadings involve no issue of wilfulness, the court is not required to instruct as to such issue.²⁷

In an action against a railroad company to recover for injuries received at a crossing, the court may and should refuse an instruction that the absence of a flagman from the crossing does not constitute wanton or wilful miscon-

22—Birmingham Railway, Light & Power Co. v. Moore, 163 Ala. 43.

23—Eaton v. Southern Pac. Co., 22 Cal. App. 461, 134 Pac. 801.

24—Fisk v. Chicago, M. & St. P. Ry. Co., 74 Iowa, 424.

25—Feldewerth v. Wabash R. Co., 181 Mo. App. 630.

26—In an action by a servant for

injuries, where the court defines the issues and submits the defense of a choice between places of work, it is not error to follow it with the abstract law covering the issue as defined. Cook v. Danaher Lumber Co., 61 Wash. 118, 112 Pac. 245.

27—Southern R. Co. v. Lawler, 11 Ala. App. 241.

duct, where it is not claimed that defendant's conduct is wanton or wilful.²⁸

An instruction based on a cause of action given by the Federal Twenty-eight Hour Law (Act June 29, 1906, ch. 3594, 34 Stat. 607) is erroneous where the petition is a mere common-law action for negligent delay in shipping cattle.²⁹

Instructions confining the right of recovery for injury to the provisions of the Federal Employers' Liability Act are properly refused where the facts do not bring the case within such act, and the cause is governed by the state act.³⁰

An instruction which permits the jury to give a greater sum as damages than is asked by the pleadings is improper.³¹

An instruction that in estimating damages the jury can consider whether the plaintiff's injuries were permanent is erroneous where there is no allegation in the petition that the injuries were permanent or no evidence showing such fact.³²

In an action for damages caused by the bursting of a water pipe, where there was nothing in the pleadings or evidence indicating that special damages were claimed because the accident occurred on Christmas eve, the refusal of instructions thereto was not error.³³

Where no claim was made in a complaint and no testimony was offered as to damages by reason of physician's fees or hospital expenses, an instruction disallowing such items was properly refused.³⁴

An instruction authorizing a finding of damages for

28—Louisville, N. A. & C. Ry. Co. v. Shires, 108 Ill. 617.

29—McFall v. Chicago, B. & Q. R. Co., 181 Mo. App. 142.

30—Vandalia R. Co. v. Stringer, — Ind. —, 106 N. E. 865.

31—Weller v. Missouri Lumber & Mining Co., 176 Mo. App. 243.

32—Salmon v. Chicago & A. R. Co., 181 Mo. App. 414.

33—Birmingham Water Works Co. v. Copeland, 161 Ala. 310.

34—Scheurmann v. Mathison, 67 Ore. 419, 136 Pac. 330.

washing or eroding of a plaintiff's land should not be given where there is no allegation of such washing or eroding.³⁵

In a criminal case, a requested charge that the policy of the law deems it better that many guilty persons shall escape rather than one innocent person should be convicted and punished is properly refused as a mere abstract principle of law.³⁶

On a trial for arson, an instruction which assumed that the defendant and another were jointly informed against, is properly refused where the information charged the direct offense against defendant alone.³⁷

A charge requiring the state to prove, in a homicide case, that the deceased did not know that the defendant had a pistol when the fight commenced is misleading when it hypothesizes a fact of which there was no evidence and raises a question not at issue.³⁸

§ 79. Limiting instructions to issues raised by pleadings.

It is a general rule that the instructions should not broaden the issues made by the pleadings or present issues not raised thereby,³⁹ and if a charge is requested which is

35—*Smith v. Sanitary Dist. of Chicago*, 260 Ill. 454.

36—*People v. Darr*, 179 Ill. App. 130.

37—*Goldberger v. People*, 45 Colo. 327, 101 Pac. 407.

38—*Hooten v. State*, 9 Ala. App. 9.

39—*Price v. St. Louis, I. M. & S. R. Co.*, 185 Mo. App. 432.

Instructions must be confined strictly to the issues made by the pleadings.

California. *Williams v. Southern Pac. R. Co.*, 110 Cal. 457, 42 Pac. 974.

Colorado. *Montgomery v. Colorado Springs & Interurban R. Co.*, 50 Colo. 210, 114 Pac. 659; *Jackson v. Ackroyd*, 15 Colo. 583, 26 Pac. 132.

Florida. *Hooker v. Johnson*, 10 Fla. 198.

Georgia. *Hambright v. Stover*, 31 Ga. 300.

Illinois. *Mosher v. Rogers*, 117 Ill. 446; *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883; *Shackelton v. Lawrence*, 65 Ill. 175; *Leach v. Nichols*, 55 Ill. 273. See also, cases in this note, *post*.

Indiana. *Inland Steel Co. v. Ilko*, 181 Ind. 72; *Lindley v. Sullivan*, 133 Ind. 588; *Lake Erie & W. R. Co. v. Ziebarth*, 6 Ind. App. 228.

Iowa. *Anderson v. Roberts*, 112 Iowa 749.

Kansas. *St. Louis & S. F. Ry. Co. v. Blinn*, 10 Kan. App. 468, 62 Pac. 427.

not relevant to an issue in the case, it should be refused,⁴⁰ and it is immaterial that it states a correct principle of law.⁴¹

The case made by the pleadings alone furnishes a basis

Michigan. Denman v. Johnston, 85 Mich. 387.

Minnesota. Morrow v. St. Paul City Ry. Co., 65 Minn. 382.

Mississippi. Brown v. Walker (Miss.), 11 So. 724.

Missouri. Melvin v. St. Louis & S. F. Ry. Co., 89 Mo. 106; Wade v. Hardy, 75 Mo. 394; Edwards v. St. Louis, K. & S. Ry. Co., 79 Mo. App. 257; Fairgrieve v. City of Moberly, 29 Mo. App. 142. See also, cases cited in this note, *post*.

Nebraska. Webster v. O'Shee, 13 Neb. 428.

North Carolina. Peebles v. Graham, 128 N. C. 218.

Oregon. Pearson v. Dryden, 28 Ore. 350, 43 Pac. 166.

Texas. Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338, 7 L. R. A. 217n, 16 Am. St. Rep. 893n; Rotan Grocery Co. v. Martin (Tex. Civ. App.), 57 S. W. 706; Stringer v. Singleterry (Tex. Civ. App.), 23 S. W. 1117; Waters-Pierce Oil Co. v. Cook, 6 Tex. Civ. App. 573.

Utah. Holt v. Pearson, 12 Utah 63, 41 Pac. 560.

Wisconsin. Austin v. Moe, 68 Wis. 458.

United States. Northern Pac. Ry. Co. v. Babcock, 154 U. S. 190, 38 L. Ed. 958.

The instructions must be neither broader nor more narrow than the pleadings. Waddingham v. Hulett, 92 Mo. 528; Crews v. Lackland, 67 Mo. 621; Iron Mountain Bank v. Murdock, 62 Mo. 70; George v. Wa-

bash Western Ry. Co., 40 Mo. App. 434.

The jury should neither be required nor allowed to pass on matters not in actual controversy in the case. Montgomery v. Colorado Springs & Interurban R. Co., 50 Colo. 210, 114 Pac. 659.

Instructions must be limited to the averments of the declaration. Presley v. Kinlock-Bloomington Tel. Co., 158 Ill. App. 220; Show v. Alton, G. & St. L. Traction Co., 152 Ill. App. 552; American Home Circle v. Schneider, 134 Ill. App. 600.

Instructions must be pertinent to the issues. West Chicago St. R. Co. v. McCafferty, 220 Ill. 476; Stickel v. Riverview Sharpshooters Park Co., 159 Ill. App. 110, *aff'd* 250 Ill. 452; Boden v. Kewanee Coal & Mining Co., 157 Ill. App. 484; Dudley v. Peoria Ry. Co., 153 Ill. App. 619; Houtz v. People, 123 Ill. App. 445.

Instructions must be relevant to some issuable fact in controversy. Inland Steel Co. v. Ilko, 181 Ind. 72; Detrich v. Metropolitan St. R. Co., 143 Mo. App. 176.

40—Blackman v. Webber, 161 Ill. App. 53; Nevada Co. v. Farnsworth, 42 C. C. A. 504, 102 Fed. 573.

41—Instructions not pertinent to the issues are properly refused though stating a correct principle of law. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, *aff'g* 124 Ill. App. 459; Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, *rev'g* 117 Ill. App. 183.

for recovery, and the issues cannot be changed by the instructions,⁴² or by the evidence.⁴³

It is error to submit issues raised by pleas to which demurrers have been sustained in the absence of an amendment,⁴⁴ and a requested instruction on the theory of confession and avoidance is properly refused where the only answer is a general denial.⁴⁵

The general rule, however, has its qualifications. The jury are not supposed to know and in practice do not in fact know the issues raised by the pleadings, except in the most general way when viewed from a legal standpoint. To them all the evidence introduced, unless excluded by the court, is to be considered as having a bearing on the case. It is therefore proper to limit, explain and declare the legal effect of particular evidence by the instructions.⁴⁶

42—*Christian v. Connecticut Mut. Life Ins. Co.*, 143 Mo. 460; *Glass v. Gelvin*, 80 Mo. 297; *Iron Mountain Bank v. Murdock*, 62 Mo. 73; *Wright v. Fonda*, 44 Mo. App. 634; *Frederick v. Kinzer*, 17 Neb. 366.

43—Instructions should not be broader than the issues made by the pleadings, however wide the scope of the evidence may be. *Scrivner v. Missouri Pac. R. Co.*, 260 Mo. 421, 6 N. C. C. A. 649.

There can be no evidence on which to base instructions, if that evidence overthrows the pleadings of the party who introduces it. *Capital Bank v. Armstrong*, 62 Mo. 65.

The issues to be raised in a cause must be raised by the pleadings, and cannot be enlarged either by the evidence or the instructions, nor, indeed, by both combined. *Christian v. Connecticut Mut. Life Ins. Co.*, 143 Mo. 460.

44—*Georgia*. See *Heath v. Smith*, 142 Ga. 106.

Iowa. *Whitsett v. Chicago, R. I.*

& P. Ry. Co., 67 Iowa 150; *Sioux City & P. R. Co. v. Walker*, 49 Iowa 273.

Michigan. *Pettibone v. Smith*, 37 Mich. 579; *Comstock v. Norton*, 36 Mich. 278.

Missouri. *Kenney v. Hannibal & St. J. R. Co.*, 70 Mo. 252.

Nebraska. *Dunbier v. Day*, 12 Neb. 596, 41 Am. Rep. 772n.

New Jersey. *Sweet v. Excelsior Elec. Co. (N. J. L.)*, 31 Atl. 721.

Texas. *Texas & P. Ry. Co. v. French*, 86 Tex. 96; *Love v. Wyatt*, 19 Tex. 312; *Trout v. McQueen* (Tex. Civ. App.), 62 S. W. 928; *Galveston, H. & S. A. Ry. Co. v. Herring* (Tex. Civ. App.), 36 S. W. 129; *Hartford Fire Ins. Co. v. Josey*, 6 Tex. Civ. App. 290.

A failure to instruct on issues not involved in a case is not error. *Heath v. Smith*, 142 Ga. 106.

45—*Omohundro v. Emerson*, 80 Mo. App. 313.

46—*Price v. St. Louis, I. M. & S. R. Co.*, 185 Mo. App. 432.

In general it is better practice to follow as nearly as possible the charges in the petition,⁴⁷ but when it is clear from the petition, evidence and instructions that the issue was in fact not broadened, reversible error is not made out.⁴⁸

Where, in the progress of the trial, all the issues raised by the pleadings have been eliminated save one, it is not error for the court to withdraw from the consideration of the jury all questions presented by the pleadings save that one.⁴⁹

It is the duty of the court to charge the jury in accordance with the interpretation of the pleadings acted upon by the parties,⁵⁰ and where the precise issues raised by the pleadings are disregarded by both parties, and a defense raised not covered by the pleadings, it is error for the court to instruct the jury that they cannot consider such defense.⁵¹ The reviewing court cannot consider an objection to instructions on the ground that they relate to an issue not in the case, if the party objecting has asked instructions on that issue.⁵² An instruction to disregard an element of the case made by the pleadings, but which the evidence wholly fails to establish, should be given if requested;⁵³ and "where there are defective counts in the declaration, it is error in the court to refuse to instruct the jury to disregard them."⁵⁴ A variance between the pleadings and

47—*Quinley v. Springfield Traction Co.*, 180 Mo. App. 287.

48—*Quinley v. Springfield Traction Co.*, 180 Mo. App. 287.

49—*Scholtz v. Northwestern Mut. Life Ins. Co.*, 40 C. C. A. 556, 100 Fed. 573.

50—*Blum v. Whitworth*, 66 Tex. 350.

Where the plaintiff seeks to recover on a contract which the answer denies, and the answer sets up a different contract, and alleges non-compliance by plaintiff, and the

cause is tried on the theory of a contract as set up in the answer, it is erroneous to instruct the jury on the theory of a contract as alleged in the complaint. *Fox v. Utter*, 6 Wash. 299, 33 Pac. 354.

51—*Brusie v. Peek Bros. & Co.*, 135 N. Y. 622.

52—*Hahn v. Miller*, 60 Iowa 96.

53—*Chicago Bridge & Iron Co. v. Hayes*, 91 Ill. App. 269; *Lange v. Wiegand*, 125 Mich. 647.

54—An instruction that the plaintiff must prove each and every ma-

evidence may be waived so as to authorize an instruction broader than the issues waived by the pleadings;⁵⁵ but this doctrine cannot be extended to cases where the evidence is so widely variant from the pleadings that the facts thereby established constitute a cause of action or defense different from the one set up in the pleadings, for even the most liberal statute relating to amendments would not permit a pleading to be so amended as to state a cause of action or defense entirely different from the one alleged in the original pleading.⁵⁶

§ 80. Same—Illustrations.

An instruction in general terms that, if a contract was procured by fraud, the jury should find a general verdict for one of the parties, invites the jury to explore a field unbounded by the pleadings, and permits them, unguided by the principles by which fraud is determined, to find its existence and pertinency to the case upon mere conjecture, and such instruction is erroneous.⁵⁷

Where the gravamen of a cause of action is negligence in allowing an engine unnecessarily to emit steam, producing a loud and unusual noise, instructions enlarging the cause of action by including negligence in failing to discontinue the noise after the engineer saw that the horses were terrified, are erroneous.⁵⁸

Where the real issue, in an action for injuries, was whether a master failed to exercise ordinary care in safe-keeping dynamite, an instruction as to the duty of defendant to keep the premises in safe condition is erroneous.⁵⁹

terial allegation in the declaration, or some count thereof, before he is entitled to recover, is erroneous where the declaration contains defective counts. *Chicago & A. R. Co. v. Eselin*, 86 Ill. App. 94.

55—*Boyce v. California Stage Co.*, 25 Cal. 460.

56—See *Savannah, F. & W. Ry. Co. v. Tiedeman*, 39 Fla. 196; *Whit-*

man v. Keith, 18 Ohio St. 134; *Comegys v. American Lumber Co.*, 8 Wash. 661, 36 Pac. 1087.

57—*Wells v. Houston*, 23 Tex. Civ. App. 629.

58—*Maynard v. Chicago, B. & Q. R. Co.*, 155 Mo. App. 352.

59—*Cincinnati, N. O. & T. P. R. Co. v. Padgett*, 158 Ky. 301.

In an action for the death of a person killed while boarding a street car, an instruction as to whether the car started "suddenly and with great force" is not objectionable though the petition charged that the car started "with a jerk."⁶⁰

It has also been held that failure to limit recovery to the negligence charged is not error where no other negligence is proved and other instructions contain the limitation.⁶¹

§ 81. Same—Criminal cases.

In criminal cases, instructions should be confined to the offense charged, and which the evidence tends to show was committed.⁶²

It is error and ground for reversal to give charges which justify the jury in convicting the defendant of an offense other than that charged in the indictment, or which enables the jury to find the defendant guilty of the offense charged on a ground not set forth in the indictment.⁶³

Where an indictment charges a defendant with unlawfully disposing of certain personal property, subject to a valid subsisting deed of trust, a charge authorizing conviction for a sale occurring about ten months after the return of the indictment is illegal and unauthorized.⁶⁴ And where a defendant is being tried for murder in the second degree, it is improper to charge the jury on the law relating to murder in the first degree.⁶⁵

60—*Johnson v. Metropolitan St. R. Co.*, 177 Mo. App. 298.

61—*Springfield Consol. R. Co. v. Puntenney*, 101 Ill. App. 95, aff'd 200 Ill. 9.

62—*People v. Jones*, 263 Ill. 564.

63—*People v. Mulkey*, 65 Cal. 501, 4 Pac. 507; *Coney v. State*, 43 Tex. 414; *Bacchus v. State*, 18 Tex. App. 15; *Mason v. State*, 7 Tex. App. 623. See also, generally, *Pena v. State* (Tex. Cr. App.), 63 S. W. 311, wherein an instruction was held not to depart from the indictment.

"The question of whether it is proper to submit to the jury the question of the defendant's guilt of any particular grade of offense included in the indictment must be answered by considering whether there is evidence which would justify a conviction for that offense." *Allison v. State*, 74 Ark. 444.

64—*Fox v. State*, 61 Tex. Cr. App. 341.

65—*State v. Walton*, 74 Mo. 270.

§ 82. Necessity of basing instructions on evidence.

It is elementary that all instructions to the jury should be applicable to and limited to the evidence adduced in the cause;⁶⁶ and it is error to give instructions based on a state of facts which there is no evidence tending to prove,⁶⁷ or

66—*Metallic Gold Min. Co. v. Watson*, 51 Colo. 278, Ann. Cas. 1913 A 1276n, 117 Pac. 609; *Schlauder v. Chicago & S. Traction Co.*, 253 Ill. 154; *People v. Rischo*, 262 Ill. 596; *Lyons v. Joseph T. Ryerson & Son*, 242 Ill. 409.

Instructions must be applicable to the facts shown. *People v. Whitlow*, 24 Cal. App. 1, 139 Pac. 826.

Charges must be predicated on facts in proof and must be applicable to such facts. *Davis v. State*, 66 Fla. 349.

Charges should be confined to the evidence. *Florida East Coast R. Co. v. Carter*, 67 Fla. 335.

Instructions must be predicated on the evidence admitted. *Mithen v. Jeffery*, 259 Ill. 372; *Illinois Match Co. v. Chicago, R. I. & P. R. Co.*, 250 Ill. 396; *Greenburg v. S. D. Childs & Co.*, 242 Ill. 110; *Boldenwick v. Cahill*, 187 Ill. 218, aff'g 86 Ill. App. 561; *Pegram v. Mutual Protective League*, 159 Ill. App. 214; *Colekin v. Bamorough*, 159 Ill. App. 130; *Boyd v. Carterville Coal Co.*, 158 Ill. App. 490; *Linberg v. City of Rock Island*, 157 Ill. App. 527; *Renken v. Chicago, B. & Q. R. Co.*, 156 Ill. App. 65; *Cessna v. United States Life Endowment Co.*, 152 Ill. App. 653; *Brennen v. Chicago & C. Coal Co.*, 147 Ill. App. 263, aff'd 241 Ill. 610; *Wiemer v. Temple*, 145 Ill. App. 498; *Donk Bros. Coal & Coke Co. v. Stoeter*, 133 Ill. App. 199, rev'd 229 Ill. 134.

The giving of instructions not

based on the evidence is error. *Stevens v. Chicago Feather Co.*, 178 Ill. App. 455; *Jones v. Vickers*, 173 Ill. App. 481; *Lepman v. Employers Liability Assur. Corporation, Ltd., of London*, 170 Ill. App. 379.

It is the duty of the court to instruct the jury as to the law applicable to the facts when evidence is received without objection. *Missouri River Transp. Co. v. Minneapolis & St. L. R. Co.*, 34 S. D. 1.

Where there is no evidence upon an issue raised by the pleadings, that issue should not be submitted to the jury. *Bowlin v. Archer*, 157 Ky. 540.

67—*Alabama*. *Thomas v. State*, 126 Ala. 4.

Arkansas. *Gaines v. Bard*, 57 Ark. 615, 38 Am. St. Rep. 266.

California. *People v. Kelly*, 133 Cal. 1, 64 Pac. 1091.

Colorado. *Johnson v. Jones*, 16 Colo. 138, 26 Pac. 584; *Fisk v. Greeley Electric Light Co.*, 3 Colo. App. 319, 33 Pac. 70.

Connecticut. *Lewis v. Phoenix Mut. Life Ins. Co.*, 44 Conn. 88.

Florida. *Savannah, F. & W. Ry. Co. v. Tiedeman*, 39 Fla. 196.

Georgia. *Maxwell v. Pritchard*, 113 Ga. 598; *City of Americus v. Ansley*, 14 Ga. App. 707.

Idaho. *Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295.

Illinois. *Farlow v. Town of Camp Point*, 186 Ill. 256.

Indiana. *Indianapolis Traction & Terminal Co. v. Hensley*, — Ind. —,

which the undisputed evidence in the case shows does not

105 N. E. 474, 6 N. C. C. A. 750;
Shilling v. Braniff, 25 Ind. App. 676.

Iowa. Anderson v. Roberts, 112
Iowa 749; State v. Kissock, 111
Iowa 690; State v. Swallum, 111
Iowa 37.

Michigan. Slingerland v. Keyser,
127 Mich. 7; Fletcher v. Post, 104
Mich. 424.

Minnesota. Mittwer v. Stremel,
69 Minn. 19.

Mississippi. Ellerbe v. State, 79
Miss. 10; Ivy v. Walker, 58 Miss.
253.

Missouri. Ephland v. Missouri
Pac. Ry. Co., 137 Mo. 187, 35 L. R. A.
107, 59 Am. St. Rep. 498; Och v.
Missouri, K. & T. Ry. Co., 130 Mo.
27, 36 L. R. A. 442; Small v. Polar
Wave Ice & Fuel Co., 179 Mo. App.
456.

Montana. Huntoon v. Lloyd, 7
Mont. 365, 16 Pac. 573.

Nebraska. Zancanella v. Omaha
& C. B. St. R. Co., 93 Neb. 774, 6
N. C. C. A. 330.

North Carolina. State v. Pearce,
46 N. C. 251; Pollard v. Teel, 25
N. C. 470; Jones v. Eason, 24 N. C.
331.

Ohio. Morgan v. State, 48 Ohio
St. 371; Donald v. State, 21 Ohio
Cir. Ct. 124, 11 Ohio Cir. Dec. 483.

Oklahoma. Levy Bros. v. West-
ern U. Tel. Co., 39 Okla. 416, 135 Pac.
423; Kirk v. Territory, 10 Okla. 46,
60 Pac. 797.

Oregon. Emison v. Owyhee Ditch
Co., 37 Ore. 577, 62 Pac. 13; Breon
v. Henkle, 14 Ore. 494, 13 Pac. 289.

Pennsylvania. Hasson v. Klee,
168 Pa. 510.

South Dakota. Bockoven v. Board
Sup'rs Lincoln Tp., 13 S. D. 317.

Tennessee. Graham v. Fidelity
Mut. Life Ass'n, 98 Tenn. 48.

Texas. Dorsey Printing Co. v.
Gainesville Cotton Seed Oil Mill &
Gin Co., 25 Tex. Civ. App. 456;
Thompson Sav. Bank v. Gregory
(Tex. Civ. App.), 59 S. W. 622.

Utah. Chapman v. Southern Pac.
Co., 12 Utah 30, 41 Pac. 551.

Vermont. Good v. Knox, 64 Vt.
97.

Virginia. Baltimore & O. R. Co.
v. Few's Ex'rs, 94 Va. 82; Bartley
v. McKinney, 28 Grat. 750.

Washington. Miller v. Territory,
3 Wash. T. 554, 19 Pac. 50.

West Virginia. Gay v. Gay, — W.
Va. —, 83 S. E. 75; Oliver v. Ohio
River R. Co., 42 W. Va. 703; Storrs
v. Feick, 24 W. Va. 606; Lawson v.
Dalton, 18 W. Va. 766.

Wisconsin. Eggett v. Allen, 106
Wis. 633.

United States. Keyser v. Hitz,
133 U. S. 138, 33 L. Ed. 531; North-
ern Pac. R. Co. v. Paine, 119 U. S.
561, 30 L. Ed. 513; United States v.
Breitling, 20 How. 252, 15 L. Ed.
900; Michigan Ins. Bank v. Eldred,
9 Wall. 544, 19 L. Ed. 763; Chicago
City v. Robbins, 2 Black 418, 17 L.
Ed. 298.

"It is error to submit as a predi-
cate of liability something which
there is no evidence to support or
which in no way gave rise to
or contributed to produce the injury
or loss for which a recovery is
sought." Small v. Polar Wave Ice
& Fuel Co., 179 Mo. App. 456.

"The only result of such an in-
struction is to create a false issue
for the jury to consider and thereby
prejudice plaintiff's rights." Levy

exist,⁶⁸ even though such instructions contain correct statements of law.⁶⁹

Requested instructions affected with this vice may and should be refused.⁷⁰

Bros. v. Western U. Tel. Co., 39 Okla. 416, 135 Pac. 423.

68—**City Council of Augusta v. Owens**, 111 Ga. 464; **Fisher v. Central Lead Co.**, 156 Mo. 479; **Wells v. Houston**, 23 Tex. Civ. App. 629; **Garcia v. State** (Tex. Cr. App.), 61 S. W. 122.

69—**Alabama. Pearson v. Adams** (Ala.), 29 So. 977.

California. People v. Hartman, 130 Cal. 487, 62 Pac. 823.

Colorado. Almond v. People, 55 Colo. 425, 135 Pac. 783.

Iowa. Whitsett v. Chicago, R. I. & P. Ry. Co., 67 Iowa 150; **Bank of Monroe v. Anderson Bros. Min. & Ry. Co.**, 65 Iowa 692; **Farr v. Fuller**, 8 Iowa 347; **Moffitt v. Cressler**, 8 Iowa 122.

Kansas. State v. Goff, 62 Kan. 104, 61 Pac. 683; **City of Kinsley v. Morse**, 40 Kan. 577, 20 Pac. 217; **State v. Whitaker**, 35 Kan. 731, 12 Pac. 106; **State v. Goff**, 10 Kan. App. 286, 61 Pac. 680.

Kentucky. Sutton v. Menser, 6 B. Mon. 434.

Mississippi. Parker v. State, 55 Miss. 414.

Missouri. Lyons v. Carter, 84 Mo. App. 483.

70—**Alabama. Davis v. State**, — Ala. —, 66 So. 67; **Barfield v. Evans**, — Ala. —, 65 So. 928; **Johnson v. Carden**, — Ala. —, 65 So. 813; **Webb & Bros. v. Story**, 184 Ala. 583; **Kirkwood v. State**, 184 Ala. 9; **Hudson v. State**, 11 Ala. App. 116; **Watson v. State**, 8 Ala. App. 414.

Arkansas. Thompson v. Bertrand, 23 Ark. 730.

California. People v. Shears, 133 Cal. 154, 65 Pac. 295; **Comptoir D'Escompte de Paris v. Dresbach**, 78 Cal. 15, 20 Pac. 28.

Florida. Richard v. State, 42 Fla. 528; **Mayer v. Wilkins**, 37 Fla. 244.

Illinois. Gibbons v. Aurora, E. & C. R. Co., 263 Ill. 266; **Brainard v. Brainard**, 259 Ill. 613; **Lyons v. Joseph T. Ryerson & Son**, 242 Ill. 409; **Belt R. Co. of Chicago v. Confrey**, 209 Ill. 344; **Rankin v. Sharples**, 206 Ill. 301; **Phillips v. Town of Scales Mound**, 195 Ill. 353; **Powers v. City of Chicago**, 180 Ill. App. 355; **Christensen v. Oscar Daniels Co.**, 170 Ill. App. 59; **King v. Gray**, 160 Ill. App. 259; **Stack v. East St. Louis & S. Ry. Co.**, 152 Ill. App. 613, aff'd 245 Ill. 308; **Coats v. Chicago, R. I. & P. Ry. Co.**, 144 Ill. App. 81; **Hanreddy v. Palilinnas**, 139 Ill. App. 148; **Thorne v. Crawford**, 17 Ill. App. 395.

Indiana. Brooks v. Muncie & P. Trac. Co., 176 Ind. 298; **Goodbar v. Lidikey**, 136 Ind. 1, 43 Am. St. Rep. 296; **City of Newcastle v. Harvey**, 54 Ind. App. 243; **Citizens' St. Ry. Co. v. Merl**, 26 Ind. App. 284; **Mullen v. Bower**, 26 Ind. App. 253.

Iowa. Hamilton Buggy Co. v. Iowa Buggy Co., 88 Iowa 364; **Norris v. Kipp**, 74 Iowa 444; **Messer v. Reginnitter**, 32 Iowa 312.

Michigan. Farrand v. Aldrich, 85 Mich. 593.

Minnesota. Weber v. McClure, 44 Minn. 407.

Mississippi. Browning v. State, 30 Miss. 656.

Missouri. State v. Furgerson, 162

It is improper to give instructions containing a statement of general propositions of law, not warranted by the facts in the case, whether the propositions as stated are correct or not, and requests for such instructions may always be refused.⁷¹ The reason why such instructions should not be

Mo. 668; *John Deere Plow Co. v. Sullivan*, 158 Mo. 440; *Harris v. Pew*, 185 Mo. App. 275; *Wood v. Kelly*, 82 Mo. App. 598; *Plummer v. City of Milan*, 79 Mo. App. 439, 1 Mo. App. Rep'r 600.

Nebraska. *Omaha Loan & Trust Co. v. Douglas County*, 62 Neb. 1.

North Carolina. *Carson v. Norfolk & C. R. Co.*, 128 N. C. 95.

Oklahoma. *Shuler v. Collins*, 40 Okla. 126, 136 Pac. 752.

Oregon. *Turner v. Loey*, 37 Ore. 158, 61 Pac. 342.

South Carolina. *Youngblood v. South Carolina & G. R. Co.*, 60 S. C. 9, 85 Am. St. Rep. 824n.

Texas. *Blount v. Henry*, — Tex. Civ. App. —, 160 S. W. 418; *Cohen v. Cohen*, 26 Tex. Civ. App. 315; *Taylor v. State* (Tex. Cr. App.), 63 S. W. 330; *Bailey v. State*, 42 Tex. Cr. App. 289; *Gann v. State* (Tex. Cr. App.), 59 S. W. 896; *Jessel v. State*, 42 Tex. Cr. App. 72; *Martinez v. State* (Tex. Cr. App.), 57 S. W. 670.

Utah. *Beaman v. Martha Washington Min. Co.*, 23 Utah 139, 63 Pac. 631.

Virginia. *Peek v. City of Hampton*, 115 Va. 855; *Fire Ass'n of Philadelphia v. Hogwood*, 82 Va. 342.

Washington. *Traver v. Spokane St. Ry. Co.*, 25 Wash. 225, 65 Pac. 284.

West Virginia. *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700; *State v. Greer*, 22 W. Va. 801.

Wisconsin. *Thayer v. Davis*, 75 Wis. 205.

United States. *Northern Pac. R. Co. v. Paine*, 119 U. S. 561, 30 L. Ed. 513.

Charges failing to predicate the several postulated findings or mental state of the jury as based upon the evidence may be refused. *Barfield v. Evans*, — Ala. —, 65 So. 928.

It is not error to refuse an instruction based upon a state of facts, to support which there is no testimony. *Shuler v. Collins*, 40 Okla. 126, 136 Pac. 752.

Where the evidence is conflicting the court does not err in refusing an instruction which hypothesizes a predicate of uncontradicted physical facts. *Harris v. Pew*, 185 Mo. App. 275.

In an action of trespass to try title, where an instruction attempts to submit a mere abstract proposition of law, not warranted by the facts, it is properly refused. *Blount v. Henry*, — Tex. Civ. App. —, 160 S. W. 418.

71—**Alabama.** *Golding v. Merchant*, 43 Ala. 705.

Arkansas. *Marshall v. Sloan*, 26 Ark. 513.

California. *Aguirre v. Alexander*, 58 Cal. 21; *People v. Dallen*, 21 Cal. App. 770, 132 Pac. 1064.

Florida. *German American Lumber Co. v. Barrett*, 66 Fla. 181.

Illinois. *White v. St. Louis Transfer Co.*, 161 Ill. App. 133.

given is that they do not attain the end which courts should always keep in mind,—that of enlightening the jury,—but tend to confuse and mislead, in that they direct the attention of the jury to issues not involved,⁷² and are likely to cause the jury to believe that there is evidence to prove the facts referred to in the instructions, when, as a matter of fact, there is no such evidence.⁷³

“If a court gives a jury the rules of law directly applicable to the consideration of the case it is sufficient and any attempt to go into a discussion of the philosophy of such rules or reasons for their existence is more apt to divert attention from the case on trial and befog the real issue to be determined, than to aid in a proper decision of the controversy between the parties.”⁷⁴ A charge, as to its suf-

Iowa. *Withey v. Fowler Co.*, 164 Iowa 377.

Kentucky. *Steamboat Blue Wing v. Buckner*, 12 B. Mon. 249.

Mississippi. *Co-operative Life Ass'n v. McConnico*, 53 Miss. 239.

Missouri. *State v. Donnelly*, 130 Mo. 642.

South Dakota. *Klaveness v. Freese*, 33 S. D. 263.

Texas. *Norvell v. Oury*, 13 Tex. 31; *Burney v. State*, 21 Tex. App. 565.

Virginia. *Buster's Ex'r v. Wallace*, 4 Hen. & M. 82.

United States. *Haines v. McLaughlin*, 135 U. S. 584, 34 L. Ed. 290.

Where instructions state mere abstract legal propositions without any suggestion or direction for their proper application to the case, there is no error in refusing them. *Withey v. Fowler Co.*, 164 Iowa 377.

It is not error to fail or refuse to give an instruction which, although it correctly states an abstract principle of law, is not applicable to the

evidence or to the theory upon which the case was tried. *Klaveness v. Freese*, 33 S. D. 263.

72—*Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272.

Instructions framed to cover vague and possible conditions arising from the evidence would tend to confuse and obscure the issues. *Dunkin v. City of Hoquiam*, 56 Wash. 47, 105 Pac. 149.

73—**Arkansas.** *Felker v. State*, 54 Ark. 489; *Little Rock & Ft. S. Ry. Co. v. Trotter*, 37 Ark. 593.

Iowa. *Moorehead v. Hyde*, 38 Iowa 382.

Michigan. *Lacy v. Wilson*, 24 Mich. 479.

Texas. *Houston & T. C. Ry. Co. v. Rider*, 62 Tex. 267.

74—*Long v. Ottumwa Railway & Light Co.*, 162 Iowa 11.

The court should refuse prayers for instructions which are merely abstract, and involve excursions into the broad and extended fields of legal science for the purpose of establishing legal principles having no rel-

iciency or insufficiency, is to be examined and tested by its applicability to the facts adduced in evidence;⁷⁵ and no instruction should be given to a jury which is not predicated upon some theory deducible from at least some portion of the evidence.⁷⁶

An instruction as to matters merely offered in evidence is erroneous.⁷⁷ A requested instruction that there is no evidence to sustain a particular allegation or theory should be refused where there is in fact competent evidence in support of such allegations;⁷⁸ and an instruction based upon the theory of the nonexistence of a fact or evidence of a fact which there was evidence tending to prove, is erroneous, and should be refused where there was evidence from which the jury might find the fact.⁷⁹

§ 83. Same—Incompetent evidence.

As a general rule, if evidence not admissible under the pleadings is admitted over objections made at the proper time, it is error to give instructions based on such evidence,⁸⁰ and a number of decisions also declare that instruc-

evancy to the controversy between the parties. *State v. Reigart*, 1 Gill (Md.) 1, 39 Am. Dec. 628.

75—*Brown v. State*, 6 Tex. App. 286.

76—*People v. Sanchez*, 24 Cal. 17.

77—*Henline v. Brady*, 110 Ill. App. 75.

78—*Liner v. State*, 124 Ala. 1; *Cederson v. Oregon Railroad & Navigation Co.*, 38 Ore. 343, 63 Pac. 763, 62 Pac. 637. See also, *People v. Lem Deo*, 132 Cal. 199, 64 Pac. 265; *State v. Horton Land & Lumber Co.*, 161 Mo. 664; *Cowell v. Phoenix Ins. Co.*, 126 N. C. 684.

79—*Alabama. Liner v. State*, 124 Ala. 1.

Illinois. Caruthers v. Balsley, 89 Ill. App. 559

North Carolina. Cowell v. Phoenix Ins. Co., 126 N. C. 684.

Texas. Nehring v. McMurrian (Tex.), 57 S. W. 943; *McGee v. West* (Tex. Civ. App.), 57 S. W. 928; *Bailey v. State*, 42 Tex. Cr. App. 289.

80—*Arkansas. Dickerson v. Johnson*, 24 Ark. 251.

Illinois. Illinois Cent. R. Co. v. McKee, 43 Ill. 119.

Iowa. Willits v. Chicago, B. & K. C. Ry. Co., 80 Iowa 531.

Michigan. Miller v. Prussian Nat. Ins. Co., 158 Mich. 402.

Missouri. Harding v. Wright, 119 Mo. 1; *Weaver v. Hendrick*, 30 Mo. 502.

New York. Shrimpton & Sons v. Dworsky, 2 Misc. 123.

Washington. Dunkin v. City of

tions based on evidence outside of the issues raised by the pleadings are erroneous and should not be given, even though no objection was taken to the admission of the evidence.⁸¹ But according to a considerable number of decisions, if evidence incompetent under the pleadings is admitted without objection at the time, the court, in charging the jury, is not confined to that part of the evidence which was properly admitted, but may instruct the jury on the legal effect of the incompetent evidence.⁸²

Hoquiam, 56 Wash. 47, 105 Pac. 149.

The reasons for this rule are so obvious that it is impossible that there could be any conflict of opinion about its propriety.

There are numerous decisions in cases where incompetent evidence was admitted, and instructions applicable thereto given, holding that the giving of such instructions was erroneous. These cases do not disclose whether timely objections to the admission of the evidence were made or not, and there is no way of determining whether the instructions would have been considered erroneous, in case the evidence was not objected to:

Iowa. *Roberts v. Richardson*, 39 Iowa 290.

Kansas. *Atchison, T. & S. F. R. Co. v. Miller*, 39 Kan. 419, 18 Pac. 486.

Missouri. *Iron Mountain Bank v. Murdock*, 62 Mo. 73; *Camp v. Heelan*, 43 Mo. 591; *Moffatt v. Conklin*, 35 Mo. 453; *Matson v. Frazer*, 48 Mo. App. 302.

Nebraska. *McCready v. Phillips*, 44 Neb. 790.

New York. *Finck v. Schaubacher*, 34 Misc. 547.

Ohio. *Cleveland, P. & E. R. Co. v. Nixon*, 21 Ohio Cir. Ct. R. 736.

Oregon. *Buchtel v. Evans*, 21 Ore. 309, 28 Pac. 67; *Woodward v. Oregon Ry. & Nav. Co.*, 18 Ore. 289, 22 Pac. 1076.

Virginia. *Richmond Ry. & Elec. Co. v. Bowles*, 92 Va. 738.

81—**Missouri**. *Paretti v. Rebenack*, 81 Mo. App. 494; *Safety Fund Nat. Bank of Fitchburg v. Westlake*, 21 Mo. App. 565.

Oregon. *Coos Bay R. Co. v. Siglin*, 26 Ore. 387, 38 Pac. 192.

Texas. *McKinney v. Fort*, 10 Tex. 220; *Texas & P. Ry. Co. v. Durrett*, 24 Tex. Civ. App. 103. See also, *Dingee v. Unrue's Adm'x*, 98 Va. 247.

The fact that evidence not admissible under the pleadings is admitted without objection will not warrant instructions based thereon, unless the pleadings are amended so as to conform to the evidence, *Kirby v. Wabash Ry. Co.*, 85 Mo. App. 345.

82—**Georgia**. *Central R. Co. v. Hubbard*, 86 Ga. 623; *Georgia R. Co. v. Lawrence*, 74 Ga. 534; *Ocean Steamship Co. v. Williams*, 69 Ga. 252; *Georgia Railroad & Banking Co. v. Oaks*, 52 Ga. 410.

Iowa. *Collins v. Collins*, 46 Iowa 60.

Minnesota. *Qualy v. Johnson*, 80 Minn. 408.

Where one party introduces evidence against the objection of the other, he cannot complain that an instruction based on such evidence is outside the issues made by the pleadings.⁸³ And in a suit on a note in which the issue is whether defendant indorsed it, it cannot be objected by defendant that the court instructed on the rights of a bona fide holder of an altered instrument, where a converse instruction on the same subject was given at defendant's request.⁸⁴

§ 84. Same—Withdrawn or excluded evidence.

An instruction based on excluded evidence is properly refused, even though such evidence was erroneously excluded.⁸⁵

When evidence has been admitted and subsequently withdrawn, or has been excluded when offered, it cannot be considered by the jury for any purpose, and it is therefore error to give instructions based upon such evidence.⁸⁶

§ 85. Same—Stating exceptions to general rules announced in other instructions.

When an instruction lays down a general rule of law applicable to the testimony, but does not state that the rule is subject to exceptions within which the evidence fairly tends to bring the case, it is misleading;⁸⁷ but if there is

Pennsylvania. *Scott v. Sheakly*, 3 Watts 50. See also, *Chafee v. City of Aiken*, 57 S. C. 507.

83—*Bowen v. Carolina, C. G. & C. Ry. Co.*, 34 S. C. 217.

84—*Iron Mountain Bank v. Armstrong*, 92 Mo. 265.

85—*Smith v. Sanitary Dist. of Chicago*, 260 Ill. 453.

86—**Arkansas.** *Atkinson v. Gatcher*, 23 Ark. 101; *Pleasants v. Scott*, 21 Ark. 371.

Illinois. *Smith v. Sanitary Dist. of Chicago*, 260 Ill. 453.

Massachusetts. *Com. v. Cosseboom*, 155 Mass. 298; *Hayes v. Kelley*, 116 Mass. 300.

Missouri. *Caldwell v. Stephens*, 57 Mo. 589; *McKinzie v. Hill*, 51 Mo. 303, 11 Am. Rep. 450.

United States. *New York & C. Min. Syndicate Co. v. Fraser*, 130 U. S. 611, 32 L. Ed. 1031.

87—*White v. Thomas*, 12 Ohio St. 312, 80 Am. Dec. 347.

no such evidence, the giving of such instruction is unnecessary and erroneous.⁸⁸ Thus, an instruction, 'in an action to enforce a vendor's lien, that the vendor may waive his lien by taking security, is erroneous where the evidence merely shows that the vendor took the note of the purchaser for the price.'⁸⁹

§ 86. Same—Sufficiency of evidence to support instructions.

It is the province of the court to determine whether there is foundation in the evidence for any particular instruction,⁹⁰ but since the weight and sufficiency of the evidence to establish a fact in issue is a question solely for the jury,⁹¹ the court should not decline to give an instruction merely because it is of the opinion that the evidence is insufficient to establish the fact, as to do so would invade the province of the jury.⁹² If there is any evidence whatsoever upon which the jury might base a finding, even though such evidence is slight, it is sufficient to sustain an instruction,⁹³ and

88—*Reinback v. Crabtree*, 77 Ill. 182; *Vandalia Coal Co. v. Yemm*, 175 Ind. 524; *Fulwider v. Ingels*, 87 Ind. 414. See also, *Hadlock v. Brooks*, 178 Mass. 425, wherein it was held, under the evidence, that it was not necessary to state the whole law of champerty.

Where the court has instructed that a person cannot recover for damages which he permits to go on without making every reasonable effort to have the damages stopped, it is reversible error to add, without evidence to sustain the qualifying clause, "unless the jury further believe from the evidence that defendant directed the plaintiff not to do so," since, if the instruction applies to no particular item of damages, it is impossible to say how much of the damages awarded was due to the qualifying clause. *Hartford Deposit*

Co. v. Calkins, 186 Ill. 104, rev'g 85 Ill. App. 627.

89—*Webb v. Robinson*, 14 Ga. 216.

90—*State v. Gibbons*, 10 Iowa 117.

91—See ch. VII, *ante*, "Province of Court and Jury."

92—*Peoria, D. & E. Ry. Co. v. Puckett*, 42 Ill. App. 642; *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 73; *Boots v. Canine*, 94 Ind. 408; *Bradford v. Pearson*, 12 Mo. 71.

93—**Alabama.** *Knowles v. Ogle-tree*, 96 Ala. 555; *Jones v. Fort*, 36 Ala. 449; *Partridge v. Forsyth*, 29 Ala. 200; *Bradford v. Marbury*, 12 Ala. 520, 46 Am. Dec. 264.

Arkansas. *Goodell v. Bluff City Lumber Co.*, 57 Ark. 203; *McNeill v. Arnold*, 22 Ark. 477.

Georgia. *Camp v. Phillips*, 42 Ga. 289.

Illinois. *Thompson v. Duff*, 119

it will be error for the court to refuse to give a requested instruction based upon such evidence.⁹⁴ An instruction may be based upon a fact of which there is no direct evidence, if circumstances are proven from which the fact may

Ill. 226; *City of Chicago v. Scholten*, 75 Ill. 468; *Milliken v. Marlin*, 66 Ill. 13; *Roach v. Willis Coal & Mining Co.*, 183 Ill. App. 578; *Hatcher v. Quincy H. Ry. & C. Co.*, 181 Ill. App. 30; *Gibson v. Lafferty*, 180 Ill. App. 629; *Morton v. O'Connor*, 85 Ill. App. 273.

Indiana. *Harris v. State*, 155 Ind. 265; *Union Mut. Life Ins. Co. v. Buchanan*, 110 Ind. 59, 59 Am. Rep. 194; *McFadden v. Ferris*, 6 Ind. App. 454.

Iowa. *Brannum v. O'Connor*, 77 Iowa 632; *Walker v. Camp*, 69 Iowa 741.

Missouri. *Hazell v. Bank of Tip-ton*, 95 Mo. 60, 6 Am. St. Rep. 22; *Davis v. Bond*, 84 Mo. App. 504.

Nebraska. *Atkins v. Gladwish*, 27 Neb. 841.

South Carolina. *Chafee v. City of Aiken*, 57 S. C. 507; *State v. Ezzard*, 40 S. C. 312; *Allston v. Pickett*, 19 S. C. 606.

Texas. *Fant v. Wright* (Tex. Civ. App.), 61 S. W. 514; *Frank v. Frank* (Tex. Civ. App.), 25 S. W. 819; *Robinson v. State* (Tex. Cr. App.) 63 S. W. 869; *Jackson v. State* (Tex. Cr. App.), 61 S. W. 404.

Virginia. *Dingee v. Unrue's Adm'r*, 98 Va. 247; *Honesty v. Com.*, 81 Va. 283.

Where there is evidence upon which the jury might find the defendant guilty of murder in either the first or the second degree, it is not error for the court to instruct in regard to murder in each degree.

Robinson v. State (Tex. Cr. App.), 63 S. W. 869.

If a case goes to the jury, and there is no evidence tending to prove a fact, it is proper for the court to give an instruction applicable to it, if requested to do so, even though the evidence is so slight as to be insufficient to support a verdict founded upon it. *Southern R. Co. v. Wilcox*, 99 Va. 394.

Where a statute was introduced in evidence without objection, it was not error to give an instruction construing it, although it was not necessary to consider such statute in determining the case. *Chafee v. City of Aiken*, 57 S. C. 507.

It is not error for the court to charge upon the whole case, although the evidence is conflicting upon only one issue, where there was no agreement or request that only such issue should be submitted, and the defendant has put in issue the whole of plaintiff's case. *Halsell v. Neal*, 23 Tex. Civ. App. 26.

94—**Illinois.** *Peoria, D. & E. Ry. Co. v. Puckett*, 42 Ill. App. 642; *Kane v. Torbit*, 23 Ill. App. 311; *Chicago & A. R. Co. v. Calkins*, 17 Ill. App. 55.

Iowa. *State v. Wright*, 112 Iowa 436; *De Camp v. Mississippi & M. R. Co.*, 12 Iowa 348.

Minnesota. *Squires v. Gamble-Robinson Commission Co.*, 84 Minn. 1.

Missouri. *Ridenis v. Ridenis*, 29 Mo. 470.

reasonably be inferred.⁹⁵ In order to require the submission of a hypothetical case to the jury, the court need not be satisfied that it is fully sustained by the testimony. It is only necessary that the evidence shall tend to sustain the hypothetical case.⁹⁶ It must not be understood from what has been said, however, that it is necessary or even proper for the court to give instructions based on testimony which, at most, raises a mere possibility or conjecture.⁹⁷ It is not easy to draw the line between a total absence of evidence to prove a fact, and evidence confessedly slight; but it seems that if the evidence is of such a nature that reason-

95—Chicago, R. I. & P. Ry. Co. v. Lewis, 109 Ill. 134.

96—Chicago, R. I. & P. Ry. Co. v. Lewis, 109 Ill. 134.

97—Arkansas. Dickerson v. Johnson, 24 Ark. 251.

California. Lemasters v. Southern Pac. Co., 131 Cal. 105, 63 Pac. 128.

Georgia. Sparks v. State, 111 Ga. 830.

Massachusetts. Saunders v. Whitcomb, 177 Mass. 457.

Missouri. Phelps v. City of Salisbury, 161 Mo. 1; O'Connor & Harder Range & Furnace Co. v. Alexe, 28 Mo. App. 184.

North Carolina. Cawfield v. Asheville St. Ry. Co., 111 N. C. 597; Sutton v. Madre, 47 N. C. 320; Cobb v. Fogalman, 23 N. C. 440.

Texas. Parlin & Orendorff Co. v. Miller, 25 Tex. Civ. App. 190; Lewis v. State, 72 Tex. Cr. App. 237.

West Virginia. Bloyd v. Pollock, 27 W. Va. 75.

Evidence which merely shows that a minor was present at the time a burglary was committed is insufficient to support an instruction stating the law as to an ac-

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complice who stands by and watches while another commits a crime. Sparks v. State, 111 Ga. 830.

The mere personal presence of the plaintiff before the jury will not justify an instruction that, in estimating damages, the plaintiff's age is to be taken into consideration. Phelps v. City of Salisbury, 161 Mo. 1.

Where, in an action to recover damages for the death of a child, it appears that the deceased was nearly seventeen years of age, and a bright, active boy, who had been for two months working as a fireman upon the identical engine upon which he was riding at the time of the accident, there is no occasion for instructions which deal with the question of the immature judgment of childhood. Lemasters v. Southern Pac. Co., 131 Cal. 105, 63 Pac. 128.

On a prosecution for burglary, where the facts and circumstances are sufficient to justify the jury in finding that the parties acted together, an instruction on the law of principals is proper. Lewis v. State, 72 Tex. Cr. App. 237.

able men might draw an inference therefrom, the court should instruct the jury in regard to it.⁹⁸

§ 87. Same—Illustrations of rule.

Where a defendant pleads limitations and laches, but the evidence does not raise such issues, it is error to instruct that the claim must have been asserted within a reasonable time.⁹⁹ "Where the plaintiff declares upon a completed sale, it is erroneous for the court, in instructing for him, to submit to the jury the question of an executory contract of sale, especially where there is no evidence * * * to prove the latter."¹ "In the absence of evidence showing an agreement to pay a particular sum for services rendered, or that the services rendered were reasonably worth that sum, it is error in the court to instruct on the basis of an assumed particular sum as the measure of plaintiff's recovery."² An instruction that, "if the jury find that the consideration for which the note sued on was given has wholly failed, they will find for the defendant," is erroneous, if there is no evidence of what was the consideration of the note.³ So a charge as to the effect of a contract is erroneous, where there is no evidence of such contract.⁴

In negligence cases, the practice of stating the allegations of a petition, and then construing them, or of enumerating grounds of negligence, in support of which there is no evidence, is not to be approved.⁵

98—**California.** *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656, 32 Pac. 308.

Illinois. *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425n; *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272; *Morton v. O'Connor*, 85 Ill. App. 273; *Peoria, D. & E. Ry. Co. v. Puckett*, 42 Ill. App. 642.

Texas. *Bishop v. State*, 43 Tex. 402.

The question here is substantially the same as where the court is asked to direct a verdict, and authorities

upon that subject are relevant here. See §§ 69, 70, *ante*, "Directing verdict."

99—*Norton v. Lea*, — Tex. Civ. App. —, 170 S. W. 267.

1—*Seckel v. Scott*, 66 Ill. 106.

2—*Biglow v. Carney*, 18 Mo. App. 534.

3—*Webster College v. Tyler*, 35 Mo. 268.

4—*Locke v. Priestly*, Express Wagon & Sleigh Co., 71 Mich. 263.

5—*Carnego v. Crescent Coal Co.*, 163 Iowa 194.

Instructions as to contributory negligence should not be given when there is no evidence in support of such issue,⁶ and in an action for the death of a person killed by a train, where there was no evidence that deceased sat down by a depot platform and was struck while asleep, a charge as to such contributory negligence was error.⁷

In an action for wrongful death, an instruction based upon the theory that deceased was intoxicated at the time he was killed was properly refused where it was not shown that he drank any liquor when he stopped at a bar for lunch on the day of the accident.⁸

“Where a plaintiff complains of personal violence as the cause of a physical disability, and no evidence is given in support of any other theory, it is error to give the jury to understand that they may find that the violence aggravated a pre-existing disability.”⁹

In an action for injuries sustained at a street crossing, instructions predicated on the violation of an ordinance or statute as to blowing a whistle, when no such ordinance or statute was shown, were erroneous.¹⁰

In an action for injuries to a boy who was struck by a street car, a requested instruction, stating in the abstract the duty which a public corporation operating a street railway owes to the traveling public by virtue of its franchise, is properly refused, as being collateral in its nature.¹¹

An instruction as to the effect of latent defects is properly refused where there is no evidence on which to base it.¹²

In an action for the death of a person caught in an elevator shaft, where there was no evidence of incompetency of

6—*City of Covington v. Diehl*, 22 Ky. L. Rep. 955; *Rinard v. Omaha, K. C. & E. Ry. Co.*, 164 Mo. 270.

7—*Hunnicut v. Alabama Great Southern R. Co.* (Miss.), 50 So. 697.

8—*Gibbons v. Aurora, E. & C. R. Co.*, 263 Ill. 266.

9—*Campau v. North*, 39 Mich. 606, 33 Am. Rep. 433n.

10—*New York, C. & St. L. R. Co. v. Lind*, 180 Ind. 38.

11—*Long v. Ottumwa Railway & Light Co.*, 162 Iowa 11.

12—*Keefe v. Armour & Co.*, 171 Ill. App. 573.

the elevator conductor, though death was alleged to have been caused by such incompetency, the trial court did not err in refusing to instruct on such issue.¹³

In an action for the death of a servant killed by the fall of a bank of cotton seed, while shoveling same, where no one saw the accident, and there was evidence that deceased was found standing nearly straight up, the contention that such deceased was asleep was a mere surmise not borne out by the evidence, and the court did not err in refusing to charge as to contributory negligence, though such defense was pleaded.¹⁴

A requested charge based on section 21 of the Illinois Mining Act (J. & A. ¶7495), as to the duties of mine examiners to post notices of danger, etc., is properly refused where the evidence does not show that a miner killed came under any of the conditions enumerated.¹⁵

In an action for the death of an engineman in a collision, where the evidence did not show knowledge of the violation of rules by employees, or a custom to disregard such rules, an instruction on such subject was erroneous.¹⁶

The giving of an instruction upon the element of damages unsupported by evidence is misleading and erroneous.¹⁷

However, a charge that "a railroad company, free from

13—*Zimman v. Miller Hotel Co.*, 95 Neb. 809, 5 N. C. C. A. 505.

14—*Industrial Cotton Oil Co. v. Lial*, — Tex. Civ. App. —, 164 S. W. 40.

15—*Wilmington Star Min. Co. v. Fulton*, 205 U. S. 60, 51 L. Ed. 708.

16—*Southern R. Co. v. Johnson's Adm'r*, 111 Va. 499, Ann. Cas. 1912 A 81n.

17—*Illinois*. *Judd v. Isenhardt*, 93 Ill. App. 520; *Cicero & P. St. Ry. Co. v. Richter*, 85 Ill. App. 591.

Michigan. *Kethledge v. City of Petoskey*, 179 Mich. 301.

North Carolina. *Wilkie v. Raleigh & C. F. R. Co.*, 128 N. C. 113; *Smith*

v. Wilmington & W. R. Co., 126 N. C. 712.

There was no error in refusing to instruct that in determining damages the age and expectancy of the plaintiff is to be considered, where there was no proof of her expectancy at her age. *Johnson v. Springfield Trac. Co.*, 176 Mo. App. 174.

An instruction directing the jury to consider a plaintiff's right to recover "for loss of time and inability to labor" is misleading and confusing where there is no proof of damages for "inability to labor." *Devlin v. City of St. Louis*, 252 Mo. 203.

negligence, is not liable for damages from fire kindled by sparks or clinkers from locomotives" states a correct abstract proposition and is not erroneous where the question of the railroad's negligence is left to the jury by other appropriate charges.¹⁸

In criminal cases, an instruction which misstates evidence of the state's witnesses by positively limiting the commission of an offense to a certain day is properly refused,¹⁹ and on a prosecution for selling intoxicating liquors, a special charge which sought to narrow the issues as to whether a sale was made on a certain Saturday was properly refused as being too restrictive, the evidence not being clear as to which Saturday the sale was made.²⁰

Also, on a prosecution for violating prohibition laws, where the defendant introduced evidence that the witness on "one" occasion stated that he had bought liquor of another, the court properly refused a written charge that if the witness made a "number" of statements that he did not purchase from defendant, etc.²¹

On a prosecution for contributing to the dependency of a girl, the omission to give an offered instruction as to the good character of the accused, where no evidence was offered in support thereof, was not error.²²

On a prosecution for assault with intent to rape, requested instructions as to simple assault, or assault and battery, were properly refused where there was no evidence of such offenses,²³ and where an accused was charged with assault in the second degree, and the evidence showed the consummated crime of rape, it was error to submit as an included crime assault in the third degree, of which there was no evidence.²⁴

18—Gracy v. Atlantic Coast Line R. Co., 51 Fla. 651.

19—Frost v. State, 124 Ala. 71.

20—De Lerosa v. State, — Tex. Cr. App. —, 170 S. W. 312.

21—Faulk v. State, 4 Ala. App. 177.

22—People v. Cruse, 24 Cal. App. 497, 141 Pac. 936.

23—State v. Sparks, 79 Kan. 548, 99 Pac. 1130.

24—State v. Kruger, 60 Wash. 542, 111 Pac. 769.

An instruction as to what constitutes murder in the first degree, stating that if accused abandoned the intention to rob before he shot, then the killing would not have been committed in an attempt to rob, held properly refused where there was no evidence of such abandonment.²⁵

On a trial for murder, an instruction that if the jury believe from the evidence that the only evidence tending to corroborate the testimony of a certain witness that tends to connect the defendant with the commission of the offense is that of another named witness, and if the jury do not believe such witness they must find defendant not guilty, is properly refused where there was other testimony tending to corroborate the first witness.²⁶

An instruction that, "if they [the jury] believed * * * that the defendant, at the time he fired the pistol, intended to kill A., the deceased, and did kill him, without any provocation, they will find him guilty of murder in the first degree," is erroneous, where there was evidence to show provocation.²⁷

§ 88. Same—Violation of rule as ground for reversal.

Ordinarily the giving of an abstract instruction not applicable to the facts in issue is error warranting reversal²⁸ if it appears that such instruction misled or might have misled the jury, to the prejudice of the party complaining.²⁹

25—State v. Mewhinney, 43 Utah 135, 134 Pac. 632.

26—Tennison v. State, 183 Ala. 1.

27—Harris v. State, 36 Ark. 127.

28—Fisher v. Central Lead Co., 156 Mo. 479.

The submission of an issue made by the pleadings, where no evidence tending to sustain it has been introduced, is an error calculated to mislead the jury and requires a reversal of the judgment. Gulf, C. & S. F. Ry. Co. v. Anderson, — Tex. Civ. App. —, 126 S. W. 928.

29—Alabama. Tennessee Valley Bank v. S. M. Avery & Sons, 9 Ala. App. 363.

California. People v. Devine, 95 Cal. 227, 30 Pac. 378.

Florida. Florala Saw Mill Co. v. Smith, 55 Fla. 447.

Illinois. Illinois Match Co. v. Chicago, R. I. & P. R. Co., 250 Ill. 396; Lyons v. Joseph T. Ryerson & Son, 242 Ill. 409; Webber v. Brown, 38 Ill. 87.

Indiana. Crowder v. Reed, 80 Ind. 1; Nicklaus v. Burns, 75 Ind. 93.

If an instruction submits an issue not warranted by the evidence,³⁰ or is based on facts not in evidence,³¹ or is so

Iowa. Farmers' & Merchants' State Bank v. Shaffer, — Iowa —, 147 N. W. 851; Case v. Illinois Cent. R. Co., 38 Iowa 581.

Kansas. Zimmerman v. Knox, 34 Kan. 245, 8 Pac. 104; Raper v. Blair, 24 Kan. 374.

Kentucky. Robards v. Wolfe, 1 Dana 156.

Maine. Weston v. Higgins, 40 Me. 102; Hopkins v. Fowler, 39 Me. 568.

Michigan. Lunde v. Detroit United Ry., 177 Mich. 374.

Missouri. Raybourn v. Phillips, 160 Mo. App. 534.

Nebraska. Esterly Harvesting Mach. Co. v. Frolkey, 34 Neb. 110; Clark v. State, 32 Neb. 246.

New York. Crossman v. Harrison, 4 Rob. 38.

Ohio. Aetna Ins. Co. v. Reed, 33 Ohio St. 283.

Pennsylvania. Lee v. Newell, 107 Pa. 283.

Texas. Cravens v. Wilson, 48 Tex. 324; Yarborough v. Tate, 14 Tex. 483; Thrasher v. State, 3 Tex. App. 281.

Virginia. Pasley v. English, 10 Grat. 236.

Wisconsin. Ward v. Henry, 19 Wis. 76, 88 Am. Dec. 672.

30—**Missouri.** Cottrell v. Spiess, 23 Mo. App. 35.

Pennsylvania. Philadelphia, W. & B. R. Co. v. Alvord, 128 Pa. 42.

South Carolina. Sims v. Southern Ry. Co., 59 S. C. 246.

Texas. Cook v. Dennis, 61 Tex. 246; Blanton v. Mayes, 58 Tex. 422; Corzine v. Morrison, 37 Tex. 511; Austin v. Talk, 20 Tex. 164; Andrews v. Smithwick, 20 Tex. 111; Lee v. Hamilton, 12 Tex. 413; Chicago,

R. I. & G. Ry. Co. v. Forrester, — Tex. Civ. App. —, 137 S. W. 162.

Where a statute is more stringent in its regulations as to the safeguards to be provided by railroad companies at crossings and at other places, it is error, in an action against a railroad company for injuries occurring at a crossing, to give to the jury any instructions as to such statutes, if the accident did not occur at the crossing, but some distance from it. Sims v. Southern Ry. Co., 59 S. C. 246.

Error in submitting issue not raised by evidence is reversible unless it is clear the jury were not misled. Chicago, R. I. & G. Ry. Co. v. Forrester, — Tex. Civ. App. —, 137 S. W. 162.

31—**Alabama.** Goldsmith v. McCafferty, 101 Ala. 663.

Arkansas. State Bank v. Hubbard, 8 Ark. 183.

Colorado. Rara Avis Gold & Silver Min. Co. v. Bouscher, 9 Colo. 385, 12 Pac. 385; Denver & R. G. R. Co. v. Robinson, 6 Colo. App. 432, 40 Pac. 840.

Georgia. Ashworth v. East Tennessee, V. & G. Ry. Co., 94 Ga. 715; Livingston v. Hudson, 85 Ga. 835.

Illinois. Illinois Cent. R. Co. v. Hileman, 53 Ill. App. 57; Irwin v. Atkins, 8 Ill. App. 221.

Maryland. Marshall v. Haney, 4 Md. 498; Long v. Eakle, 4 Md. 454.

Michigan. Briggs v. Fireman's Fund Ins. Co., 65 Mich. 52.

Missouri. Waddingham v. Hulett, 92 Mo. 528; Musick v. Atlantic & P. R. Co., 57 Mo. 134; State v. Bailey, 57 Mo. 131; Bowles v. Lewis, 58 Mo.

worded as to lead the jury to infer the existence of a state of facts entirely at variance with the evidence,³² the error will almost invariably be considered a ground for reversal. A number of cases illustrative of this principle will be found in the notes.³³

Like other general rules, this is subject to exception, and if the record shows affirmatively and clearly that the jury were not misled, and that the objecting party was not injured, the case will not be reversed.³⁴ The giving of in-

App. 649; *Stokes v. Ravenswood Distillery Co.*, 2 Mo. App. 1093.

Montana. *Sheehy v. Flaherty*, 8 Mont. 365, 20 Pac. 687.

Nebraska. *Clark v. State*, 32 Neb. 246.

New York. *Black v. Brooklyn City R. Co.*, 108 N. Y. 640.

North Carolina. *King v. Wells*, 94 N. C. 344.

Texas. *Harrell v. Houston*, 66 Tex. 278; *Atchison, T. & S. F. Ry. Co. v. Click*, 5 Tex. Civ. App. 224; *Wilson v. State* (Tex. Cr. App.), 34 S. W. 284.

Washington. *Martin v. Union Mut. Ins. Co.*, 13 Wash. 275, 43 Pac. 53.

32—*Caw v. People*, 3 Neb. 357.

33—On a criminal prosecution it was held reversible error to instruct the jury that, if defendant formed a conspiracy to commit the crime, and became intoxicated to nerve himself to commit it, his intoxication would be no excuse, there being no evidence that he became intoxicated for such purpose. *Clark v. State*, 32 Neb. 246.

In an action for damages, caused by the alleged negligence of the defendant railway company, it was held reversible error to charge as to the duty of the company in the selection and retention of its em-

ployees, where there was no evidence or issue as to that subject to submit to the jury. *Houston & T. C. Ry. Co. v. Gilmore*, 62 Tex. 391.

In an action for personal injuries sustained while crossing defendant's track, the court charged the jury as to the duties of railroad companies in operating trains over public crossings, and stated that a "failure to comply with those requirements is made criminal under the law." It was held that this instruction was inapplicable, and ground for a new trial, where it appeared that the place where plaintiff was injured was not a public crossing. *Ashworth v. East Tennessee, V. & G. Ry. Co.*, 94 Ga. 715.

34—**Alabama.** *Lockridge v. Brown*, 184 Ala. 106.

California. *People v. Cochran*, 61 Cal. 548.

Georgia. *Daniels v. Western & A. R. Co.*, 96 Ga. 786.

Iowa. *Farmers' & Merchants' State Bank v. Shaffer*, — Iowa —, 147 N. W. 851; *Hall v. Stewart*, 58 Iowa 681.

Louisiana. *State v. Durbin*, 22 La. Ann. 154.

Missouri. *Riley v. City of Independence*, 258 Mo. 671, 7 N. C. C. A. 191; *Berry v. Missouri Pac. Ry. Co.*, 124 Mo. 223.

structions which consist in mere abstract and general propositions of law which could not arise upon the testimony will not, in general, be ground for reversal,³⁵ unless it satisfactorily appears that the jury were misled, to the prejudice of the party complaining.³⁶ And it has also been held that the statement of an abstract proposition, even though not applicable to the case, furnishes no just ground of complaint, where it is given merely for the purpose of

Nebraska. *Labaree v. Klosterman*, 33 Neb. 150; *Waters v. Shafer*, 25 Neb. 225.

North Carolina. *Craig & Wilson v. Stewart & Jones*, 163 N. C. 531; *Bryan v. Cowles*, 152 N. C. 767.

South Carolina. *Mason v. Southern Ry. Co.*, 58 S. C. 70, 53 L. R. A. 913, 79 Am. St. Rep. 826; *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303.

Texas. *Gulf, C. & S. F. Ry. Co. v. Greenlee*, 70 Tex. 553; *Thomas v. Ingram*, 20 Tex. 727.

Virginia. *Reed v. Com.*, 98 Va. 817.

Washington. *Graham v. Allen & Nelson Mill Co.*, 78 Wash. 589, 139 Pac. 591.

The giving of an instruction stating an abstract principle of law in a criminal case is not error unless the principle stated is erroneous, and, unless the court can see that an instruction not applicable to the facts of the case has confused or misled the jury, it will not reverse the judgment in the lower court for the giving of an abstract instruction. *Reed v. Com.*, 98 Va. 817.

35—**Alabama.** *Fleming v. Lunsford*, 163 Ala. 540; *McCutchen v. Loggins*, 109 Ala. 457; *Payne v. Crawford*, 102 Ala. 387; *Shaungut's Adm'r v. Udell*, 93 Ala. 302.

California. *People v. March*, 6 Cal. 543.

Florida. *Proctor v. Hart*, 5 Fla. 465.

Illinois. *Upstone v. People*, 109 Ill. 169; *Christensen v. Oscar Daniels Co.*, 170 Ill. App. 59; *Miller v. Kenwood Bridge Co.*, 169 Ill. App. 404.

Iowa. *McGregor v. Armill*, 2 Iowa 30.

Louisiana. *State v. Canty*, 41 La. Ann. 587; *State v. Johnson*, 33 La. Ann. 889.

Missouri. *Benjamin v. Metropolitan St. Ry. Co.*, 133 Mo. 274; *Grout v. Central Elec. R. Co.*, 151 Mo. App. 330.

Nebraska. *Caw v. People*, 3 Neb. 357.

Ohio. *Creed v. Commercial Bank of Cincinnati*, 11 Ohio 489; *Reed v. McGrew*, 5 Ohio 375.

Oregon. *Salomon v. Cress*, 22 Ore. 177, 29 Pac. 439.

Wisconsin. *Ward v. Henry*, 19 Wis. 76, 88 Am. Dec. 672; *Lee v. Merrick*, 8 Wis. 229.

Frequently, appellate courts allow abstract instructions to pass in cases where the court is satisfied that the error was not prejudicial. *Grout v. Central Elec. R. Co.*, 151 Mo. App. 330.

36—**Herring v. Skaggs**, 73 Ala. 446; *Bernstein v. Humes*, 71 Ala. 260; *Pittsburg, Ft. W. & C. R. Co. v. Slusser*, 19 Ohio St. 157.

pointing out well-known distinctions,³⁷ or to illustrate and emphasize rules governing the relations of the parties, and their respective rights and responsibilities.³⁸ An instruction stating a correct proposition of law is not necessarily misleading, although it refers in no way to the evidence.³⁹ So, where an instruction is based on a state of facts not in evidence, but favorable to the appellant, he has no right to complain of the giving of such instruction;⁴⁰ and a party who has asked instructions on a particular point cannot afterwards complain of instructions given by the court upon that point, on the ground that there is no evidence to support the instructions.⁴¹ So, an instruction which is outside of the issues raised by the pleadings will not be a ground for reversal if it is favorable to the party complaining.⁴²

§ 89. Necessity of concrete application to facts of case.

Abstract instructions should be concretely applied to the case.⁴³ The trial judge should not leave the jury to apply general principles of law to a case, but he should inform the jury what the law is as applied to the facts.⁴⁴ However

37—*McGrew v. Missouri Pac. Ry. Co.*, 109 Mo. 582.

38—*West Memphis Packet Co. v. White*, 99 Tenn. 256, 38 L. R. A. 427. See also, *Mason v. Southern Ry. Co.*, 58 S. C. 70, 53 L. R. A. 913, 79 Am. St. Rep. 826. A definition of "probable cause," given merely as an illustration, and having no practical application to the case, is not ground for reversal. *Baker v. Hornick*, 57 S. C. 213.

39—*Bosqui v. Sutro R. Co.*, 131 Cal. 390, 63 Pac. 682. An instruction that national bank notes are not money for the purpose of tender, states the law, and cannot be prejudicial, although the evidence contained no reference to bank notes. *Chicago,*

I. & E. Ry. Co. v. Patterson, 26 Ind. App. 295.

40—*Johnson v. McKee*, 27 Mich. 471; *Ft. Worth & D. C. Ry. Co. v. Peters*, 7 Tex. Civ. App. 78.

41—*Spears v. Town of Mt. Ayr*, 66 Iowa 721.

42—*Miller v. Root*, 77 Iowa 545; *Paretti v. Rebenack*, 81 Mo. App. 494; *Terrapin v. Barker*, 26 Okla. 93, 109 Pac. 931.

43—*Baltimore & O. S. W. R. Co. v. Fox*, 113 Ill. App. 180.

44—*Arkansas*. *Shinn v. Tucker*, 37 Ark. 580.

Connecticut. *Morris v. Platt*, 32 Conn. 75.

Georgia. *Baldwin v. State*, 75 Ga. 489.

pertinent and applicable an instruction may be, it is abstract unless made to apply in express terms to the facts in issue.⁴⁵

As to whether the giving of instructions in the form of general propositions of law without a concrete application to the facts of the case is ground for reversal, the correct

Illinois. *Hassett v. Johnson*, 48 Ill. 68; *Hite v. Blandford*, 45 Ill. 9; *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355; *Chicago & A. R. Co. v. Utley*, 38 Ill. 410; *Atkinson v. Lester*, 2 Ill. 407; *Heimann v. Kinnare*, 73 Ill. App. 184.

Indiana. *Hutchinson v. Wenzel*, 155 Ind. 49.

Iowa. *Seekel v. Norman*, 71 Iowa 264; *State v. Glynden*, 51 Iowa 463.

Kentucky. *Brown v. Wilson*, 1 Litt. 232.

Louisiana. *State v. Stouderman*, 6 La. Ann. 286.

Maine. *State v. Pike*, 65 Me. 111.

North Carolina. *State v. Jones*, 87 N. C. 547; *State v. Boon*, 82 N. C. 637.

Pennsylvania. *Rider v. Maul*, 70 Pa. 15.

South Dakota. See *Barker v. Coats*, 34 S. D. 291.

Tennessee. *Memphis City Ry. Co. v. Logue*, 13 Lea 32; *East Tennessee, V. & G. R. Co. v. Duffield*, 12 Lea 63, 47 Am. Rep. 319.

Texas. *Hargis v. St. Louis, A. & T. Ry. Co.*, 75 Tex. 19; *Louisiana Extension Ry. Co. v. Carstens*, 19 Tex. Civ. App. 190.

Vermont. *State v. McDonnell*, 32 Vt. 491; *Mason v. Silver*, 1 Aik. 367.

West Virginia. *Wilhelm v. Parkersburg, M. & I. Ry. Co.*, — W. Va. —, 82 S. E. 1089.

"It is not the province of the judge to impress any particular view of the facts upon the jury, but it is

his province to make his charge so directly applicable to the facts as to enable the jury to render a correct verdict. To leave as little room as possible for them to make mistakes in applying the law to the facts, which they may be very liable to do when they have only general abstract propositions given to them in charge, there ought, if possible, to be no room for misunderstanding the charge or its application, and to this end it ought to be specific and direct." *East Tennessee, V. & G. R. Co. v. Toppins*, 10 Lea (Tenn.), 64.

Nothing is more dangerous than to lay down general propositions which, instead of aiding, scarcely ever fail to mislead, juries. Courts should apply the principles to the facts in evidence, stating the facts hypothetically. *Gorman v. Campbell*, 14 Ga. 142.

45—*Clarke v. Baker*, 7 J. J. Marsh. (Ky.) 197; *Metcalf v. Conner*, Litt. Sel. Cas. (Ky.) 370. In a hypothetical statement of facts as a basis for the application of the principles of law governing the case, while it is necessary that all the material facts which the evidence reasonably tends to prove shall be stated,—that is to say, facts essential to the validity of the hypothesis,—it is not necessary to include the subsidiary and evidential facts. *Hutchinson v. Wenzel*, 155 Ind. 49.

rule would seem to be that if the facts of the case are voluminous and complicated, or of such nature that a body of men unacquainted with the law would find difficulty in applying to the facts a general principle of law, the judgment should be reversed if the instructions given consist merely in a statement of general principles; and that, if the facts are few and simple, and of such a nature that a general principle of law may be easily applied, a judgment should not be reversed for the giving of such an instruction.⁴⁶ The decisions as to this proposition are, however, conflicting. In jurisdictions where the court is required, by express statutory provision, to apply the principles of law to the facts of the case in charging the jury, it has been held reversible error to give instructions which deal in mere generalities and abstractions;⁴⁷ and in other jurisdictions, where no such statutes exist, judgments have been reversed for instructions defective in this regard.⁴⁸ In some cases it has been held that the giving of such instructions is not a sufficient ground for reversal,⁴⁹ and, in others, that error cannot be assigned because of the giving of such instructions, unless more specific instructions are requested.⁵⁰ It

46—*Mulrone v. Marshall*, 35 Mont. 238, 88 Pac. 797.

Since, presumptively, an erroneous proposition of law, referring in no way to the evidence in the case submitted to the jury, is not prejudicial, it must follow that a correct proposition of law, not based upon the evidence, will not necessarily mislead the jury. *Bosqui v. Sutro R. Co.*, 131 Cal. 390, 63 Pac. 682.

47—*State v. Jones*, 87 N. C. 547.

48—*Morris v. Platt*, 32 Conn. 82; *Fisher v. Central Lead Co.*, 156 Mo. 479; *Mason v. Silver*, 1 Aik. (Vt.) 367.

49—*Taylor v. Felsing*, 164 Ill. 331; *Little v. Munson*, 54 Ill. App. 437; *Axtell v. Caldwell*, 24 Pa. 88; *New*

Orleans Ins. Ass'n v. Piaggio, 16 Wall. 378, 21 L. Ed. 358.

50—*Hansen v. Gaar, Scott & Co.*, 68 Minn. 68; *Kleintobb v. Trescott*, 4 Watts (Pa.), 301; *East Tennessee, V. & G. R. Co. v. Toppins*, 10 Lea (Tenn.) 58. See *Villereal v. State* (Tex. Cr. App.), 61 S. W. 715.

Compare *Seekel v. Norman*, 71 Iowa 264, where it was held that where an abstract rule of law, though correct, may be misleading, in the absence of instructions for its application, such instructions should be given by the court, even though not asked for by a party. In this state the court is required by statute to state all the law applicable to a case, even though not

has also been held, very properly, that the giving of an abstract instruction, which correctly states the law applicable to the case at bar, cannot be assigned for error, where it is followed immediately by an instruction applying the law thus stated to the facts,⁵¹ or where, taken in connection with the other instructions, the charge advises the jury concerning the evidence applicable to the issues clearly and in the concrete.⁵²

The rule that an instruction is improper which is expressed in general and abstract terms is applicable only where the trial takes place before a jury. The reason of the rule is that such an instruction is apt to mislead the jury. No ground can exist for the enforcement of such a rule, where the trial is before the court.⁵³

requested. See generally, ch. XV, *post*, "Requests for Instructions."

51—First Nat. Bank of Springfield v. Gatton, 71 Ill. App. 323; McGrew v. Missouri Pac. Ry. Co., 109 Mo. 582.

52—Denver Tramway Co. v.

Owens, 20 Colo. 107, 36 Pac. 848; Blackwell v. Lynchburg & D. R. Co., 111 N. C. 151, 17 L. R. A. 729n, 32 Am. St. Rep. 786.

53—Vigus v. O'Bannon, 118 Ill. 334.

CHAPTER IX.

STATING ISSUES TO JURY.

- § 90. Manner of stating issues.
- § 91. Use of language of pleading in stating issues.
- § 92. Referring jury to pleading.
- § 93. Illustrations of rule.
- § 94. Erroneous statement of issues.
- § 95. Incomplete statement of issues.
- § 96. Withdrawal of issues.

§ 90. Manner of stating issues.

Only the issues of fact raised by the pleadings should be submitted to the jury and not mere questions of fact growing out of the evidence,¹ and only such issues should be submitted as are necessary to present the material matters in dispute.² It is not required that the issues should all be stated in a single paragraph of the charge. It is sufficient if they are fairly and fully stated to the jury in some part of the charge in such a manner as to be understood by the jury.³ Thus, the court may state in one instruction the issues as raised by the pleadings, and in another instruction

1—*Busbee v. Western North Carolina Land & Lumber Co.*, 151 N. C. 513.

2—*Busbee v. Western North Carolina Land & Lumber Co.*, 151 N. C. 513.

The issues should be comprehensive enough to determine the rights of the parties and to support the verdict and judgment. *Busbee v. Western North Carolina Land & Lumber Co.*, 151 N. C. 513.

Where instructions were interjected into a part of other instructions stating the issues, in such a manner as to leave the impression that all issues previously stated were to be submitted, the error was prejudicial. *McDivitt v. Des Moines City R. Co.*, 141 Iowa 689.

3—*Timins v. Chicago, R. I. & P. Ry. Co.*, 72 Iowa 94; *Siltz v. Hawkeye Ins. Co.*, 71 Iowa 710; *Chicago, R. I. & P. Ry. Co. v. Groves*, 56 Kan.

state that a part of the case is admitted.⁴ It is often difficult to frame a single instruction which shall embrace all the phases of a complicated case.⁵ Where the issues have once been stated, a repetition is unnecessary.⁶ If the issues involved are such as to require explanation, the best practice is to do this in a general charge, and not submit the case entirely on charges asked by the parties and given.⁷ The issues must, of course, be fairly and impartially stated, and not so as to put an undue burden upon either party,⁸ and it is error to give the plaintiff's contention without also stating the defendant's contention.⁹ If the instructions are required by statute to be in writing, the statement of the issue should be in writing, and it is not proper to make the statement by reading from the pleadings portions which are not incorporated in the instructions.¹⁰

§ 91. Use of language of pleading in stating issues.

While it is not improper to submit the issues in the terms in which they are raised by the pleadings,¹¹ it is the duty of the trial court to make the issue as plain to the jury as

601, 44 Pac. 628; Fullerton v. St. Louis, I. M. & S. Ry. Co., 84 Mo. App. 498.

"It is not necessary that the issues be grouped and stated in separate paragraphs of the charge, devoted to that purpose alone. It is enough if the instructions, as a whole, point out the entire issue in the case." Meyer v. Boepple Button Co., 112 Iowa 51.

4—Haymond v. Saucer, 84 Ind. 3.

5—Chicago, R. I. & P. Ry. Co. v. Groves, 56 Kan. 601, 44 Pac. 628; Muehlhausen v. St. Louis R. Co., 91 Mo. 332.

6—Richmond v. Sundburg, 77 Iowa 255; Doran v. Waterloo, C. F. & N. Ry. Co., — Iowa —, 147 N. W. 1100.

7—Redus v. Burnett, 59 Tex. 576.

8—Short v. Kelly (Tex. Civ. App.), 62 S. W. 944.

In stating the allegations of the pleadings the charge should always give their substance correctly. Gulf, C. & S. F. R. Co. v. Walters, — Tex. Civ. App. —, 107 S. W. 369.

9—Brown v. Everett Ridley Ragan Co., 111 Ga. 404.

10—Hall v. Carter, 74 Iowa 364.

11—Hess v. Newcomer, 7 Md. 325; Planters' Bank of Prince George's Co. v. Bank of Alexandria, 10 Gill & J. (Md.) 346; Atchison, T. & S. F. Ry. Co. v. Cuniffe (Tex. Civ. App.), 57 S. W. 692.

It is correct practice to state the issues made by the pleadings, and it is not error to properly summarize the allegations of the pleadings.

practicable, regardless of whether the language of the pleadings does so or not.¹²

The court, in stating the issues to the jury, need not confine itself to the express averments of the pleadings. It will be sufficient if the substance of the issues be correctly stated in such a manner as to work no prejudice,¹³ and the practice of copying the pleadings into the instructions with unnecessary fullness is disapproved.¹⁴

Of course where the pleadings contain a clear statement of the issues so that when copied they intelligently present the very matters to be tried, there is no error in copying them in stating the issues,¹⁵ although as a general rule it is better for the court to state the exact matters to be tried in its own language, omitting all extraneous or collateral matters, and especially taking from the case all issues which have been withdrawn.¹⁶

Chicago, R. I. & G. R. Co. v. Bentley, 43 Okla. 469, 143 Pac. 175.

While it may not be necessary to make a preliminary statement of the issues raised by the pleadings, it is not error to state the issues, and a paragraph of a charge wherein part of the petition is copied, in stating the issues is not objectionable. Lisle-Dunning Const. Co. v. McCall, — Tex. Civ. App. —, 167 S. W. 810.

12—Stephens v. Brill, 159 Iowa 620.

13—Sage v. Haines, 76 Iowa 581. "It is unnecessary for the court * * * to state the substance of the matters pleaded by either party. It is only necessary to submit to the jury the questions of fact raised by the pleadings, and instruct them upon the law as to the issues submitted." Galveston, H. & S. A. Ry. Co. v. Smith, 24 Tex. Civ. App. 127.

14—Stephens v. Brill, 159 Iowa 620.

15—Canfield v. Chicago, R. I. & P. R. Co., 142 Iowa 658.

Where the pleadings are concise, the language thereof may be followed in the instructions. Stephens v. Brill, 159 Iowa 620.

Where the pleadings were clear and concise and stated the exact issues, and the parties by their counsel agreed that the pleadings might be used in the instructions there was no error. Dean v. Carpenter, 134 Iowa 275.

16—Canfield v. Chicago, R. I. & P. R. Co., 142 Iowa 658.

It is the duty of the trial court to cull from the pleadings the exact matters to be submitted to the jury, and it is bad practice, if not reversible error, to copy the pleadings, leaving it to the jury to discover what points are to be considered by them. Canfield v. Chicago, R. I. & P. R. Co., 142 Iowa 658.

An instruction setting forth the

The judge is not required to recite any more of the pleadings than he deems necessary, and it is the duty of a party, if there is an omission, to supply it by requesting a special charge.¹⁷

Where the pleadings are copied for a statement of the issues, no prejudice will be presumed, but the court will look to the statement so made, and if it appears that the issues are so stated as to clearly present the matters involved and there is no reason to believe that the jury have been misled thereby, no reversal will be ordered.¹⁸

Although there are decisions to the contrary¹⁹ the practice of reading the pleadings to the jury as part of the instructions is usually disapproved,²⁰ but such practice is also usually considered harmless error.²¹

“The pleadings often contain irrelevant and immaterial allegations, and others, though material and pertinent,

legal effect of a pleading is sufficient, though it does not set out evidentiary facts also pleaded. *Murphy v. Virgin*, 47 Neb. 692.

17—*Missouri, K. & T. R. Co. of Texas v. Swift*, — Tex. Civ. App., —, 128 S. W. 450; *Galveston, H. & H. R. Co. v. Alberti*, 47 Tex. Civ. App. 32.

18—*Canfield v. Chicago, R. I. & P. R. Co.*, 142 Iowa 658.

Where the issues are stated in the language of the pleadings, and it is not made to appear that the jury were either misled or confused by the method pursued, the judgment cannot be reversed for the sole reason that the court stated the issues in the language of the pleadings. *Smith v. Columbus Buggy Co.*, 40 Utah 580, 123 Pac. 580.

19—The court may read the pleadings so that the jury may know the real issues. *Baltzer v. Chicago, M. & N. R. Co.*, 89 Wis. 257.

“It is not error for the court in charging the jury to read the original petition and the amended petition, where such amended petition worked a dismissal of the case as to one defendant, and the original petition was amended in several other material parts, it appearing that the court read both the stricken and substituted amendments and both of which were in the jury room when they considered and made their verdict. *Jackson v. Seaboard Air Line Ry.*, 140 Ga. 277.

20—*Savino v. Griffin Wheel Co.*, 118 Minn. 290.

21—While the practice of copying a complaint including the caption and signature of counsel in an instruction should not be encouraged, a reversal will not be ordered where an appellant was not harmed thereby. *Evansville Gas & Electric Light Co. v. Robertson*, — Ind. —, 100 N. E. 689.

which find no support in the evidence. By reading these matters to them, the jurors are likely to be confused.”²²

§ 92. Referring jury to pleading.

The determination of what issues are raised by the pleadings is a question of law for the court, and it is usually held that the court must instruct the jury as to the issues to be tried, and not leave the question to the jury, as by referring them to the pleadings.²³ Such practice has been repeatedly disapproved²⁴ and requested instructions which refer the jury to the pleadings may and should be refused.²⁵

Instructions should refer the jury to the evidence and not

22—*Savino v. Griffin Wheel Co.*, 118 Minn. 290.

23—*Illinois*. *Latham v. Cleveland, C., C. & St. L. Ry. Co.*, 179 Ill. App. 324.

Iowa. *Stephens v. Brill*, 159 Iowa 620; *Keatley v. Illinois Cent. Ry. Co.*, 94 Iowa 685; *Gorman v. Minneapolis & St. L. Ry. Co.*, 78 Iowa 509; *Burns v. Oliphant*, 78 Iowa 456; *Lindsay v. City of Des Moines*, 68 Iowa 368; *Hollis v. State Ins. Co.*, 65 Iowa 454; *Bryan v. Chicago, R. I. & P. Ry. Co.*, 63 Iowa 464; *Porter v. Knight*, 63 Iowa 365; *Hempstead v. City of Des Moines*, 52 Iowa 303; *Little v. McGuire*, 43 Iowa 450.

Kansas. *Myer v. Moon*, 45 Kan. 580, 26 Pac. 40.

Kentucky. *Tipton v. Triplett*, 1 Metc. (Ky.) 570.

Michigan. *Wilbur v. Stoepel*, 82 Mich. 344, 21 Am. St. Rep. 568.

Missouri. *Blackmore v. Missouri Pac. Ry. Co.*, 162 Mo. 455; *Dassler v. Wisley*, 32 Mo. 498; *Birch Tree State Bank v. Dowler*, 163 Mo. App. 65; *Fleischmann v. Miller*, 38 Mo. App. 177; *Procter v. Loomis*, 35 Mo. App. 482; *Gessley v. Missouri Pac. Ry. Co.*, 26 Mo. App. 156; *Grant v.*

Hannibal & St. J. Ry. Co., 25 Mo. App. 227.

Nebraska. *Sioux City & Pac. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724n.

North Carolina. *Fairecloth v. Isler*, 75 N. C. 551.

Tennessee. *East Tennessee, V. & G. Ry. Co. v. Lee*, 90 Tenn. 570.

It is never permissible to refer the jury to the pleadings to ascertain what the issues are, but it is the duty of the court to tell the jury what facts must be found by them to be true to warrant a verdict. *Birch Tree State Bank v. Dowler*, 163 Mo. App. 65.

24—*Schlauder v. Chicago & S. Traction Co.*, 253 Ill. 154; *Waschow v. Kelly Coal Co.*, 245 Ill. 516; *Krieger v. Aurora, E. & C. R. Co.*, 242 Ill. 544; *Freeman v. McElroy*, — Tex. Civ. App. —, 149 S. W. 428.

A charge requiring an examination by the jury of a pleading in a case is objectionable. *Birmingham Railway, Light & Power Co. v. Adkins*, 8 Ala. App. 555.

25—*Rosinski v. Burton*, 163 Ill. App. 162; *Smith v. Means*, 170 Mo. App. 158.

to the pleadings,²⁶ although the view has been presented that, where the declaration contains a full statement of the facts, no error is committed in referring the jury to the declaration for information with regard to such facts, and in telling the jury that they must find the facts "in manner and form as charged in the declaration."²⁷

Where the pleadings are short and unambiguous, it is not error to refer to them in the instructions without otherwise stating the issues,²⁸ and for the purpose of conciseness of expression and description, the court may refer to the pleadings, though of course the greatest care must be exercised not to assume the existence of any controverted fact to which the description may pertain,²⁹ though, as already stated, where the pleadings are voluminous and involved, it is the better practice to instruct as to the substance of the issues.³⁰ It is not error to refer to the pleadings merely to shorten the instructions, where the essential questions in the case are apparent from the instructions.³¹

Ordinarily the practice of referring the jury to the pleadings to determine the issues does not warrant reversal,³²

26—*Small v. Polar Wave Ice & Fuel Co.*, 179 Mo. App. 456.

27—*North Chicago City Ry. Co. v. Gastka*, 27 Ill. App. 518, aff'd 128 Ill. 613, 4 L. R. A. 481; *Sturgeon v. Sturgeon*, 4 Ind. App. 232.

It is not error to refer to the declaration in instructions to determine what negligence was charged. *Latham v. Cleveland, C. & St. L. Ry. Co.*, 179 Ill. App. 324.

28—*Graybill v. Chicago, M. & St. P. Ry. Co.*, 112 Iowa 738; *Crawford v. Nolan*, 72 Iowa 673.

29—*Myer v. Moon*, 45 Kan. 580, 26 Pac. 40; *Britton v. City of St. Louis*, 120 Mo. 437; *Corrister v. Kansas City, St. J. & C. B. Ry. Co.*, 25 Mo. App. 619.

30—*Woodruff v. Hensley*, 26 Ind. App. 592.

31—*Corrister v. Kansas City, St. J. & C. B. Ry. Co.*, 25 Mo. App. 619.

A reference may be made to the petition for a fuller statement of the items of plaintiff's claim. *Lanning v. Chicago, B. & Q. Ry. Co.*, 68 Iowa 502.

32—*Washcow v. Kelly Coal Co.*, 245 Ill. 516; *Schillinger Bros. Co. v. Smith*, 225 Ill. 74, aff'g 128 Ill. App. 30; *Freeze v. Harris*, 162 Ill. App. 118.

It has been held that in a charge on contributory negligence, a direct reference to the pleadings to ascertain the nature of defenses is not reversible error. *Hoyt v. Chicago City Ry. Co.*, 166 Ill. App. 361; *Freeman v. McElroy*, — Tex. Civ. App. —, 149 S. W. 428.

While it is not error to refer the

although it has been suggested that where the pleadings referred to are so involved and technical as to render it doubtful whether the jury could clearly understand the issues presented, the charge referring to the same for issues of fact would require a reversal.³³

In determining whether the jury was misled, the instructions are to be considered as a whole.³⁴

Where the pleadings are stated or referred to with the assent of the parties, the error, if any, is waived.³⁵

§ 93. Illustrations of rule.

The general rule that the court should not refer the jury to the pleadings may be illustrated by cases wherein it was held error to submit to the jury the question whether the statute of limitations was pleaded or not,³⁶ or to give an instruction which, although not a copy of the pleadings, contained every detail, submitted issues not in dispute, and failed to specify the issues about which there was controversy.³⁷

So, in an action for personal injuries, it is erroneous to instruct as follows: "These wrongs and injuries are set

jury to the pleadings to determine the issues, it is the better practice not to do so. *Clouser v. Ruckman*, 104 Ind. 588; *Ohio & M. Ry. Co. v. Smith*, 5 Ind. App. 560; *Texas & Pac. Ry. Co. v. Tankersley*, 63 Tex. 57.

Where the trial court does not state the issues to the jury otherwise than by copying the pleadings into the charge, the supreme court, though condemning the practice, and recommending a different method on a new trial, will not reverse on this ground alone. *McDonald v. Bice*, 113 Iowa 44.

33—*Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36; *Woodruff v. Hensley*, 26 Ind. App. 592, holding

that, in such case, the substance of the issue should be stated.

34—*Canfield v. Chicago, R. I. & P. R. Co.*, 142 Iowa 658.

Where two answers contained pleas of contributory negligence which were not involved or technical, and the charges as a whole fairly submitted the issues, it was not error warranting reversal to refer to the pleadings. *Freeman v. McElroy*, — Tex. Civ. App. —, 149 S. W. 428.

35—*Burns v. Oliphant*, 78 Iowa 456. See also *Sprague v. Atlee*, 81 Iowa 1.

36—*Bradshaw v. Mayfield*, 24 Tex. 482.

37—*Erb v. German-American Ins. Co.*, 112 Iowa 357.

out in plaintiff's declaration, which you will have out with you, and which you will read. In the defendant's plea, * * * which you will read, these wrongs and injuries are denied. * * * These pleadings form the issue which you * * * were sworn to well and truly try."³⁸

Where there is no statement of the issues in any part of the charge, and the acts of negligence charged in the petition are such that no proper presentation of the case to the jury could have been made without a plain and clear statement of the issues, telling the jury to turn to these papers for the particular statement of fact upon which the plaintiff must recover, if he is entitled to recover at all, under the evidence and the instructions in this case, is prejudicial error.³⁹

On the other hand, it has been held not erroneous, as referring the jury to the pleadings for the issues to state: "That upon the issue of contributory negligence of plaintiff, raised by defendant's answer, the burden of proof is upon defendant."⁴⁰

And in an action for damages to property by fire, caused by sparks emitted from a locomotive, an instruction referring to the property destroyed as that mentioned in the petition is not erroneous as referring the jury to the pleadings.⁴¹

In an action to recover for injuries received because of careless driving, the expression, "in direct consequence of

38—East Tennessee, V. & G. Ry. Co. v. Lee, 90 Tenn. 570.

39—Keatley v. Illinois Cent. Ry. Co., 94 Iowa 685. But in Chicago & A. R. Co. v. Harrington, 90 Ill. App. 638, aff'd 192 Ill. 9, it was held that an instruction to the effect that, if the jury believed from the evidence that the injury complained of resulted from defendant's negligence, as charged in the declaration, the defendant was liable, was not erro-

neous for failure to explain the facts from which the conclusion of the defendant's liability was to be drawn, as it was sufficient to refer to the declaration in which the facts necessary to make out plaintiff's case were stated.

40—Sherwood v. Grand Ave. Ry. Co., 132 Mo. 339.

41—Big River Lead Co. v. St. Louis, I. M. & S. R. Co., 123 Mo. App. 394.

the acts herein complained of," is not objectionable as requiring a reference to the petition to find the issues to be determined, such expression referring to acts complained of, and mentioned already in the instructions.⁴²

In an action against a city and a contractor for negligently leaving an excavation open in the street, an instruction which says that, if the jury "believe from the evidence that the excavation mentioned in plaintiff's petition was made by defendant, * * * and was made in the alley, in the petition mentioned, * * * they will find," etc., cannot be objected to on the ground that it refers the jury to the petition to find the issues, the excavation being a conceded fact in the case. The reference to the petition is for the purpose of description merely.⁴³

An introductory statement of the allegation of a pleading, though of unnecessary length, is not error.⁴⁴

In stating the plaintiff's contentions, the court may properly call the attention of the jury to any allegations of the petition which have not been demurred to or stricken out, and which are supported by evidence;⁴⁵ but merely reading the pleadings to the jury, without including them in the charge by copy, is objectionable as, in effect, partly instructing the jury orally.⁴⁶

Where the court fully and clearly states the issues to the jury, and what it is necessary for the plaintiff to prove in order to recover, it is not error for the court to also read the pleadings to the jury, and incorporate them in the instruction.⁴⁷

42—Taylor v. Scherpe & Koken Architectural Iron Co., 133 Mo. 349.

43—Britton v. City of St. Louis, 120 Mo. 437.

44—Atchison, T. & S. F. Ry. Co. v. Cuniffe (Tex. Civ. App.), 57 S. W. 692.

45—Macon Consolidated St. R. Co. v. Barnes, 113 Ga. 212.

46—Hall v. Carter, 74 Iowa 364.

47—Lake Shore & M. S. Ry. Co. v. McIntosh, 140 Ind. 261; Jenks v. Lansing Lumber Co., 97 Iowa 342; Morrison v. Burlington, C. R. & N. Ry. Co., 84 Iowa 663; Probert v. Anderson, 77 Iowa 60; Helt v. Smith, 74 Iowa 667; Dorr v. Simerson, 73 Iowa 89.

§ 94. Erroneous statement of issues.

It is error to give an instruction misstating the issues of a case,⁴⁸ and such misstatement is ground for reversal when the instruction tends to confuse or mislead the jury.⁴⁹

It is reversible error for the court to submit a case to the jury upon a theory entirely different from that claimed in the declaration, and upon which the case has been tried,⁵⁰ but a charge cannot be attacked as erroneous for misconstruing a pleading if such misconstruction cannot affect the substantial rights of the party objecting.⁵¹

48—*Harley v. Merrill Brick Co.*, 83 Iowa 73; *Fuhs v. Osweiler*, 59 Iowa 431; *Stafford v. City of Oskaloosa*, 57 Iowa 478; *Reed v. Gould*, 93 Mich. 359; *Marquette, H. & O. R. Co. v. Marcott*, 41 Mich. 433; *Hall v. Woodin*, 35 Mich. 67; *Klosterman v. Olcott*, 27 Neb. 685; *Galloway v. Hicks*, 26 Neb. 531; *Howell v. Wilcox & Gibbs Sew. Mach. Co.*, 12 Neb. 177.

Where one of two defendants introduces an ordinance over objection of the other and no recovery is sought for a violation thereof, an instruction as to no recovery for the violation is improper. *Sehrt v. Sampsell*, 167 Ill. App. 628.

49—*Stouffer v. Stoy*, 46 Ind. App. 180; *Lower v. Marceline Coal & Mining Co.*, 142 Mo. App. 351; *Howell v. Wilcox & Gibbs Sew. Mach. Co.*, 12 Neb. 177.

Where the court, in instructing the jury as to the issues in the case, stated them more broadly than was warranted by the instrument which was the foundation of the action, it was held reversible error. *Klosterman v. Olcott*, 27 Neb. 685.

If no prejudice results from a misstatement of the issues, it is not ground for reversal. *Stark v. Willetts*, 8 Kan. 203.

The fact that the court, in stating the issues to the jury, confounds the action of trespass with trespass on the case, will not warrant a reversal. *Brown v. Hendrickson*, 69 Iowa 749.

Where a locomotive engineer is charged with negligence in backing up his engine too fast, and the instruction refers to this charge as being "that the parties in charge of the engine moved the train at an unusual fast rate of speed," such instruction is not erroneous in not properly stating the plaintiff's cause of action. *Beems v. Chicago, R. I. & P. R. Co.*, 58 Iowa 150.

50—*Reed v. Gould*, 93 Mich. 359.

Where the evidence tends to show a promise, by way of guaranty, to make good the obligation of others, it is error to submit the case to the jury as one of an absolute and original promise to pay. *Hall v. Woodin*, 35 Mich. 67.

51—*Stark v. Willetts*, 8 Kan. 203.

In ejectment, where defendant's answer admits plaintiff's title, thus, prima facie at least, admitting plaintiff's right to possession, an instruction that defendant admitted plaintiff's right to possession is not error, in the absence of any attempt on the part of defendant to show that plaintiff did not have such right of

Where an instruction submits one question which did not arise under the pleadings, but the issues were properly submitted in other instructions, and it is clear that the question on which the rights of the parties turn was before the jury, the judgment should not be reversed because of error in the one instruction.⁵²

§ 95. Incomplete statement of issues.

The issues should be stated to the jury fully, so that such jury may intelligently pass upon the case,⁵³ thus it is erroneous to omit reference to a material issue in the case, as, for instance, the issue of contributory negligence,⁵⁴ and an instruction which purports to enumerate all the material elements which a party must prove in order to maintain his action or support his defense must be correct and complete, and, if any essential element is omitted, the error is ground for reversal.⁵⁵

Such error has an obvious tendency to mislead the jury. It has been held, however, that an incomplete statement of the issues is not ground for reversal, unless the party complaining requested an instruction correctly stating the issues.⁵⁶

§ 96. Withdrawal of issues.

Issues raised by the pleadings which are not supported by the evidence may properly be withdrawn from the jury's

possession. *Stark v. Willetts*, 8 Kan. 203.

52—*Newton v. Ritchie*, 75 Iowa 91.

53—*McDivitt v. Des Moines City R. Co.*, 141 Iowa 689; *Potter v. Chicago, R. I. & P. R. Co.*, 46 Iowa 399; *Rand v. Butte Electric R. Co.*, 40 Mont. 398, 107 Pac. 87.

54—*Gamble v. Mullin*, 74 Iowa 99.

55—*Jackson School Tp. v. Shera*,

8 Ind. App. 330; *Kentucky & I. Bridge Co. v. Eastman*, 7 Ind. App. 514; *Gamble v. Mullin*, 74 Iowa 99; *Hill v. Aultman*, 68 Iowa 630; *Potter v. Chicago, R. I. & P. R. Co.*, 46 Iowa 399; *State v. Brainard*, 25 Iowa 572.

56—*Sioux City & Pac. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724n.

consideration,⁵⁷ and when an issue is abandoned or conceded, it should not be submitted.⁵⁸

The court may and should refuse to instruct upon issues which have been withdrawn or stricken out.⁵⁹

If the court declines to submit an issue to the jury upon which evidence has been introduced, the evidence bearing upon that issue should be taken from the jury, and it is error, in such case, to instruct that the facts concerning that matter may properly be considered in determining the issues that are submitted;⁶⁰ but where an issue raised by the petition is not submitted to the jury, a refusal to withdraw testimony as to such issue is not erroneous, where the jury are instructed to consider only the issues submitted.⁶¹

In this connection it has been held that a paragraph instructing the jury that all other issues raised by the pleadings other than those submitted are withdrawn from their consideration, should not be included, as the tendency may be to mislead the jury.⁶²

57—Colorado Midland R. Co. v. Edwards, 24 Colo. App. 350, 134 Pac. 248; Whalen v. Chicago, R. I. & P. Ry. Co., 75 Iowa 563; Dupuy v. Burkitt, 78 Tex. 338.

58—Brown v. Drainage Dist. No. 48, 163 Iowa 290; Canfield v. Chicago, R. I. & P. R. Co., 142 Iowa 658; Latman v. Douglas & Co., 149 Iowa 699; Tathwell v. City of Cedar Rapids, 114 Iowa 180; Erb v. German-American Ins. Co., 112 Iowa 357.

59—Alabama. Western U. Tel. Co. v. Boteler, 183 Ala. 457.

Georgia. Stanford v. Murphy, 63 Ga. 410. See also, Macon Consolidated St. R. Co. v. Barnes, 113 Ga. 212.

Iowa. New Haven Lumber Co. v. Raymond, 76 Iowa 225.

Massachusetts. Bugbee v. Kendrick, 132 Mass. 349.

Virginia. Fry v. Leslie, 87 Va. 269.

60—Hammer v. Chicago, R. I. & P. Ry. Co., 70 Iowa 623.

61—Gulf, C. & S. F. Ry. Co. v. Shieder (Tex. Civ. App.), 26 S. W. 509.

Where two or more grounds of negligence are alleged and the court submits the case to the jury only upon one of these grounds the same constitutes a sufficient withdrawal of the other ground and the defendant is not entitled to any special charge relating to the question withdrawn. St. Louis Southwestern Ry. Co. of Texas v. Martin, — Tex. Civ. App. —, 161 S. W. 405.

62—Missouri, K. & T. R. Co. v. Graves, 57 Tex. Civ. App. 395.

CHAPTER X.

IGNORING EVIDENCE, ISSUES, THEORIES, AND DEFENSES.

- § 97. Ignoring issues, theories, and defenses.
- § 98. Same—Illustrations.
- § 99. Ignoring evidence.
- § 100. Same—Instructions held erroneous, as ignoring evidence or withdrawing it from consideration.
- § 101. Same—Instructions held not erroneous, as ignoring evidence or withdrawing it from consideration.

§ 97. Ignoring issues, theories, and defenses.

Instructions to the jury should not ignore or exclude any of the issues, theories, or defenses presented by the pleadings and the evidence,¹ even though the evidence in support

1—**Alabama.** *Brown & Flowers v. Central of Georgia R. Co.*, 185 Ala. 659; *Bloch v. Edwards*, 116 Ala. 90.

Arkansas. *Western Coal & Mining Co. v. Moore*, 96 Ark. 206.

California. *Remy v. Olds*, 4 Cal. Unrep. 240, 34 Pac. 216.

Georgia. *Klink v. Boland*, 72 Ga. 485.

Illinois. *Mengelkamp v. Consol. Coal Co.*, 259 Ill. 305; *Cromer v. Borders Coal Co.*, 246 Ill. 451; *Costly v. McGowan*, 174 Ill. 76; *Simpson Brick-Press Co. v. Wormley*, 166 Ill. 383; aff'g 61 Ill. App. 460; *McColom v. Indianapolis & St. L. R. Co.*, 94 Ill. 534; *Volk v. Roche*, 70 Ill. 297; *Chicago & N. W. Ry. Co. v. Clark*, 70 Ill. 276; *Flennor v. Cleveland, C., C. & St. L. Ry. Co.*, 163 Ill. App. 536; *Union Stock Yard & Transit Co. v. Goodman*, 91 Ill. App. 426; *Clark v. Smith*, 87 Ill. App. 409.

Indiana. *Burke v. State*, 72 Ind. 392; *Terry v. Shively*, 64 Ind. 106; *Longnecker v. State*, 22 Ind. 247.

Maryland. *Eureka Fertilizer Co. of Cecil County v. Baltimore Copper, Smelting & Rolling Co.*, 78 Md. 179.

Michigan. *Miller v. Miller*, 97 Mich. 151; *Dikeman v. Arnold*, 71 Mich. 656; *Willey v. Crane*, 69 Mich. 17; *People v. Cummins*, 47 Mich. 334.

Minnesota. *De Foe v. St. Paul City Ry. Co.*, 65 Minn. 319.

Missouri. *Condon v. Missouri Pac. Ry. Co.*, 78 Mo. 567; *Turner v. Loler*, 34 Mo. 461; *Jobes v. Wilson*, 140 Mo. App. 281; *Evers v. Shumaker*, 57 Mo. App. 454; *Walter A. Wood Mowing & Reaping Mach. Co. v. Bobbst*, 56 Mo. App. 427; *Brown v. McCormick*, 23 Mo. App. 181.

Montana. *O'Brien v. Corra-Rock*

thereof is very slight;² and whether the court believes the evidence or not, the issues must be presented to the jury.³

If there is evidence on a material issue, it is error to instruct that it scarcely requires attention, the defendant having made no contest thereon,⁴ and where the right of action or defense rests upon several questions of fact, an

Island Min. Co., 40 Mont. 212, 105 Pac. 724.

Nebraska. Rising v. Nash, 48 Neb. 597.

Oregon. Fiore v. Ladd, 25 Ore. 423, 36 Pac. 572; Holmes v. Whitaker, 23 Ore. 319, 31 Pac. 705; Kearney v. Snodgrass, 10 Ore. 181.

Pennsylvania. Hayes v. Pennsylvania R. Co., 195 Pa. 184; Hall v. Vanderpool, 156 Pa. 152.

South Carolina. Kennedy v. Kennedy, 86 S. C. 483.

Tennessee. Nashville & C. R. Co. v. Conk, 11 Heisk. (Tenn.) 575.

Texas. Wootters v. Hale, 83 Tex. 563; Island City Boating & Athletic Ass'n v. New York & T. Steamship Co., 80 Tex. 375; Cannon v. Cannon, 66 Tex. 682; McGehee v. Lane, 34 Tex. 390; Smithwick v. Andrews, 24 Tex. 488; Park v. Pyle, — Tex. Civ. App. —, 157 S. W. 445; Gibson & Cunningham v. Purifoy, 56 Tex. Civ. App. 379; Dorsey Printing Co. v. Gainesville Cotton Seed Oil Mill & Gin Co., 25 Tex. Civ. App. 456; Eppstein v. Thomas, 16 Tex. Civ. App. 619; Gulf, C. & S. F. Ry. Co. v. Kiziah, 4 Tex. Civ. App. 356; Banner Distilling Co. v. Dieter (Tex. Civ. App.), 60 S. W. 798; P. J. Willis & Bro. v. Sims' Heirs (Tex. Civ. App.), 57 S. W. 325; Taylor v. State (Tex. Cr. App.), 63 S. W. 330.

Virginia. Atlantic C. L. R. Co. v. Caple's Adm'x, 110 Va. 514.

Washington. Dignan v. Spurr, 3 Wash. 309, 28 Pac. 529.

West Virginia. Franklin v. T. H. Lilly Lumber Co., 66 W. Va. 164; Maxwell v. Kent, 49 W. Va. 542; McVey v. St. Clair Co., 49 W. Va. 412.

United States. Adams v. Roberts, 2 How. (U. S.) 486, 11 L. Ed. 349.

Theories of recovery relied upon in the declaration which the evidence may sustain, must not be excluded. Flenner v. Cleveland, C. C. & St. L. R. Co., 163 Ill. App. 536.

A charge excluding a material issue of defense is reversible error. Gibson & Cunningham v. Purifoy, 56 Tex. Civ. App. 379.

Instruction ignoring issue held prejudicial error. Park v. Pyle, — Tex. Civ. App. —, 157 S. W. 445.

An instruction given at the request of the defendant and covering only a part of the theory of the defense is objectionable because too narrow, but it is not ground for reversal where it is manifest that it did not operate to the prejudice of the plaintiff. Maxwell v. Kent, 49 W. Va. 542.

2—Providence Gold Min. Co. v. Thompson, 7 Ariz. 69, 60 Pac. 874; McGown v. International & G. N. Ry. Co., 85 Tex. 289; Morgan v. State, 62 Tex. Cr. App. 39.

3—Morgan v. State, 62 Tex. Cr. App. 39.

4—Barker v. State, 126 Ala. 83; Republican Valley R. Co. v. Fink, 18 Neb. 89.

instruction making the question turn upon the finding as to one point, and ignoring the others, is erroneous, and may be refused.⁵

It is also error to submit the case entirely from the standpoint of one party, by calling the attention of the jury to the claims and evidence of such party, without adverting to the claims and evidence of his adversary.⁶

It has been held, however, that if the court fails to submit defensive matter to the jury, it is the duty of the defense to request same, and failing to do so the case will not be reversed on that account.⁷

A refusal of instructions defective in this regard is, of course, proper, and error can in no case be predicated of such refusal.⁸

5—**Alabama.** *Holmes v. State*, 23 Ala. 17; *Davis Wagon Co. v. Cannon* (Ala.), 29 So. 841.

California. *Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114.

Idaho. *Deasy v. Thurman*, 1 Idaho 779.

Pennsylvania. *Kennedy v. Forest Oil Co.*, 199 Pa. 644.

West Virginia. *McVey v. St. Clair Co.*, 49 W. Va. 412.

6—*Hayes v. Pennsylvania R. Co.*, 195 Pa. 184.

7—*Houston & T. C. R. Co. v. Coleman*, — Tex. Civ. App. —, 166 S. W. 685. See also, *Chrystal v. Gerlach*, 25 S. D. 128.

8—**Alabama.** *Davis Wagon Co. v. Cannon*, 129 Ala. 301.

Florida. *Jacksonville Elec. Co. v. Sloan*, 52 Fla. 257.

Georgia. *Southwestern R. Co. v. Singleton*, 67 Ga. 306.

Illinois. *Chicago & N. W. R. Co. v. Clark*, 70 Ill. 276.

Maryland. *Turner v. Ellicott*, 9 Md. 52.

Missouri. *Condon v. Missouri Pac.*

Ry. Co., 78 Mo. 567; *Henry v. Bassett*, 75 Mo. 89; *Martin v. Johnson*, 23 Mo. App. 96.

Nebraska. *Fulton v. Ryan*, 60 Neb. 9; *Carruth v. Harris*, 41 Neb. 789.

New York. *Leonard v. Brooklyn Heights R. Co.*, 57 App. Div. (N. Y.) 125.

Oregon. *Mitchell v. LaFollett*, 38 Ore. 178, 63 Pac. 54; *Krewson v. Purdom*, 13 Ore. 563, 11 Pac. 281.

Pennsylvania. *Kennedy v. Forest Oil Co.*, 199 Pa. 644; *Hall v. Vanderpool*, 156 Pa. 152.

South Carolina. *Westbury v. Simmons*, 57 S. C. 467.

Texas. *Pope v. Riggs* (Tex. Civ. App.), 43 S. W. 306; *Gulf, C. & S. F. Ry. Co. v. Kizziah*, 4 Tex. Civ. App. 356.

Wisconsin. *Novak v. Nordberg Mfg. Co.*, 141 Wis. 298.

It is proper to refuse instructions, as misleading, when they are based on the theory of a party as to facts in evidence, and ignore the legal effect of other facts applicable to the relation and rights of the parties.

However, an instruction ignoring a theory or defense is not erroneous, where there is no evidence to sustain the theory or defense ignored,⁹ although remarks of counsel in argument may sometimes require an instruction upon questions not in issue.¹⁰

Instructions on matters about which there is no real dispute are properly refused,¹¹ and it has been held not a ground of reversal that the court omitted, in commenting on the facts, to mention facts favorable to the unsuccessful party, where he told the jury that they were to determine all issues of fact, and that the comments of the court were made for the purpose of illustrating the statements of law, and were not to control the jury.¹²

It is not necessary that all issues, theories, and defenses be presented in one instruction. An instruction containing a correct proposition of law in regard to one theory, issue, or defense is not erroneous, where the other issues, theories, or defenses are presented in other instructions.¹³

Jacksonville Elec. Co. v. Sloan, 52 Fla. 257.

9—*Scott v. Parlin & Orendorff Co.*, 245 Ill. 460; *E. A. Moore Furniture Co. v. W. & J. Sloane*, 166 Ill. 457, *aff'd* 64 Ill. App. 581; *Leslie v. Joliet Bridge & Iron Co.*, 149 Ill. App. 210; *Longnecker v. State*, 22 Ind. 247; *Hilburn v. Phoenix Ins. Co.*, 140 Mo. App. 355; *Gulf, C. & S. F. Ry. Co. v. Dorsey*, 66 Tex. 148.

It is error to leave it to the jury to determine whether there is any evidence to support a particular issue. *Central of Georgia Ry. Co. v. Crane*, — Ala. —, 65 So. 866; *David v. Tucker*, 140 Ga. 240; *McAllister v. Ferguson*, 50 App. Div. (N. Y.) 529.

A refusal to instruct the jury on a theory, issue, or defense which there is evidence tending to support is erroneous. *De Foe v. St. Paul City Ry. Co.*, 65 Minn. 319; *Kraft v. Mc-*

Boyd, 32 Mo. App. 399; *Parker v. Chancellor*, 78 Tex. 524; *Underwood v. Coolgrove*, 59 Tex. 164; *Smithwick v. Andrews*, 24 Tex. 488; *P. J. Willis & Bro. v. Sims' Heirs* (Tex. Civ. App.), 57 S. W. 325; *Oliver v. Moore* (Tex. Civ. App.), 43 S. W. 812; *Jackson v. Com.*, 96 Va. 107.

10—See *Missouri, K. & T. Ry. Co. v. Nail*, 24 Tex. Civ. App. 114, where, however, the particular remark was held not to call for an instruction that exemplary damages could not be allowed, the question of exemplary damages not being in issue.

11—*Cooke v. Plaisted*, 176 Mass. 374.

12—*Lowry v. Mt. Adams & E. P. Incline Plane Ry. Co.*, 68 Fed. 827.

13—*Fessenden v. Doane*, 89 Ill. App. 229, *aff'd* 188 Ill. 228; *State v. Hope*, 102 Mo. 410.

Also, where an issue is submitted in several paragraphs of a charge, it is immaterial that the issue is not referred to in other paragraphs, as the charge must be construed as a whole.¹⁴

§ 98. Same—Illustrations.

In an action for breach of contract, an instruction that the jury should give plaintiff damages if defendant did not perform withdraws from the jury the question of performance by plaintiff and is erroneous.¹⁵

An instruction to find for the defendant unless they should find from the evidence that a good consideration passed from the plaintiff to the defendant, and the defendant signed a memorandum in writing, charging himself with the debt of another, there being evidence that defendant's undertaking was an original, and not a collateral, agreement is erroneous.¹⁶

In an action on a note, where "defendant pleaded *non est factum* under oath, and also an unsworn denial of any indebtedness to the plaintiff," an instruction telling the jury that the only issue before them was the execution of the note was erroneous,¹⁷ and in a similar action on a note, "with a condition that the same was subject to all payments made to the payee, as a partner of the maker, and not charged upon the books of the firm, where such payments were pleaded, and also a plea of set-off, an instruction that if the matters of defense under the condition in the note are not proved, the jury should find for the plaintiff," was erroneous, since such instruction ignores "the defense and proof under the plea of set-off."¹⁸

In an action on a note, where proof is offered tending to establish two grounds of defense, either of which were

14—Missouri, K. & T. Ry. Co. of Texas v. Stogner, — Tex. Civ. App. —, 163 S. W. 319.

15—Remy v. Olds, 4 Cal. Unrep. 240, 34 Pac. 216.

16—Clark v. Smith, 87 Ill. App. 409.

17—McGehee v. Lane, 34 Tex. 390.

18—Volk v. Roche, 70 Ill. 297.

available, an instruction narrowing the defense to a single point is erroneous.¹⁹

In negligence cases it has been held error to give instructions which ignored issues supported by the evidence, such as the last clear chance doctrine,²⁰ the issue of vice principal,²¹ or the defenses of assumed risk²² and contributory negligence.²³

In an action for injuries sustained in a collision with a street car, an instruction requiring a verdict for plaintiff if the accident occurred at a certain place, and the car was not under such complete control that it could be immediately stopped by the motorman, was erroneous as eliminating the issues of proximate cause, contributory negligence, and injury.²⁴

In an action for injuries caused by rock flying during

19—Anderson v. Norvill, 10 Ill. App. 240.

20—Watts v. Chicago, E. & I. R. Co., — Ind. App. —, 104 N. E. 42.

21—Hugo, Schmeltzer & Co. v. Paiz, — Tex. Civ. App. —, 128 S. W. 912.

22—Instructions ignoring the issues of assumed risk and contributory negligence, when pleaded and proved, should not be given. Lawson v. Hamilton Compress Co., — Tex. Civ. App. —, 162 S. W. 1023.

23—Iowa. Neel v. Smith, — Iowa —, 147 N. W. 183.

Kansas. Jones v. Joplin & P. R. Co., 91 Kan. 282, 137 Pac. 796.

Mississippi. Yazoo & M. Val. R. Co. v. Bruce, 98 Miss. 727.

Missouri. Tinkle v. St. Louis & S. F. R. Co., 212 Mo. 445; Hawkins v. Missouri Pac. R. Co., 182 Mo. App. 323.

Texas. Carter v. South Texas Lumber Yards, — Tex. Civ. App. —, 160 S. W. 626; Ft. Worth & D. C.

R. Co. v. Wininger, — Tex. Civ. App. —, 159 S. W. 881.

Virginia. Atlantic C. L. R. Co. v. Caple's Adm'r, 110 Va. 514.

West Virginia. McVey v. St. Clair Co., 49 W. Va. 412.

Charge ignoring contributory negligence, held properly refused. Carter v. South Texas Lumber Yards, — Tex. Civ. App. —, 160 S. W. 626.

Instruction ignoring contributory negligence held not erroneous when the instructions were considered as a whole. Neel v. Smith, — Iowa —, 147 N. W. 183.

In a negligence case, an instruction, which purports to cover the whole case and directs a verdict, is erroneous if it ignores the issue of contributory negligence, where the evidence tends to show negligence on the part of the one injured, and such issue is not presented by other instructions. Hawkins v. Missouri Pac. R. Co., 182 Mo. App. 323.

24—Feille v. San Antonio Traction Co., 48 Tex. Civ. App. 541.

blasting operations, an instruction ignoring the issue as to whether plaintiff had warning of the blast and could have protected himself, did not correctly submit the law.²⁵

In an action for the death of a driver of mules, while stringing an electric wire, caused by the pulling out of a clevis, when the driver failed to receive a signal to stop pulling the wire, an instruction ignoring a ground of liability based upon the failure of defendant to furnish and properly distribute a sufficient number of men for the purpose of transmitting signals, was erroneous.²⁶

In an action for injuries to a passenger caused by derailment of a train and explosion of a car load of dynamite, an instruction confining the issue to the condition of the axle of the powder car, and ignoring other acts of negligence, such as improperly loading the car ahead of the powder car, so as to allow slabs to fall and derail the powder car, was properly refused.²⁷

In an action for damages caused by a collision of railway cars with an automobile, an instruction as to striking the automobile with a car while switching was erroneous when it omitted to submit whether the switching and striking was negligently done, as charged in the petition.²⁸

In an action for injuries sustained at a railroad crossing, a requested instruction ignoring the question of negligence *per se* in the failure to ring the bell, and a speed ordinance, was properly refused.²⁹

In an action for injuries to a passenger while alighting from a street car, an instruction ignoring acts of negligence alleged by the plaintiff and supported by the evidence, which acts the jury was warranted in finding were concur-

25—*Lexington & E. R. Co. v. California*, 14 Cal. App. 180, 111 Pac. Fields, 152 Ky. 19, 4 N. C. C. A. 19. 519.

26—*Stone & Webster Engineering Corp. v. Goodman*, — Tex. Civ. App. Co., 180 Mo. App. 368.
—, 167 S. W. 10.

27—*Roberts v. Sierra R. Co. of Co. v. Lynn*, 177 Ind. 311.

28—*Botts v. Chicago, B. & Q. R. Co.*, 180 Mo. App. 368.

29—*Cleveland, C., C. & St. L. R. Co. v. Lynn*, 177 Ind. 311.

rent causes with the starting of the car, proximately causing the injury, was properly refused.³⁰

In an action for injuries to a servant, an instruction ignoring the issue whether or not plaintiff negligently or intentionally put his hand under the knife of a "veneering machine" or clipper, was properly refused.³¹

In an action for injuries to a brakeman caused by the fall of a defective platform, an instruction ignoring the issue of negligence in the construction of the platform was properly refused.³²

On a trial for burglary, an instruction ignoring a theory of the defendant that he did not steal the pistol, but bought it from the owner, was erroneous, there being evidence to support such theory.³³

On a trial for assault and battery, instructions ignoring the question of retreat or freedom from fault in bringing on the difficulty, are properly refused,³⁴ and in an action for an assault and battery, in which was filed a plea of *son assault demesne*, an instruction withdrawing from the jury the consideration of the issue on that plea is erroneous.³⁵

An instruction that defendant "does not controvert the evidence for the state," in a prosecution for carrying concealed weapons, where defendant testifies that the weapon carried was not concealed, is also erroneous.³⁶

§ 99. Ignoring evidence.

It has been noted that instructions should be applicable to and limited to the evidence adduced in the cause.³⁷

30—El Paso Elec. Ry. Co. v. Mebus, — Tex. Civ. App. —, 157 S. W. 955.

31—Bryson v. Moore, — Tex. Civ. App. —, 157 S. W. 233.

32—Missouri, K. & T. Ry. Co. of Texas v. Rogers, — Tex. Civ. App. —, 128 S. W. 711; Missouri, K. & T. Ry. Co. of Texas v. Rogers, — Tex. Civ. App. —, 117 S. W. 914.

33—Robinson v. State, 71 Tex. Cr. App. 561.

34—Blankenship v. State, — Ala. App. —, 65 So. 860.

35—Collins v. Waters, 54 Ill. 485.

36—Barker v. State, 126 Ala. 83.

37—See *ante*, § 82.

It is also the rule that the instructions must not ignore material evidence, or be drawn so as to exclude such evidence from the consideration of the jury.³⁸

38—Alabama. Southern R. Co. v. Weatherlow, 164 Ala. 151; Bloch v. Edwards, 116 Ala. 90; Highland Ave. & B. R. Co. v. Sampson, 112 Ala. 425; Anniston Lime & Coal Co. v. Lewis, 107 Ala. 535; Williamson v. Tyson, 105 Ala. 644; Louisville & N. R. Co. v. Hurt, 101 Ala. 34; Marx v. Leinkauff, 93 Ala. 453; Wooten v. Federal D. Co., — Ala. App. —, 62 So. 263.

Arkansas. Arkansas Lumber & Contractors' Supply Co. v. Benson, 92 Ark. 392.

California. Fox v. Stockton Combined Harvester & Agricultural Works, 83 Cal. 333, 23 Pac. 295; Gallagher v. Williamson, 23 Cal. 331, 83 Am. Dec. 114.

Colorado. Venine v. Archibald, 3 Colo. 163.

Connecticut. Charter v. Lane, 62 Conn. 121.

Florida. Mims v. State, 42 Fla. 199; Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394.

Georgia. Wylly v. Gazan, 69 Ga. 507.

Idaho. Deasey v. Thurman, 1 Idaho 775.

Illinois. Mithen v. Jeffery, 259 Ill. 372; Elgin, J. & E. Ry. Co. v. Raymond, 148 Ill. 241, aff'g 47 Ill. App. 242; Phenix Ins. Co. v. La Pointe, 118 Ill. 384, aff'g 17 Ill. App. 248; Wooley v. Lyon, 117 Ill. 244; 57 Am. Rep. 867; Wabash, St. L. & P. Ry. Co. v. Rector, 104 Ill. 296; Thorne v. McVeagh, 75 Ill. 81; Prante v. Hartman, 168 Ill. App. 393; Ruch v. Aurora, E. & C. R. Co., 150 Ill. App. 329. And see cases cited *post* this note.

Indiana. Prothero v. Citizens' St. Ry. Co., 134 Ind. 431; Dean v. State, 130 Ind. 237; Indianapolis Traction & Terminal Co. v. Miller, 40 Ind. App. 403.

Iowa. Carpenter v. Campbell Automobile Co., 159 Iowa 52, 4 N. C. C. A. 1; Carruthers v. Towne, 86 Iowa 318; State v. Meshek, 51 Iowa 308.

Kentucky. Myers v. Sanders' Heirs, 7 Dana (Ky.), 509.

Maryland. Higgins v. Grace, 59 Md. 365.

Massachusetts. McDonough v. Miller, 114 Mass. 94.

Michigan. Sterling v. Callahan, 94 Mich. 536; People v. Marks, 90 Mich. 555; Kieldsen v. Wilson, 77 Mich. 45.

Minnesota. Campbell v. Duluth & N. E. R. Co., 111 Minn. 410.

Mississippi. Solomon v. City Compress Co., 69 Miss. 319; Thrasher v. Gillespie, 52 Miss. 840.

Missouri. Birtwhistle v. Woodward, 95 Mo. 113; Stöcker v. Green, 94 Mo. 280, 4 Am. St. Rep. 382n; Greer v. Parker, 85 Mo. 107; Jackson v. Bowles, 67 Mo. 609; Wyatt v. Citizens' Ry. Co., 62 Mo. 408; Jones v. Jones, 57 Mo. 138; Barada v. Blumenthal, 20 Mo. 162; Hilburn v. Phoenix Ins. Co., 140 Mo. App. 355.

Nebraska. Brown v. State, 9 Neb. 157.

New Hampshire. Ordway v. Sanders, 58 N. H. 132.

North Carolina. Meredith v. Cranberry Coal & Iron Co., 99 N. C. 576.

Pennsylvania. Peirson v. Duncan, 162 Pa. 187; Ott v. Oyer's Exec'x, 106 Pa. 7.

An instruction which selects a part of the evidence and calls the jury's attention to it, omitting other evidence that is entitled to be considered on the same question, is calculated to mislead,³⁹ and it makes no difference how weak the evidence is on the point in issue.⁴⁰

It is safer to avoid grouping facts and charging with reference to them, but if a party requests a charge in that form presenting his theory of the evidence, as he has a right

Texas. *City of Houston v. Du-pree*, — Tex. Civ. App. —, 129 S. W. 173; *Missouri, K. & T. Ry. Co. v. Simmons*, 12 Tex. Civ. App. 500; *Gulf, C. & S. F. Ry. Co. v. Lankford*, 9 Tex. Civ. App. 593; *Pitt v. Elser*, 7 Tex. Civ. App. 47; *Weis v. Dittman*, 4 Tex. Civ. App. 35; *Bryan Cotton-Seed Oil Mill v. Fuller* (Tex. Civ. App.), 57 S. W. 924; *Caraway v. Citizens' Nat. Bank of Weatherford* (Tex. Civ. App.), 29 S. W. 506.

Vermont. *Montgomery v. Com.*; 98 Vt. 852; *Ashley v. Hendee*, 56 Vt. 209; *Gordon v. Tabor*, 5 Vt. 103.

Virginia. *Peek v. City of Hampton*, 115 Va. 855; *Hash v. Commonwealth*, 88 Va. 172.

West Virginia. *McCreery's Adm'r v. Ohio River R. Co.*, 43 W. Va. 110; *Thompson v. Douglass*, 35 W. Va. 337; *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682n.

Wisconsin. *Sherman v. Kreul*, 42 Wis. 33; *Phoenix Ins. Co. v. Sholes*, 20 Wis. 35.

United States. *Rio Grande Western Ry. Co. v. Leak*, 163 U. S. 280, 41 L. Ed. 160; *Allison v. United States*, 160 U. S. 203, 40 L. Ed. 395.

Essential elements must not be ignored. *Pittman v. Chicago & E. I. R. Co.*, 231 Ill. 581, aff'g 135 Ill. App. 481; *Cole v. City of East St. Louis*, 158 Ill. App. 494; *Plopper v. St. Louis & N. E. Ry. Co.*, 158 Ill. App. 196;

Ranney v. Chicago & A. R. Co., 158 Ill. App. 104; *Asplund v. Conklin Const. Co.*, 154 Ill. App. 164; *Harmening v. Henrietta Coal Co.*, 149 Ill. App. 387; *Mohr & Sons v. Martewicz*, 139 Ill. App. 173, aff'd 236 Ill. 143; *Chicago City Ry. Co. v. Gates*, 135 Ill. App. 180; *Harding v. Thuet*, 124 Ill. App. 437; *Muren Coal & Ice Co. v. Howell*, 119 Ill. App. 209, aff'd 217 Ill. 190.

It is error in an instruction to limit or confine the consideration of the jury to certain facts to the exclusion of others that are important. *Indianapolis Traction & Terminal Co. v. Miller*, 40 Ind. App. 403.

39—*People v. Tielke*, 259 Ill. 88.

40—Evidence should not be withdrawn from the consideration of the jury, and an instruction which does so is calculated to mislead, and improper. *Holmes v. State*, 23 Ala. 17; *Edgar v. McArn*, 22 Ala. 796; *Pritchett v. Munroe*, 22 Ala. 501; *Providence Gold-Min. Co. v. Thompson*, 7 Ariz. 69, 60 Pac. 874; *Mims v. State*, 42 Fla. 199; *Beale v. Hall*, 22 Ga. 431.

If instructions in effect discard or ignore, and thereby induce the jury to discard or ignore, any material evidence, however weak, they are erroneous. *Woodbury v. State*, 69 Ala. 242; *Gooden v. State*, 55 Ala. 178.

to do, the court should see that it does not eliminate a material fact.⁴¹

Where a court instructs a jury upon what state of facts they must find a verdict for a party, the instruction should include all the facts in controversy material to the right of the plaintiff or the defense of the defendant.⁴²

Although the judge may lay down the law correctly in his general charge, yet if, in a specific subsequent charge, he places the case upon the existence of certain facts, on which alone it may not properly be made to turn, and the effect of this charge, if literally followed by the jury, is to withdraw from them the consideration of other facts which tend to disprove or materially qualify the facts upon which the charge is predicated, injury will be presumed from the error.⁴³

However, it has also been held that an instruction need not anticipate and negative defenses,⁴⁴ or embody evidence tending to establish an antagonistic theory,⁴⁵ and where instructions are incomplete, but the omission is supplied in other instructions given, this is sufficient to prevent a

41—*St. Louis, B. & M. R. Co. v. Drodgy*, — Tex. Civ. App. —, 114 S. W. 902.

42—*California*. *Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114.

Idaho. *Deasey v. Thurman*, 1 Idaho 779.

Illinois. *Krieger v. Aurora, E. & C. R. Co.*, 242 Ill. 544; *Keller v. Chicago, W. & V. Coal Co.*, 184 Ill. App. 248; *Wibel v. Illinois Cent. R. Co.*, 147 Ill. App. 187; *Whitaker v. Mastin*, 143 Ill. App. 195.

Indiana. *Neeley v. Louisville & S. I. Traction Co.*, 53 Ind. App. 659.

Minnesota. *Campbell v. Duluth & N. E. R. Co.*, 111 Minn. 410.

Missouri. *Kendrick v. Ryus*, 225 Mo. 150, 135 Am. St. Rep. 585. See

also, *Turner v. Snyder*, 139 Mo. App. 656.

Texas. *St. Louis, B. & M. R. Co. v. Drodgy*, — Tex. Civ. App. —, 114 S. W. 902.

West Virginia. *Parfitt v. Sterling Veneer & Basket Co.*, 68 W. Va. 438.

43—*Holmes v. State*, 23 Ala. 17. See *McVey v. St. Clair Co.*, 49 W. Va. 412.

44—*Kellyville Coal Co. v. Strinè*, 217 Ill. 516, aff'g 117 Ill. App. 115; *Cincinnati, I. & W. Ry. Co. v. Ward*, 120 Ill. App. 212; *O'Leary v. Zindt*, 109 Ill. App. 309.

45—*Hartford Life Ins. Co. v. Sherman*, 223 Ill. 329, aff'g 123 Ill. App. 202; *Dunn v. Crichfield*, 214 Ill. 292.

reversal, the rule being that instructions are to be considered as a whole.⁴⁶

An instruction limiting consideration to testimony in open court has also been held not erroneous as excluding documentary evidence.⁴⁷

§ 100. Same—Instructions held erroneous, as ignoring evidence or withdrawing it from consideration.

Requested charges which would hinge the conclusion of guilt upon the testimony of one witness examined at the trial, are erroneous when there is other evidence tending to establish guilt.⁴⁸

An instruction “upon the credibility of a witness,” telling the jury that “they have the right to take into consideration the contradictory statements of a party as a witness, setting them forth, without calling their attention to the explanation given as to the error or mistake in the prior statements” is erroneous.⁴⁹

An instruction, summarizing the elements essential to recovery for sinking a shaft, which improperly omits a refusal to continue and inability to complete the work, is also improper.⁵⁰

In a suit for services rendered a deceased person, an instruction directing a verdict on a claim for pasturing and boarding a horse, if plaintiffs rendered such services, was erroneous when there was evidence that the deceased was received as a guest and was suffered to bring with him such property as he needed without any intention of paying for the services.⁵¹

In an action by a father for the seduction of his daughter, the court gave the following instruction: “As to the main

46—*Marietta Glass Mfg. Co. v. Pruitt*, 180 Ind. 434.

47—*Fitzgerald v. Benner*, 219 Ill. 485, aff'g 120 Ill. App. 447.

48—*McKinstry v. City of Tuscaloosa*, 172 Ala. 344.

49—*Chesney v. Meadows*, 90 Ill. 430.

50—*Keck v. Pfeil*, 173 Ill. App. 319.

51—*Burt v. Gabbert*, 174 Mo. App. 521.

fact of sexual intercourse, the daughter swears to this fact, and the defendant denies it. If these two witnesses, as they stand before you, seem equally to claim your credence, you cannot, in such a case, find for the plaintiff, because, as to that fact, which is radical in the case, there is no preponderance for the plaintiff." It was held that, where there was any other evidence tending to establish such fact, such instruction was erroneous, as tending to mislead the jury.⁵²

An oral instruction, defining negligence which eliminates all consideration of unavoidable and inevitable accidents, is erroneous when there is evidence of such accident.⁵³

An instruction, in an action for damages caused by the negligence of a railroad company, which states that certain matters of fact were, as a matter of law, negligence on the part of the plaintiff, and which ignores the elements of negligence on the part of defendant, is also erroneous.⁵⁴

In an action for injuries sustained at a railroad crossing caused by a horse being frightened, an instruction ignoring evidence that the whistle of a locomotive was blown in an unusual and unnecessary manner, was properly refused.⁵⁵

An instruction, "in an action by a father against the proprietor of a planing mill to recover damages for a personal injury sustained by his son while in the defendant's employment," directing the jury "that, if changing the boy's work was the cause of the accident and injury, the defendant was liable," the whole evidence tending to show that the injury was the result of the boy's own carelessness, was erroneous.⁵⁶

In an action for injuries sustained by a fall caused by a defective sidewalk, an instruction, as to obstructions on the sidewalk, which ignored evidence as to the actual position

52—Pruitt v. Cox, 21 Ind. 15.

53—Alabama City, G. & A. R. Co. v. Ventress, 171 Ala. 285.

54—Chicago, B. & Q. R. Co. v. Kuster, 22 Ill. App. 188.

55—St. Louis Southwestern Ry. Co. of Texas v. Cambron, — Tex. Civ. App. —, 131 S. W. 1130.

56—Sinclair v. Berndt, 87 Ill. 174.

of a step away from the house and in the midst of the sidewalk, was erroneous.⁵⁷

An instruction in a prosecution for assault with intent to commit rape, which gathers a cluster of circumstances stated by the witnesses, and presents them as proper to be considered in determining the defendant's intent, making no mention of other circumstances pointing in a different direction, is erroneous.⁵⁸

An instruction requiring the jury to discard all evidence of defendant's confessions, properly admitted in evidence, in determining whether or not a crime had been committed, is erroneous.⁵⁹

An instruction, as to flight of an accused, which is defective because it omits to expressly declare the qualifications under which evidence of flight may be considered, cannot be said to have been prejudicial to a defendant if it appears under the evidence, which the jury by the instruction were to consider, that the jury must necessarily have found such qualifications in connection with the claim of flight.⁶⁰

§ 101. Same—Instructions held not erroneous, as ignoring evidence or withdrawing it from consideration.

An instruction that, if the jury found certain specified facts from plaintiff's testimony, she was not necessarily guilty of negligence, is not erroneous, as ignoring conflicting testimony on the part of the defendant, the general charge being full and correct.⁶¹

In proceedings to condemn land, an instruction that "statements of counsel or parties, not made under oath, or

57—City of Richmond v. Gentry, 111 Va. 160.

58—Coon v. People, 99 Ill. 368, 39 Am. Rep. 28.

59—Dodson v. State, 86 Ala. 60.

60—People v. Lee Nam Chin, 166 Cal. 570, 137 Pac. 917.

61—Shaw v. Village of Sun Prairie, 74 Wis. 105. As to the cure of an instruction ignoring evidence, see also, Moore v. Aurora, E. & C. R. Co., 246 Ill. 56; Colono v. Consolidated Coal Co., 147 Ill. App. 327.

made as admissions, are not evidence, and are not to be regarded as such by the jury in making up their verdict," does not exclude an admission, made by the petitioner for the purpose of the trial, that title to a portion of the lands in question was in one of the parties to the proceeding.⁶²

An instruction that it is a question of fact for the jury to determine whether a part, or, if so, how much, of the proceeds of a designated sale came into the hands of the executor making the sale, after the latter's decease, in an action against the executor to recover the proceeds of the sale, is not erroneous.⁶³

62—Bowman v. Venice & C. Ry. Co., 102 Ill. 459.

was not to be understood as telling the jury this was the only question for their consideration.

63—Kirby v. Wilson, 98 Ill. 240, in which it was held this instruction

CHAPTER XI.

ASSUMPTION OF FACTS IN INSTRUCTIONS.

- § 102. Assumption of disputed facts.
- § 103. Illustrations of improper assumption of facts in general.
- § 104. Same—Criminal cases.
- § 105. Same—Negligence cases.
- § 106. Same—Damages.
- § 107. Instructions held not to assume disputed facts—In general.
- § 108. Same—Criminal cases.
- § 109. Same—Negligence cases.
- § 110. Assumptions in opposition to evidence.
- § 111. Assumption of facts not supported by any evidence.
- § 112. Assuming nonexistence of fact in absence of evidence.
- § 113. Assuming facts by way of illustration.
- § 114. Assumption of admitted facts.
- § 115. Assumption of facts supported by strong uncontradicted evidence.

§ 102. Assumption of disputed facts.

In the administration of justice, it is of the highest importance that the court should not invade the province of the jury in instructing as to the law of the case.

It is a legal maxim "that the court is for the law, and the jury for the fact," and, as was noted in a previous chapter, it is the exclusive province of the jury to determine the facts.¹

Accordingly when material facts are in issue between the parties, and the evidence is conflicting as to such issues, it is error and a usurpation of the province of the jury to assume the existence or nonexistence of such facts.²

1—See ch. VII, *ante*.

2—**Alabama.** Birmingham Railway, Light & Power Co. v. Girod, 164 Ala. 10, 137 Am. St. Rep. 17.

Arizona. Lujan v. State, — Ariz. —, 141 Pac. 706.

Arkansas. Cox & Sons Mach. Co. v. Forshee, 96 Ark. 156.

California. Llewellyn Steam Condenser Mfg. Co. v. Malter, 76 Cal. 242, 18 Pac. 271.

Colorado. Denver City Tramway

This rule is elementary and familiar, and it makes no difference in the application of the rule whether one fact or several are assumed,³ or whether the assumption is direct or indirect.⁴

The court cannot assume the existence of facts if there is room for controversy even where the evidence is slight,⁵

Co. v. Wright, 47 Colo. 366, 107 Pac. 1074.

Georgia. *Central of Georgia R. Co. v. Woodall*, 13 Ga. App. 50.

Illinois. *People v. Pezutto*, 255 Ill. 583; *Allmendinger v. McHie*, 189 Ill. 308; *Chambers v. People*, 105 Ill. 409; *Bradley v. Coolbaugh*, 91 Ill. 148; *Carroll v. Chicago City Ry. Co.*, 180 Ill. App. 309.

Indiana. *Noblesville & E. G. R. Co. v. Gause*, 76 Ind. 142, 40 Am. Rep. 224n; *Kuhn v. Bowman*, 46 Ind. App. 677.

Iowa. *Case v. Chicago G. W. R. Co.*, 147 Iowa 746; *Case v. Burrows*, 52 Iowa 146; *Russ v. Steamboat War Eagle*, 14 Iowa 363.

Michigan. *Weyburn v. Kipp*, 63 Mich. 79.

Minnesota. *Schwartz v. Germania Life Ins. Co.*, 21 Minn. 215.

Mississippi. *French v. Sale*, 63 Miss. 386.

Missouri. *Scheurer v. Banner Rubber Co.*, 227 Mo. 347, 28 L. R. A. (N. S.) 1207n, 21 Ann. Cas. 1110; *St. Louis, K. & N. W. R. Co. v. St. Louis Union Stock Yards Co.*, 120 Mo. 541; *State v. Gann*, 72 Mo. 374; *Bradley v. Modern Woodmen of America*, 146 Mo. App. 428.

Montana. *Trogdon v. Hanson Sheep Co.*, 49 Mont. 1, 139 Pac. 792.

North Carolina. *Fleming v. Wilmington & W. R. Co.*, 115 N. C. 676.

North Dakota. *Lang v. Bailes*, 19 N. D. 582.

Ohio. *Weybright v. Fleming*, 40 Ohio St. 52.

Oklahoma. *Kirk v. Territory*, 10 Okla. 46, 60 Pac. 797.

Oregon. *West v. McDonald*, 67 Ore. 551, 136 Pac. 650; *E. H. Moorehouse & Co. v. Weister Co.*, 56 Ore. 126, 95 Pac. 497, 107 Pac. 470, 108 Pac. 121.

Texas. *International & G. N. Ry. Co. v. Kruger*, — Tex. Civ. App. —, 163 S. W. 677; *Hunt v. Johnson*, — Tex. Civ. App. —, 129 S. W. 879.

Virginia. *Houston v. Com.*, 87 Va. 257.

West Virginia. *Layne v. Chesapeake & O. R. Co.*, 66 W. Va. 607; *Harrison v. Farmers' Bank*, 4 W. Va. 393.

The instructions should state the law upon a supposed state of facts to be found by the jury, and not assume the facts as determined. *Sherman v. Dutch*, 16 Ill. 283.

The assumption of the existence of any fact which is in contest is reversible error. *Central of Georgia R. Co. v. Woodall*, 13 Ga. App. 50.

Where the evidence is conflicting upon a vital question, the jury should be left to find the facts without any interference by the court. *Bradley v. Coolbaugh*, 91 Ill. 148.

3—*Morrison v. Hammond's Lessee*, 27 Md. 604.

4—*People v. Williams*, 17 Cal. 142.

5—*Stevens v. Snyder*, 8 Ill. App. 362; *Miller v. Mutual Ben. Life Ins.*

although a verdict may be directed where the evidence would not sustain a contrary finding.⁶

Requested instructions which assume a certain state of facts as existing should seldom be given at all, and never if there is room for a different finding by the jury.⁷

The error in assuming a disputed fact as true is usually prejudicial, warranting reversal,⁸ but a different rule pre-

Co., 31 Iowa 216, 7 Am. Rep. 122n; Lewis v. Rice, 61 Mich. 97; Clark v. McGraw, 14 Mich. 139.

Even if the evidence is so slight that the court would approve and sustain a finding against the existence of the fact, it is not error to submit the question to the jury. Blackledge v. Clark, 24 N. C. 394.

6—See §§ 69, 70, *ante*, "Directing verdict." See also, Wright v. City of Fort Howard, 60 Wis. 123.

7—Lewis v. Rice, 61 Mich. 97; Fife v. Chicago & A. R. Co., 174 Mo. App. 655.

Instructions which assume as proved matters as to which the evidence is conflicting may and should always be refused.

Alabama. Liner v. State, 124 Ala. 1.

Colorado. Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323, 29 Pac. 21.

Illinois. Straus v. Minzesheimer, 78 Ill. 492; Hepp v. McAvoy Brewing Co., 171 Ill. App. 540; Morgan v. Pacific Exp. Co., 161 Ill. App. 245.

Indiana. Lafayette, M. & B. R. Co. v. Murdock, 68 Ind. 137.

Iowa. Connors v. Chingren, 111 Iowa 437.

Kansas. Metropolitan St. Ry. Co. v. McClure, 58 Kan. 109, 48 Pac. 566.

Minnesota. Lake Superior & M.

R. Co. v. Greve, 17 Minn. 322 (Gil. 299).

Missouri. Worley v. Hicks, 161 Mo. 340. *

Nevada. People v. Bonds, 1 Nev. 33.

North Carolina. Bradley v. Ohio River & C. Ry. Co., 126 N. C. 735.

South Carolina. Watts v. Blalock, 17 S. C. 162.

South Dakota. Arneson v. Spawn, 2 S. D. 269, 39 Am. St. Rep. 783.

United States. Snyder v. Rosenbaum, 215 U. S. 261, 54 L. Ed. 186; White v. Van Horn, 159 U. S. 3, 40 L. Ed. 55.

Where the validity of a contract is denied and the execution of it is said to have been abandoned, instructions assuming it to be in force are properly refused. Snyder v. Rosenbaum, 215 U. S. 261, 54 L. Ed. 186.

8—See illustrations, §§ 103-106, *post*.

Where the charge is so worded as to assume the existence of a material controverted fact involved in the issue, regarding which the evidence is conflicting, and the verdict is in accordance with such assumption, a new trial should be granted. L. I. Aaron Co. v. Hirschfeld, 89 Ill. App. 205; Boaz v. Schneider, 69 Tex. 128.

vails where the error is invited by the complaining party,⁹ or where substantial justice has been done.¹⁰

An erroneous assumption of facts may also be cured by the giving of a correct instruction,¹¹ although there are decisions to the contrary.¹²

Usually on appeal, no complaint can be made of a paragraph of an instruction which assumes a fact, when the other paragraphs of the same instruction correctly submit

9—As to the invited error in instructions, see ch. XXXIV, *post*.

Where a requested instruction has been refused, the party making the request cannot object to an instruction substantially similar, that it assumes facts of which there is no evidence. *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. (U. S.) 307, 14 L. Ed. 157.

See also, *Auburn Bolt & Nut Works v. Shultz*, 143 Pa. St. 256, in which it was held that, if an instruction is asked, based on the assumption that a certain fact is before the jury, the party presenting it cannot afterwards object that there was no evidence in the case justifying the submission of the question.

10—*Bradley v. Lee*, 38 Cal. 362; *City of Chicago v. Moore*, 139 Ill. 201; *Ricards v. Wedemeyer*, 75 Md. 10; *Hardy v. Graham*, 63 Mo. App. 40. And see, generally, ch. XXXIV, *post*.

Error in assuming that a mule was worthless held not material where the evidence showed that such mule had glanders, was killed by the county authorities and was of no value. *Caruthers v. Link*, — Tex. Civ. App. —, 154 S. W. 330.

The assumption of a controverted fact in the charge, when by such as-

sumption a proposition favorable to the complaining party is emphasized and made more prominent, is not a ground for reversal. *Fort Worth Pub. Co. v. Hitson*, 80 Tex. 216.

In a prosecution for homicide, an instruction assuming the existence of a clot on the brain of deceased was not prejudicial error, as the verdict was not affected. *State v. Ayers*, 86 S. C. 426.

11—Instructions which assume material facts are erroneous unless given in connection with another, which leaves it to the jury to determine whether the assumed facts are true. *State v. West*, 157 Mo. 309; *State v. Hecox*, 83 Mo. 531.

12—An improper assumption of a fact is not cured by other instructions submitting the question of its existence to the jury. *Cahoon v. Marshall*, 25 Cal. 201; *Bressler v. Schwertferger*, 15 Ill. App. 294.

“An instruction which assumes that plaintiff has proven damages is * * * necessarily prejudicial to the defendant,” and the error is not cured by another portion of the charge, which “tells the jury that they are the judges of the facts and the credibility of the witnesses.” *Marti v. American Smelting & Refining Co.*, 23 Utah 52, 63 Pac. 184.

the issue,¹³ it being a familiar rule that instructions must be considered as a whole.¹⁴

§ 103. Illustrations of improper assumption of facts in general.

Although the rule against assuming facts is well recognized, its violation is a most fruitful source of reversal. The error results rather through inadvertence than intention, and the question of whether an instruction is erroneous is not always easily determined, as it involves a construction of the language used. Accordingly it has been thought not improper to give a considerable number of specific instances of instructions which have been attacked as erroneous, and for convenient reference some of the instructions, as in criminal and negligence cases, have been classified in separate sections. An examination of these illustrations will show that the rule against assumption is enforced rather strictly.

In an action where one of two defendants may be liable, an instruction which assumes that if one is liable, both are liable, is improper.¹⁵

In trespass for assault and battery, an instruction which assumes as a fact that violence was used is erroneous, as assuming the main fact in issue, and is a clear invasion of the province of the jury.¹⁶

In a proceeding for forcible entry and detainer, instructions "that defendant had, and had proved that he had, undisputed possession [of the premises] between two and

13—A paragraph of an instruction which assumes as a fact that a plaintiff was injured cannot be complained of where the preceding and succeeding paragraphs clearly submit the issue as to whether such plaintiff was injured, as the charge must be considered as a whole. Gal-

veston, H. & S. A. Ry. Co. v. Grant, —Tex. Civ. App. —, 124 S. W. 145.

14—See ch. XVI, *post*.

15—Hansen v. Crocker, 160 Ill. App. 514.

16—Mohr v. Kinnane, 85 Ill. App. 447.

three years," are erroneous, as assuming the fact as determined.¹⁷

In an action for commissions for effecting a sale of land, a request for an instruction which assumes that a definite price was fixed at the time of plaintiff's employment is properly refused, where the evidence is conflicting upon that point.¹⁸

An instruction telling the jury to what extent a special agent may bind his principal, and continuing "it therefore follows in this case," etc., impliedly assumes the existence of a special agency and is erroneous.¹⁹

An instruction "that, if they [the jury] find from all the evidence * * * that the goods sold in this case were sold on the credit of the defendant, then the plaintiff is entitled to recover," is erroneous, in assuming that the goods were sold.²⁰

In submitting the question of the existence of a chain of facts, it is error to assume the existence of one link in the chain.

Thus an instruction that, "if the jury find that the plaintiffs did the work * * * under the provisions of the contract, * * * offered in evidence by the defendant," is erroneous as assuming the existence and execution of the contract;²¹ and an instruction "that the plaintiff is entitled to recover such sum as the jury shall believe, from the evidence, to be the value of the materials belonging to him, and used by the defendants in the new arch," is erroneous as assuming that such materials were so used.²²

An instruction that if the defendant received certain notes in controversy before their maturity, and "without notice of the conditions attached to them," etc., though

17—Wall v. Goodenough, 16 Ill. 415.

18—Sample v. Rand, 112 Iowa 616.

19—Buchanan v. Caine, — Ind. App. —, 106 N. E. 885.

20—Cropper v. Pittman, 13 Md. 190.

21—Baltimore & O. R. Co. v. Resley, 7 Md. 297.

22—Denmead v. Coburn, 15 Md. 29.

open to criticism, as telling the jury that there were conditions attached to the transfer of the notes, is not ground for reversal, if other parts of the charge make the matter perfectly clear.²³

The use of qualifying words, such as "if," "when," etc., usually operates to render the instruction proper,²⁴ but the use of the word "if" preceding each statement of fact, will not render an instruction free from error where it is not stated how any query thereby raised is to be solved, whether by reference to the evidence or otherwise, and where the solution is not even referred to the jury.²⁵

In submitting facts to the jury, courts sometimes make certain deductions which amount to an unwarranted assumption. Thus, an instruction as to whether a deed is delivered, which assumes that the grantor intended to deliver such deed, is erroneous.²⁶

This vice is further illustrated in negligence cases.

§ 104. Same—Criminal cases.

In giving instructions in a criminal case, where a plea of not guilty has been entered, the court may not assume that the defendant is guilty,²⁷ since such assumption would be equivalent to directing a verdict of guilty,²⁸ neither may

23—Turner v. Grobe, 24 Tex. Civ. App. 554.

24—See § 107, *post*.

25—Chambers v. People, 105 Ill. 409.

26—An instruction: "To constitute a delivery, it is not necessary that the deed should be placed in the grantees' hands, but it is necessary that it should be and was put into the control of the grantees, and that the grantees accepted the same. That would be a delivery. If you believe from the evidence that the grantor placed said deed or instrument in a trunk in the house where she and grantee had access to, and

told grantee that she could get said deed or instrument at any time she desired, and have it recorded, if she wanted to, then that would be a delivery,"—is erroneous, since, whether such facts constitute a delivery depends upon the intent of the grantor, and such instruction assumes that the intent existed. Walker v. Nix, 25 Tex. Civ. App. 596.

27—State v. Sloan, 35 Mont. 367 89 Pac. 829.

28—State v. Sloan, 35 Mont. 367, 89 Pac. 829. See § 70, *ante*, "Directing verdict."

the court assume that there is an accomplice, as this is an assumption that a crime has been committed and that there is a principal,²⁹ and the use of the word "crime" has been held erroneous as indicating an impression of the court that an offense had been committed.³⁰

The assumption that a defendant has a good character is erroneous,³¹ and on a prosecution of a minor for larceny, the giving of an instruction as to intent, stating that the defendant "was a bright boy," has been held reversible error.³²

In a prosecution for assault with intent to kill, it is error to assume that a knife is a deadly weapon,³³ and a charge assuming as a fact that a person accused of murder carried a pistol for defensive purposes should not be given.³⁴

It is also error to assume, in a prosecution for homicide, that the accused was the assailant,³⁵ and instructions as to self-defense are erroneous when they assume that the defendant is justified in protecting himself,³⁶ or when

29—State v. Sloan, 35 Mont. 367, 89 Pac. 829.

30—Pettus v. State, 58 Tex. Cr. App. 546, 137 Am. St. Rep. 978.

31—A requested charge that the defendant has proven without conflict a good character and that the jury must consider this proof with other evidence, etc., is properly refused as assuming that the defendant had a good character, a question for the jury. Reid v. State, 181 Ala. 14.

A charge that "the jury may consider the good character of the defendant and may find the defendant not guilty if such good character and the other evidence generates a reasonable doubt of guilt," is properly refused as assuming the establishment of the defendant's good character. Sadler v. State, 165 Ala. 109.

32—Neville v. State, 148 Ala. 681.

33—State v. Harris, 209 Mo. 423.

34—Williams v. State, 161 Ala. 52.

35—In a prosecution for homicide, where the evidence is conflicting as to whether an accused or the other party was the assailant, an instruction which assumes that the accused was the assailant is improper. Foglia v. People, 229 Ill. 286.

36—A charge which assumes that a threatened attack with a billiard ball was such a dangerous one as would authorize a defendant to shoot is erroneous and should be refused. Cheney v. State, 172 Ala. 368.

In a prosecution for assault with intent to murder, an instruction that if the person assaulted was reaching for a gun, and the defendant was free from fault in bringing on the difficulty and had no reasonable mode of escape, then he had a right

other facts material in character are assumed by the court.³⁷

In a prosecution for homicide, an instruction that the jury should consider the conduct of the defendants at the time of the shooting, and immediately afterwards, and if they left the county to avoid arrest, such fact might be considered in determining their guilt, is erroneous as assuming that the defendants were present at the killing, when they testified that they were elsewhere.³⁸

An instruction that "on the question of intent on the part of the defendants, and the purpose of their prior engagement to meet and settle the difficulties, whether to be done peaceably or otherwise, you are to consider their prior conduct, and if they armed themselves with deadly weapons before their going, the purpose and object of their arming themselves," is erroneous as assuming that the defendants had a prior engagement to meet and settle the difficulties.³⁹

On an indictment for murder, an instruction that "the theory of the defense is that defendant is not guilty, but that the injury or wound which the deceased woman received was caused by her being struck by a train of cars," assumes as a fact that the deceased woman received a wound which caused her death.⁴⁰

An instruction that the sending of certain postal cards to parties other than the defendant, or members of her immediate family, did not justify an assault on the prosecuting witness, is erroneous as it assumes that the postal cards had been introduced in evidence addressed to the

to stand his ground, was erroneous, as the question whether the defendant was in imminent peril and had the right to stand his ground was for the jury. *Phillips v. State*, 170 Ala. 5.

37—An instruction that before the defendant can avail himself of the right of self-defense it must appear that at the time of the killing the danger was so urgent and pressing

to prevent his receiving great bodily harm the killing of the deceased was necessary, and that the deceased was the assailant, is erroneous as assuming that the killing of the deceased was the act of the defendant. *People v. Warren*, 259 Ill. 213, Ann. Cas. 1914 C 219n.

38—*People v. Pezutto*, 255 Ill. 583.

39—*Stokes v. State*, 54 Fla. 109.

40—*Hellyer v. People*, 186 Ill. 550.

other parties and that they had been sent, and it also assumes that an assault had been made.⁴¹

Where the genuineness of a diary is disputed, an instruction stating that the diary "kept through the year" is in evidence, is erroneous as assuming the existence of a disputed fact.⁴²

In a prosecution for making a false entry in an account book with intent to defraud, a charge that if the accused wilfully made "the alleged false entry in the manner and form set out in the indictment" he was guilty, was erroneous as assuming that the entry was false.⁴³

Where, in a prosecution for receiving stolen goods, it appears that the goods were carried in a buggy, over which defendants had control, to the place of sale, and the issue of fact most seriously controverted is as to whether defendants assisted in taking the goods to the buggy, a statement in an instruction that if, "at any time between the time they took these goods to the buggy," etc., assumes as a fact that defendants took them there, and is reversible error.⁴⁴

§ 105. Same—Negligence cases.

The erroneous assumption of facts is well illustrated in negligence cases where instructions submitting the question of negligence to the jury frequently assume such fact as proved,⁴⁵ as well as other facts which are material and

41—*De Silva v. State*, 93 Miss. 635.

42—*Scott v. People*, 141 Ill. 195.

43—*Pope v. State*, — Tex. Cr. App. —, 170 S. W. 150.

44—*Com. v. Light*, 195 Pa. 220.

45—In an action for the death of a railroad employee who was struck by a falling lump of coal, an instruction that, "If you believe from the evidence that the defendant in loading the coal on the tender or in maintaining its track at the place where such injury occurred, or in running the train at too great a

speed, or in providing an insufficient number of men to keep the track in the section where such injury occurred, if it did occur, in good condition, failed to exercise ordinary care," etc., you will find for the plaintiff, was erroneous as assuming that the train was run at too great a rate of speed and that an insufficient number of sectionmen were provided. *Missouri, K. & T. Ry. Co. of Texas v. Smith*, — Tex. Civ. App. —, 133 S. W. 482.

In an action for the death of a

as to the nature or existence of which there is a dispute.⁴⁶

person struck by a train, it is erroneous to give instructions assuming that the sounding of the whistle would have averted the accident, or that the train employees discovered the peril of the deceased. *Neas v. Chicago, B. & Q. Ry. Co.*, 138 Mo. App. 484.

In an action against a railway for injuries resulting from exposure to cold, an instruction stating the duties of railroads as to keeping passenger houses warm, and stating, "You are charged that the evidence shows a failure on the part of the defendant railway company to keep its depot warm," etc., was erroneous as assuming that the defendant was negligent in not having a fire in its waiting room. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, — Tex. Civ. App. —, 133 S. W. 499.

Charge assuming negligence of defendant in starting street car held error. *West End & Atlanta Ry. Co. v. Mozely*, 79 Ga. 463, 2 Am. Neg. Cas. 401.

46—It is erroneous to give an instruction assuming the existence of a trench across a track at the place of an alleged injury, when the existence of the trench at that place was a vigorously contested issue of fact. *Galveston, H. & S. A. R. Co. v. Wirtz*, 55 Tex. Civ. App. 555.

An instruction assuming the existence of an engine on another track nearby at the time of the accident, a material fact which was sharply controverted, is defective. *Plummer v. Indianapolis Union R. Co.*, 56 Ind. App. 615.

In an action for injuries sustained in a collision between a street car and wagon an instruction that if the car was run so close to a preceding

car that the noise of such preceding car drowned the signals of the second car, the defendant was guilty of negligence, was erroneous as assuming the existence of a disputed fact. *Indiana Union Traction Co. v. Reynolds*, 176 Ind. 263.

In an action for injuries to an employee, an instruction assuming that there was a guard on a machine is properly refused where the plaintiff testified to the contrary. *Continental Gin Co. v. Milbrat*, 10 Ala. App. 351, 7 N. C. C. A. 596.

In an action for injuries to a servant caused by falling from a wall while rolling a wheelbarrow containing concrete, where there were two issues, as to whether a post was in dangerous proximity to the servant's place of work, and whether the post was within one foot of the wall, an instruction which assumed that any point within one foot of such wall was a dangerous position for the post to occupy, was erroneous. *Ganey v. Kansas City*, 259 Mo. 654.

In an action for injuries caused by an automobile, an instruction that if the jury find "that the defendant or his agent, in operating said automobile * * * operated the said car without observing the highest degree of care," plaintiff could recover, was erroneous as assuming that the defendant or his agent was operating the automobile at the time, and suggesting that such was the idea of the court, when the ownership and control of the machine was a vital issue in the case. *Warrington v. Bird*, 163 Mo. App. 385.

In a suit for negligent failure to promptly deliver a telegram, an instruction that if the jury find that

The error in the instruction frequently results from the language used, and the words "had it used reasonable care" have been held to imply that a defendant did not use reasonable care,⁴⁷ and such words have also been held to assume the existence of contributory negligence.⁴⁸

In other cases, error has resulted from the court making certain deductions which amounted to an unwarranted assumption. Thus, an instruction assuming that a child fifteen years old was of "tender years and imperfect discretion," has been held erroneous.⁴⁹

the cause of delay "was the mistake in the address of plaintiff in changing it from 214 to 215 Main Street," then it becomes your duty to determine if the mistake resulted from the defendant's negligence, was properly refused as it assumed that there was a mistake in the address, a question as to which the evidence was conflicting. *Western U. Tel. Co. v. Bennett*, — Tex. Civ. App. —, 124 S. W. 151.

In an action for the killing of a dog an instruction that, "when the engineer in charge of defendant's train saw plaintiff's dog running along beside the railroad track, he had a right to presume that the dog would leave the track before being struck," was properly refused, as it assumed as a fact that the dog was running along the side of the track when such question of fact was controverted. *St. Louis, I. M. & S. Ry. Co. v. Rhoden*, 93 Ark. 29, 137 Am. St. Rep. 73, 20 Ann. Cas. 915.

In an action for injuries to a switchman, an instruction that if the jury believed that while plaintiff was employed as a switchman, "and that while he was walking on the top of the car next to the rear car on his way to such rear car," as alleged and that "while near the end of the

car on which he was walking one of defendant's switch crew" uncoupled said rear car, was subject to the objection that it assumed that the plaintiff was walking from the seventh to the eighth car when injured. *Ft. Worth Belt Ry. Co. v. Johnson*, — Tex. Civ. App. —, 125 S. W. 387.

47—In an action by a guest, injured at a hotel by a defective chair, it was proper to refuse an instruction that the defendant was liable "had it used reasonable care" to ascertain the defect, as the quoted words assumed that the defendant did not use reasonable care. *Burchmore v. Antlers Hotel Co.*, 54 Colo. 314, 130 Pac. 846, 4 N. C. C. A. 707.

48—An instruction that if the jury believed that a basement was sufficiently lighted to enable a person with average eyesight to easily see the pit into which he fell, and if they further believed "that had plaintiff been in the exercise of ordinary care he would have detected the depression and would have avoided falling," was erroneous as telling the jury that the fall was due to lack of ordinary care. *Glaser v. Rothschild*, 221 Mo. 180, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576.

49—In an action for personal in-

Also, an instruction that, "if the jury believe the evidence, the plaintiff could have extricated himself from any danger after he saw the engine," is properly refused, as being an inference to be made by the jury from all the evidence.⁵⁰

Error has resulted from the assumption of the existence of a specified fact in directing the jury as to their verdict in case they find that the injury complained of resulted or did not result from the specified fact.

Thus, an instruction that, "if the jury believe. * * * the injury to the plaintiff occurred by reason of the neglect of the employees of the defendant to obey the signal of the semaphore, * * *" assumes as a fact the neglect of the defendant's employees to obey such signal.⁵¹

An instruction submitting to the jury the question of negligence and the question as to whether it caused the accident, is improper where it further states that such negligence was the cause.⁵²

§ 106. Same—Damages.

An instruction which assumes that a plaintiff has proven damages, invades the province of the jury and is necessarily prejudicial,⁵³ and it is also erroneous to give an instruction

juries, an instruction assuming that a child fifteen years old was of "tender years and imperfect discretion" was erroneous. Whether or not he was of "tender years," etc., should have been submitted to the jury, and the facts of his age, capacity, experience, and knowledge of the particular danger passed on by it. *Day v. Citizens' Ry. Co.*, 81 Mo. App. 471. Compare *Schmidt v. St. Louis R. Co.*, 163 Mo. 645; *Bertram v. People's Ry. Co.*, 154 Mo. 639.

50—*McQuay v. Richmond & D. R. Co.*, 109 N. C. 585.

51—*Illinois Cent. R. Co. v. Zang*, 10 Ill. App. 594.

52—*Lichter v. Aurora, E. & C. R. Co.*, 129 Ill. App. 216.

53—*Marti v. American Smelting & Refining Co.*, 23 Utah 52, 63 Pac. 184.

An instruction that, "if the jury shall believe from the evidence that the damage to the * * * [property] of the plaintiff was occasioned by fire communicated from the engines of, or by the agent or agents of, the defendant, * * * then * * *," assumes that damage was done to plaintiff's property. *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242.

In an action for a balance due on

which assumes that some sum further than nominal damages has been proved, when such fact is disputed.⁵⁴

Error has been held to result from the use of the words "in arriving at the compensatory damages,"⁵⁵ and the words "in estimating the damages,"⁵⁶ thus assuming that the damages were proven.

Instructions as to damages which assume other disputed facts to be proved, should not be given.⁵⁷

a sale of goods, where defendant set up a breach of warranty of value, and that a portion of the goods only were delivered, which were invoiced by him at a certain amount, an instruction that the measure of damages was the difference between the amount warranted and the invoice is an improper assumption of controverted facts. *Smith v. Dukes*, 5 Minn. 373 (Gil. 301).

54—An instruction that "the plaintiff, under the evidence in this case, is entitled to recover at least nominal damages, and such further sum as you may believe, from the preponderance of the evidence and the facts and circumstances in evidence, was the difference between the price which the defendant agreed to sell for and the market value of the premises at a certain date," assumes that some further sum than nominal damages was shown by a preponderance of the evidence. *Dady v. Condit*, 188 Ill. 234.

55—In an action for assault and battery, where the defense was a denial, an instruction that the jury, "in arriving at the compensatory damages," etc., was held erroneous, as assuming that compensatory damages were to be awarded. *Judd v. Isenhardt*, 93 Ill. App. 520.

56—Where it is a question in issue whether or not the plaintiff sustained any damage from the wrong complained of, an instruction containing the language, "that, in estimating the measure of damages in this case," etc., and "that they must find for the plaintiff, and the only question in this case is the amount of damages which they ought, under the evidence, to allow the plaintiff," and that "in arriving at the verdict, and the amount of damages you should give plaintiff in this case," etc., assumes that some damages have been sustained by plaintiff. *Dady v. Condit*, 188 Ill. 234, rev'g 87 Ill. App. 250.

57—An instruction "that he [the plaintiff] is entitled to recover in this action all damages proved to have been sustained by him on account of the trespasses committed by defendant on plaintiff's premises, as alleged in the declaration," assumes the commission of the trespass. *Small v. Brainard*, 44 Ill. 355.

An instruction that, "if the plaintiff has sustained no injury by reason of the alleged trespass, still he is entitled to a verdict for nominal damages," is erroneous for assuming that a trespass was committed. *Steele v. Davis*, 75 Ind. 191.

**§ 107. Instructions held not to assume disputed facts—
In general.**

An instruction stating facts hypothetically is proper where the jury is required to find the facts stated from the evidence,⁵⁸ and such requirement need not be repeated as

58—Ladd v. Pigott, 114 Ill. 647.

Chicago City Ry. Co. v. Math, 114 Ill. App. 350.

An instruction which states in hypothetical form the facts which the evidence tends to prove is not obnoxious to the rule against improper assumptions of fact.

Alabama. Seaboard Mfg. Co. v. Woodson, 94 Ala. 143; Paul v. Meek, 6 Ala. 753.

Colorado. Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577.

Illinois. Ladd v. Pigott, 114 Ill. 647.

Indiana. City of Logansport v. Justice, 74 Ind. 378, 39 Am. Rep. 79n; I. F. Force Handle Co. v. Hisey, 52 Ind. App. 235.

Iowa. State v. Thompson, 19 Iowa 299.

Mississippi. Jones v. Edwards, 57 Miss. 28.

Missouri. O'Connell v. St. Louis, C. & W. Ry. Co., 106 Mo. 482; Klutts v. St. Louis, I. M. & S. Ry. Co., 75 Mo. 642.

Texas. Missouri Pac. Ry. Co. v. Lehmborg, 75 Tex. 61; San Antonio & A. P. Ry. Co. v. Belt, 24 Tex. Civ. App. 281; Galveston, H. & S. A. Ry. Co. v. Waldo (Tex. Civ. App.), 32 S. W. 783.

Where the propositions in an instruction are all made to rest upon what the jury shall believe from the evidence, or when it states a hypothetical case, which, if the jury believe from the evidence existed, they may consider, it will not be liable to

the objection that it assumes there is evidence of the fact. Ladd v. Pigott, 114 Ill. 647. See also, Triolo v. Foster (Tex. Civ. App.), 57 S. W. 698.

An instruction commencing with the words "if you find for the plaintiff," and stating what damages may be assessed, does not assume the truth of the facts in issue. I. F. Force Handle Co. v. Hisey, 52 Ind. App. 235.

In an action for injury at a railway crossing, an instruction "that as to whether or not defendant blew off steam from its engine at said railroad crossing, and by reason thereof frightened the horse that the wife of plaintiff was driving, is a question of fact to be determined by the jury from the evidence before them; and if you find that the defendant company blew off steam from its engine at said crossing, and thereby frightened the horse then being driven on such crossing by plaintiff's wife, and the agents or employees of defendant knew of the presence of plaintiff's wife on said track, then you will further consider whether or not the blowing off of steam was negligence, and whether same frightened said horse,"—is not objectionable as assuming "as a fact that the horse was just being driven upon the crossing when the steam escaped, etc." San Antonio & A. P. Ry. Co. v. Belt, 24 Tex. Civ. App. 281.

to each one of the separate facts involved in the case.⁵⁹

But the instructions should not state the facts positively, the qualification "if any" being proper,⁶⁰ although in one case it was contended that the use of the words "if any" operated to prejudice the jury against a plaintiff.⁶¹

It is not objectionable, as assuming facts, to instruct that, "if the jury believe from the evidence * * * that both of the defendants concurred in laying hands on him * * *,"⁶² and an instruction that "if you believe the owner directed," etc., does not assume that he directed.⁶³

Paragraphs of an instruction referring to an injury sustained have been held not objectionable when preceded by the conditional statement "if the jury finds," or, "if they believe."⁶⁴

The word "when" has been characterized as a roughly serviceable equivalent for "if,"⁶⁵ and it has been held not improper to use the words, "as you may find,"⁶⁶ or to

59—Schmitt v. Kurrus, 234 Ill. 578, aff'g 140 Ill. App. 132.

60—McAyeal v. Gullett, 202 Ill. 214, aff'g 105 Ill. App. 155.

61—In an action for injuries caused by the sudden starting of a street car while a passenger was alighting, a charge that the verdict should be for the defendant if the fall and the injury, "if any," was caused by the plaintiff's contributory negligence was not erroneous as the quoted words referred to the injury, and if construed to also apply to the fall did not assume that the plaintiff had been guilty of contributory negligence. *Drewery v. El Paso Elec. Ry. Co.*, — Tex. Civ. App. —, 120 S. W. 1061.

62—Mullin v. Spangenberg, 112 Ill. 140.

63—Fitzgerald v. Benner, 120 Ill. App. 447, aff'd 219 Ill. 485.

64—*Central of Georgia R. Co. v. Woodall*, 13 Ga. App. 50.

65—On a trial of the right of property an instruction that the burden of proof is discharged "when" the plaintiff shows that defendant was in possession of the property at the time of levy, is not erroneous as assuming that the defendant was in possession of the property. *Lightman Bros. & Goldstein v. Epstein*, 164 Ala. 660.

66—*Bronnenburg v. Charman*, 80 Ind. 475, in which case the court instructed: "You may find for the plaintiff for any amount which you may find was collected and not paid over, * * * or you may find for the whole amount collected and not paid over, after deducting such amount as you may find was consumed by fire."

state that one of the parties "claimed" certain facts to have been shown.⁶⁷

An instruction containing the statement that "plaintiffs, by their reply, give us a history of the transaction," need not further state that such history is plaintiff's version of the facts and does not assume that the history is true.⁶⁸

Where an attorney sought to establish a claim for services, an instruction that the claimant was a "reputable" lawyer was not erroneous as sustaining the character of the plaintiff since the quoted word merely meant that the plaintiff was a regular lawyer.⁶⁹

Instructions stating legal principles in the abstract, though applicable to the evidence in the case, cannot be objected to as assuming the existence of facts not proven.⁷⁰ It is not trenching upon the province of the jury to say that evidence has been given tending to establish a fact,⁷¹ or to state matters of common knowledge,⁷² and in states where damages for mental anguish are recoverable, such suffering may sometimes be assumed.⁷³

An instruction that, in estimating plaintiff's damages, the jury might take into consideration physical injuries, if any, resulting from the injury, does not assume that the

67—Hawley v. Chicago, B. & Q. Ry. Co., 71 Iowa 717.

Carraher v. San Francisco Bridge Co., 81 Cal. 98, 22 Pac. 480.

68—De St. Aubin v. Marshall Field & Co., 27 Colo. 414, 62 Pac. 199.

69—In re Freshour's Estate, 174 Mich. 114, 45 L. R. A. (N. S.) 67n, Ann. Cas. 1915 A 726n.

70—Taylor v. Territory, 7 Ariz. 234, 64 Pac. 423.

An instruction which only purports to declare a principle of law applicable to the case is not objectionable on the ground that it assumes that the defendant committed

the act mentioned therein. People v. Mullen, 179 Ill. App. 262.

71—Graham v. Nowlin, 54 Ind. 389; State v. Watkins, 11 Nev. 30.

72—Harris v. Shebek, 151 Ill. 287.

73—It is not prejudicial error to assume that a son will suffer mental anguish in being deprived of the opportunity of being with his father in his last illness. Western U. Tel. Co. v. Sockwell, 91 Ark. 475.

In an action for failure to deliver a telegraph message the giving of a charge assuming that a mother suffered mental anguish if deprived of attending the funeral of her son, was not error. Western U. Tel. Co. v. Wilson, — Ark. —, 133 S. W. 845.

injuries complained of in the declaration were inflicted,⁷⁴ and an instruction to find such sum as will compensate for the injury, if any, does not assume the injury.⁷⁵

An instruction that the testimony of the president of a bank that he had no notice of any defect in a note would not be conclusive, and that notice to any of the officers of the bank of such infirmity was notice to the bank, does not assume that other officers of the bank had notice.⁷⁶

An instruction that, if the defendant did certain acts specified, they should infer a fraudulent intent, is not objectionable as assuming that these acts are established.⁷⁷

An instruction that "the question is whether the wrong was done wilfully and without lawful justification or excuse, and if you find and believe from the evidence that the assault of the defendant's motorman, if any, upon plaintiff was wanton and brutal, then your verdict must be for the plaintiff" is not erroneous as assuming that the motorman assaulted the plaintiff.⁷⁸

An instruction that "unless you find that 'defendant' acted in violation of law in making the assault," or if defendant "was acting in his necessary self defense," etc., does not assume that the person assaulted had done some act from which it might appear to defendant that such person was making an unlawful assault on him.⁷⁹

An instruction that defendant "had no right to do" certain specified things does not assume that he did them, or take the question of fact from the jury,⁸⁰ and an instruction that a husband had the right to give personalty to his wife, without any writing evidencing the gift, and that

74—*Evans v. City of Joplin*, 84 Mo. App. 296.

75—*Western Union Tel. Co. v. Linn* (Tex. Civ. App.), 23 S. W. 895.

76—*Bank of Bushnell v. Buck Bros.*, 161 Iowa 362.

77—*State v. Thompson*, 19 Iowa 299.

78—*Dawson v. Metropolitan St. R. Co.*, 157 Mo. App. 642.

79—*Woodmen of the World v. McCoslin*, — Tex. Civ. App. —, 126 S. W. 894.

80—*Timm v. Bear*, 29 Wis. 254.

such a gift would be valid as against the heirs, does not improperly assume that the gift was in fact made.⁸¹

Where an answer sets up payment as a consequence of certain transactions between plaintiff and defendant, an instruction which speaks of "payment of the note sued on by plaintiff to defendants, as alleged in their answer," is not misleading as assuming a payment in money.⁸²

In an action for wages, an instruction which tells the jury to "find in favor of the plaintiff such amount as they may believe * * * to be the reasonable value of such services" does not assume that the services were of some value.⁸³

An instruction that "it is incumbent on the defendants, under the contract alleged in plaintiff's declaration, to show an offer to perform, or some sufficient excuse for non-performance, on their part, in order to excuse themselves from liability to pay damages, if the evidence shows that the plaintiffs were ready and willing to perform their part of the contract," does not assume the existence of the contract.⁸⁴

In an action against an agent and others by the principal for fraud and conspiracy, if an instruction that, "if plaintiff's agent acted in entire good faith, and the job was put up on him, instead of on plaintiff, then plaintiff has no claim against this party," is objected to as containing an assumption, attention should be called to the specific ground, as that objection would not be likely to occur to any one without notice.⁸⁵

§ 108. Same—Criminal cases.

An instruction that necessary facts must be consistent with each other and with the main fact sought to be estab-

81—Hopper v. Hopper, 84 Mo. App. 117.

84—Bird v. Foreman, 62 Ill. 212.

82—Semple v. Crouch, 8 Mo. App. 593.

85—Emmons v. Alvord, 177 Mass. 466.

83—Blackman v. Cowan, 11 Mo. App. 589.

lished "that is, with the defendant's guilt," is not erroneous as assuming by the quoted words that the defendant is guilty,⁸⁶ and in a prosecution for malicious shooting an instruction that the principles of the law of self-defense in murder cases apply to "malicious shooting cases" does not assume the fact of malice on the part of the accused, since the terms used indicate a class of cases.⁸⁷

In a prosecution for larceny, an instruction that, "If the watchman was on the inside * * * as a part of the scheme to loot this store, etc., is not objectionable, as the word "if" shows that the judge did not undertake to decide that the acts mentioned therein constituted a scheme to loot the store."⁸⁸

An instruction requiring the jury to believe from the evidence beyond a reasonable doubt that the defendants, or some of them, entered into a conspiracy to commit the crime of arson, and "that thereafter the conspirators or any of them, pursuant to said conspiracy and in furtherance thereof, set fire to and burned said building," etc., is not erroneous as assuming the fact of conspiracy.⁸⁹

A charge in a homicide case that, "mere weakness of mind is no defense to crime" provided that the accused knew the difference between right and wrong does not assume that such accused was of weak mind.⁹⁰

An instruction that "it is important that you determine whether the alleged assault, or assault and battery, made upon W. [the deceased] by defendant, either alone or in company with others, was an unlawful or a lawful act," does not assume that such assault was proved.⁹¹

Where the evidence was that the defendant struck the deceased on the head with a heavy club, causing death within a few hours, an instruction that, "if the defendant,

86—Gordon v. State, 62 Tex. Cr. App. 638.

87—State v. Lavin, 64 W. Va. 26.

88—State v. Lucas, 88 S. C. 520.

89—People v. Harris, 263 Ill. 406.

90—Cox v. State, 60 Tex. Cr. App. 471.

91—Patterson v. State, 70 Ind. 341.

in the heat of passion, and without design to cause death, by 'means and use of a dangerous weapon, to-wit, a wooden club,' feloniously killed the deceased, and that the killing was not justifiable or excusable, they will find him guilty of manslaughter in the third degree, is not objectionable as assuming that the club was a dangerous weapon."⁹²

In a prosecution for rape, an instruction that the jurors should not, by their verdict, "lessen the protection the law wisely designs to throw around the innocent and virtuous female" is not erroneous as assuming that the prosecutrix was an innocent female,⁹³ and an instruction that if the jury found that the prosecutrix was "under the age of fifteen years, and was not the wife of defendant you will find the defendant guilty of rape as charged in the indictment" does not assume that they were not married, or that she was under the age of fifteen.⁹⁴ Also an instruction that if the defendant was not present at the time and place of the alleged rape of the prosecuting witness, or if they entertained a reasonable doubt as to his presence, then they would acquit him, has been held not erroneous as assuming that the prosecuting witness was violated.⁹⁵

§ 109. Same—Negligence cases.

The words "negligence if any" contained in an instruction have been held to mean that the court would not have the jury infer that it assumed that defendant was negligent.⁹⁶

A charge that the plaintiff sues the defendant "in an action on the case and claims * * * damages for the negligence of the defendant in the operation of its train, whereby the plaintiff was thrown from the steps of its passenger coach and injured as set out in her declaration,

92—State v. Grayor, 16 Mo. App. 558, *aff'd* 89 Mo. 600.

93—State v. Dean, 148 Iowa 566.

94—Haywood v. State, 61 Tex. Cr. App. 92.

95—State v. Campbell, 210 Mo. 202, 14 Ann. Cas. 403.

96—Browder v. Northwestern Gas Light & Coke Co., 182 Ill. App. 26. See also, §§ 105, 106, *ante*.

which has been read in your hearing," is merely a statement of the complaint as made, and does not assume the negligence of the defendant.⁹⁷

In an action for injuries to a passenger on a street car, an instruction that if the car was derailed as alleged and if from the evidence by reason of such derailment, the plaintiff received the injuries alleged, the verdict must be for the plaintiff does not assume that the defendant was negligent.⁹⁸

In an action for the killing of a minor child an instruction requiring the jury to find that the electric car was allowed to strike and cause the child's death and requiring the jury to find that the car was so allowed "to strike * * * in consequence of the failure of the motorman * * * to keep vigilant watch" is not erroneous as assuming that such motorman failed to keep vigilant watch.⁹⁹

An instruction that "if you believe that, by reason of the failure to so blow the whistle and ring the bell, plaintiff drove upon the track and his team was struck and killed" is not erroneous as assuming that defendant railroad failed to signal the approach of the train where other charges submitted the question as to such failure.¹

An instruction that if you shall find that an ordinarily cautious and prudent person would not have attempted "to stand between the rails" and mount the pilot of the locomotive in the manner that the plaintiff did, has been held not erroneous as assuming a controverted fact but such charge left the jury to decide where the plaintiff was standing on the track.²

97—Florida R. Co. v. Dorsey, 59 Fla. 260.

98—San Antonio Traction Co. v. Probandt, — Tex. Civ. App. —, 125 S. W. 931.

99—Kaiser v. United Rys. Co. of St. Louis, 155 Mo. App. 428.

1—Chicago, R. I. & G. Ry. Co. v. Coffee, — Tex. Civ. App. —, 126 S. W. 638.

2—St. Louis Southwestern R. Co. of Texas v. Ford, 56 Tex. Civ. App. 521.

An instruction, in an action for the failure to stop a train at a station, which submitted the question whether the train stopped for a sufficient length of time for "B" to get on, has been held not erroneous as assuming that "B" was a man of ordinary prudence using due diligence to board the train.³

An instruction that a servant "did not accept risks which grew out of any defects in the road which rendered it more hazardous than reasonable, unless he had knowledge of the defects," does not assume the existence of defects.⁴

In an action by a wife for the death of her husband an instruction that "if you find for the plaintiff, then you should assess her damages" at such sum as would be a fair and reasonable compensation, etc., is not erroneous as assuming that the death was caused by the injuries sustained by the husband.⁵

§ 110. Assumptions in opposition to evidence.

The assumption of the establishment of a fact or state of facts in direct opposition to the evidence, is of course error,⁶ and requested instructions assuming such facts should be refused.⁷

Thus, in an action for the death of an infant caused by an electric car, an instruction that if the motorman saw the child leave the sidewalk and come into the street and stop before going to the track, then the motorman was

3—*Bing v. Atlantic Coast Line R. Co.*, 86 S. C. 528.

4—*Taylor, B. & H. Ry. Co. v. Taylor*, 79 Tex. 104, 23 Am. St. Rep. 316.

5—*Powell v. Union Pac. R. Co.*, 255 Mo. 420.

6—*Michigan. Leslie v. Smith*, 32 Mich. 64.

Mississippi. Bowman v. Roberts, 58 Miss. 126.

Missouri. Moffatt v. Conklin, 35 Mo. 453.

Texas. McCown v. Shrimpf, 21

Tex. 22, 73 Am. Dec. 221; *Texas Land & Loan Co. v. Watson*, 3 Tex. Civ. App. 233.

7—A request for an instruction, in an action of ejectment, that a deed to a certain person under a certain name is a transfer of rights to a person having the same surname, but whom the evidence shows to be a different person, is properly refused. *Worley v. Hicks*, 161 Mo. 340.

under no obligation to stop his car, was erroneous as assuming that such motorman saw the child leave the sidewalk, when he testified to the contrary.⁸

§ 111. Assumption of facts not supported by any evidence.⁹

Instructions must not assume the existence of facts of which there is no evidence or which are not proved,¹⁰ and ordinarily the giving of such charges is reversible error.¹¹ Wherefore requests for instructions affected with this vice should be refused.¹²

An instruction in a criminal case assuming the unpopu-

8—*Simon v. Metropolitan St. R. Co.*, 231 Mo. 65, 140 Am. St. Rep. 498.

9—See § 112, *post*.

10—*Schmalfeld v. Peoria & E. Ry. Co.*, 158 Ill. App. 335; *Hughes v. Hughes*, 133 Ill. App. 654.

Where there is absolutely no evidence in the case upon which a finding of certain facts could be based, it is erroneous for the court to assume in the instructions the existence of such facts.

Alabama. *Kidd v. State*, 83 Ala. 58.

Arkansas. *Little Rock & Ft. S. Ry. Co. v. Wells*, 61 Ark. 354.

California. *People v. Lee Chuck*, 74 Cal. 30, 15 Pac. 322.

Illinois. *Chicago Western Division Ry. Co. v. Mills*, 91 Ill. 39; *Russell v. Minter*, 83 Ill. 150; *Lennartz v. Popp*, 175 Ill. App. 539.

Indiana. *Moore v. State*, 65 Ind. 382.

Michigan. *Hood v. Olin*, 68 Mich. 165; *Hart v. Firzlaff*, 67 Mich. 514; *Brower v. Edson*, 47 Mich. 91.

Missouri. *Gerren v. Hannibal & St. J. R. Co.*, 60 Mo. 405.

New Hampshire. *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205.

North Carolina. *Lance v. Rum-bough*, 150 N. C. 19.

South Carolina. *State v. Johnson*, 85 S. C. 265.

Tennessee. *Hill v. Childress*, 10 Yerg. 515.

Texas. *Holtzclaw v. State*, 26 Tex. 682; *Texas Land & Loan Co. v. Watson*, 3 Tex. Civ. App. 233.

11—**Alabama.** *Kidd v. State*, 83 Ala. 58.

Nebraska. *Bowie v. Spaid*, 26 Neb. 635; *Newton Wagon Co. v. Diers*, 10 Neb. 284.

New Hampshire. *Flanders v. Stark*, 37 N. H. 424.

Pennsylvania. *Kelly v. Eby*, 141 Pa. 176.

Tennessee. *Hill v. Childress*, 10 Yerg. 515.

12—**California.** *Crawford v. Roberts*, 50 Cal. 235; *People v. Cotta*, 49 Cal. 166.

Illinois. *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334, 33 Am. St. Rep. 249; *Chicago Western Division Ry. Co. v. Mills*, 91 Ill. 39.

Tennessee. *Gulf Compress Co. v. Stuyvesant Ins. Co.*, 129 Tenn. 586.

Texas. *Flanagan v. Boggess*, 46 Tex. 330.

larity of the defendant, when not shown by the evidence, is erroneous¹³ and it is error to give an instruction assuming that an admission has been made by the prosecution, which has not in fact been made.¹⁴

So, where there is no evidence before the court that any witness had sworn falsely, but the main witness for plaintiff, before his final dismissal as a witness, asks leave to make a retraction and correction of part of his testimony, it is error to give in charge to the jury the maxim, *falsus in uno, falsus in omnibus*.¹⁵

In a personal injury action, an instruction to find the defendant not guilty if the jury believe that a motorman was led to believe that deceased would stop a wagon before going on the track is properly refused where there is no evidence tending to prove such fact.¹⁶

An instruction assuming the existence of a partnership between the parties, and stating the law of partnership, is erroneous, where there is no evidence of such partnership;¹⁷ and where there was no testimony of grossly unskilled advice given by counsel (unless the failure to recover constituted such evidence), a charge "that, if the claimants made this claim under the advice of counsel, which was wrong and grossly unskillful," etc., this was held erroneous, as charging upon a supposed state of facts which did not exist.¹⁸

§ 112. Assuming nonexistence of fact in absence of evidence.

The court may properly assume that a fact has not been proved where there is no evidence tending to prove such

13—Langdon v. People, 133 Ill. 382.

14—People v. Cotta, 49 Cal. 166.

15—Kay v. Noll, 20 Neb. 380.

16—Brisch v. Chicago City Ry. Co., 176 Ill. App. 341.

17—Freeman v. Exchange Bank, 59 Ill. App. 197.

18—Perkins v. Attaway, 14 Ga. 27.

fact, and may direct the jury that there is no evidence to prove it.¹⁹

§ 113. Assuming facts by way of illustration.

An instruction does not assume facts when it purports to declare only a principle of law,²⁰ and it is not improper for the court to assume facts merely in order to illustrate the application of a proposition of law pertinent to the case.²¹

This is a common practice, and no intelligent juror can be misled by such illustrations,²² but it should be impressed upon the minds of the jury that such facts have not been proven in the case,²³ and it is proper to refer the jury to the testimony, and direct them to examine it for themselves, and to remind them that they are the exclusive judges of the facts.²⁴

19—**California.** *People v. Sternberg*, 111 Cal. 3, 43 Pac. 198.

Georgia. *Underwood v. American Mortgage Co.*, 97 Ga. 238.

Illinois. *Sharp v. Parks*, 48 Ill. 511, 95 Am. Dec. 565.

Indiana. *State v. Banks*, 48 Ind. 197.

North Carolina. *Willis v. Branch*, 94 N. C. 142; *McCombs v. North Carolina R. Co.*, 67 N. C. 193; *Wells v. Clements*, 48 N. C. 168; *State v. Cardwell*, 44 N. C. 245; *Redman v. Roberts*, 23 N. C. 479.

South Carolina. *Fripp v. Williams, Birnie & Co.*, 14 S. C. 510.

Texas. *Horan v. Long*, 11 Tex. 230.

20—*Von Reeden v. Evans*, 52 Ill. App. 209.

21—**California.** *People v. Williams*, 59 Cal. 674; *People v. Campbell*, 30 Cal. 312.

Connecticut. *Masters v. Town of Warren*, 27 Conn. 293.

Georgia. *Central Railroad &*

Banking Co. v. Smith, 80 Ga. 526; *McConnell v. State*, 67 Ga. 635.

Indiana. *Bundy v. McKnight*, 48 Ind. 503.

Louisiana. *State v. Obregon*, 10 La. Ann. 799.

Massachusetts. *Melledge v. Boston Iron Co.*, 5 Cush. 180.

Michigan. *Gullikson v. Gjorud*, 82 Mich. 503.

Ohio. *Gage v. Payne*, Wright 678.

Pennsylvania. *Long v. Township of Milford*, 137 Pa. 122.

An illustration, not founded upon testimony, may be given in connection with correct principles of law, unless it misleads. *Parker v. Glenn*, 72 Ga. 638; *State v. Alvarez*, 7 La. Ann. 284.

22—*Masters v. Town of Warren*, 27 Conn. 300.

23—*Masters v. Town of Warren*, 27 Conn. 300; *Bundy v. McKnight*, 48 Ind. 503; *Long v. Township of Milford*, 137 Pa. 122.

24—*Stephen v. State*, 11 Ga. 225.

In one case it has been said that, where the court assumes the facts by way of illustration, this should be done by remarks of a general character, in order not to induce a particular verdict.²⁵

Error cannot be assigned where the facts assumed conform to a theory of the case urged by the opposite party,²⁶ and in a criminal case the court may illustrate its instructions to the jury by an hypothesis unfavorable to the prisoner, provided the evidence justifies it, and need not say anything of an opposite state of facts, if there be no evidence of these facts before the jury.²⁷

The court may illustrate a case by an analogy; as, for instance, where the analogy is between a wife's authority to buy necessities on her husband's credit, and the power to purchase supplies by one who is hired to run a hotel,²⁸ and the assumption of facts by way of illustration may also be illustrated by instructions as to the weight of positive and negative testimony.²⁹

Where an instruction is requested the court is not re-

25—State v. Obregon, 10 La. Ann. 799.

26—Long v. Township of Milford, 137 Pa. 122.

27—Pressley v. State, 19 Ga. 192.

28—Beecher v. Venn, 35 Mich. 466.

29—The court may properly instruct "that the existence of a fact testified to by one witness positively was rather to be believed than that it did not exist because of many witnesses testifying that they did not see or know of its having transpired, although they had the same opportunity for observation." *McConnell v. State*, 67 Ga. 635. See also, ch. XXV, *post*, "Cautionary Instructions."

Instruction held erroneous.

In an action against a city to recover for an injury received from a

defect in a culvert an instruction "that positive evidence is entitled to more weight than negative evidence; and that, if twelve men were in a room where there was a clock, and one of them should swear he heard the clock strike, and the eleven should swear they did not hear it strike, then the jury, in such a case, should give a judgment for one against the eleven; and if H. and G. swear they saw a hole in the culvert in question, and twice as many witnesses, equally as credible, say they did not see holes in the culvert, then positive evidence should be taken by the jury,"—is objectionable, and not apt as an illustration, because it omits the element of the reasonableness of the fact testified to. *City of Greenville v. Henry*, 78 Ill. 150.

quired to hypothetically illustrate in the language of a request. It may give the law as requested, leaving out all suppositive illustrations of the legal principles, if it sees fit to do so.³⁰

Where the court correctly states the law governing the case, but exception is taken to an illustration used by the court explanatory of a legal principle, the reviewing court will not narrowly view the illustration, if satisfied that, whether right or wrong, it was not calculated to mislead, and did not in fact mislead, the jury.³¹

§ 114. Assumption of admitted facts.

It is not error to assume in an instruction, the existence of undisputed or admitted facts³² as when facts are admitted by the pleadings³³ or upon the trial³⁴ or are agreed

30—Whitley v. State, 66 Ga. 659. See also, Whitecomb v. Town of Fairlee, 43 Vt. 671.

31—Wilson v. State, 33 Ga. 207. To same effect, see Masters v. Town of Warren, 27 Conn. 300.

32—O'Rourke v. Sproul, 241 Ill. 576, aff'g 147 Ill. App. 609; Shults v. Shults, 229 Ill. 420; Chicago City Ry. Co. v. Carroll, 206 Ill. 318, aff'g 102 Ill. App. 202; Walker v. Lewis, 140 Mo. App. 26.

33—Richard Coke & Co. v. New Era Gravel & Development Co., — Tex. Civ. App. —, 168 S. W. 988.

The existence of facts which are admitted by the pleadings may be properly assumed in the instructions. Wiley v. Man-a-to-wah, 6 Kan. 111; Wiley v. Keokuk, 6 Kan. 94; Brown v. Emerson, 66 Mo. App. 63.

34—Anderson v. Kinnear, 80 Wash. 638, 141 Pac. 1151.

See Ellis v. Metropolitan St. R. Co., 234 Mo. 657; Burton v. Kansas City, 181 Mo. App. 427.

It is proper to assume the exist-

ence of facts which are treated by the parties during the trial as conceded facts, whether put in issue by the pleadings or not:

Alabama. Madden v. Blythe, 7 Port. 258.

California. People v. Phillips, 70 Cal. 61, 11 Pac. 493.

Georgia. Johnson v. State, 30 Ga. 426.

Illinois. Hellyer v. People, 186 Ill. 550; St. Louis, J. & S. R. Co. v. Kirbb, 104 Ill. 345; Hanrahan v. People, 91 Ill. 142; Martin v. People, 13 Ill. 341.

Indiana. Louisville, E. & St. L. C. R. Co. v. Utz, 133 Ind. 265.

Iowa. McKenna v. Hoy, 76 Iowa 322.

Michigan. Dalm v. Bryant Paper Co., 157 Mich. 550; Burt v. Long, 106 Mich. 210; Mooney v. York Iron Co., 82 Mich. 263; Wright v. Towle, 67 Mich. 255.

Missouri. Taylor v. Scherpe & Koken Architectural Iron Co., 133

upon by counsel³⁵ and an instruction which contains a statement by the judge of what facts are admitted or not contested is not objectionable as a charge on the facts.³⁶

This proposition is self-evident, as it is the province of the jury to determine the existence or nonexistence of disputed facts, and it would be absurd to require them to pass upon facts as to which there is no dispute, and which are admitted by the parties. Accordingly, instructions are held to be erroneous which treat as in issue and submit to the

Mo. 349; *Pope v. Kansas City Cable Ry. Co.*, 99 Mo. 400.

North Carolina. *State v. Williams*, 47 N. C. 194; *State v. Rash*, 34 N. C. 382, 55 Am. Dec. 420.

South Carolina. *Pickett v. Fidelity & Casualty Co.*, 60 S. C. 477.

South Dakota. *Duprel v. Collins*, 33 S. D. 365.

Texas. *Fahey v. State*, 27 Tex. App. 146; *Thompson v. Johnson*, 24 Tex. Civ. App. 246.

Utah. *Cooper v. Denver & R. G. R. Co.*, 11 Utah 46, 39 Pac. 478.

What all parties to a litigation treat and assume as a fact during the entire progress of the trial before the court, the court, without error, may assume for convenience in drafting its instructions to the jury. *Taylor v. Scherpe & Koken Architectural Iron Co.*, 133 Mo. 349. See also, *Hanrahan v. People*, 91 Ill. 142; *Martin v. People*, 13 Ill. 341.

A charge which states that plaintiff brings the action as the successor of a receiver who died, and that plaintiff stands in the place of such receiver, is not a charge upon the facts, where the facts stated are admitted or adjudicated. *Pickett v. Fidelity & Casualty Co.*, 60 S. C. 477.

By the plea of not guilty, the defendant puts in issue every material

allegation of the indictment, and, before the jury can rightfully find him guilty, the people are bound to establish, by competent evidence, his guilt beyond all reasonable doubt. It is the province of the jury to determine the weight of the evidence in the case, and what admissions, if any, have been made by defendant, and the effect thereof, and an instruction that it is admitted by the defendant, etc., is error. *Hellyer v. People*, 186 Ill. 550.

In an action to recover personalty seized under attachment and sold under execution, an instruction assuming that the plaintiff was a resident of the state was proper though the pleadings raised an issue as to such residence, when the evidence presented no such issue. *Duprel v. Collins*, 33 S. D. 365.

35—Where all the facts are agreed upon by counsel, it is not an invasion of the province of the jury to assume the existence of such facts. *State v. Pritchard*, 16 Nev. 101.

36—*Mullaly v. Smyth*, 96 S. C. 14; *McLain v. Allen*, 95 S. C. 152.

As to charging with respect to matters of fact or commenting on the weight of the evidence, see ch. XII, *post*.

jury facts which are admitted by the pleadings,³⁷ or upon the trial,³⁸ and an instruction assuming that such facts are still in issue may properly be refused.³⁹

Where a party by his own admissions shows certain facts to be true, he cannot complain if the court assumes such facts in the instructions,⁴⁰ and in personal injury actions, instructions which assume that the plaintiff was injured are not erroneous, when the fact of injury is not questioned.⁴¹

Where the fact of employment is in issue by the pleadings, but such fact is admitted by the opposite party, the court may properly instruct the jury that the employment is an established fact,⁴² and it is not prejudicial error for the court in instructing the jury to refer to a written instrument signed by the defendant but not signed by the plaintiff, as a written contract, where both the pleadings and evidence of the plaintiff assert that the proposal made in the written instrument was orally accepted by the plain-

37—*Orth v. Clutz's Adm'r*, 18 B. Mon. (Ky.) 223.

38—*Blaul v. Tharp*, 83 Iowa 665.

39—*Stewart v. Nelson*, 79 Mo. 522.

40—If a party, by his own admissions, shows facts upon which the court is asked to make a ruling against him, it may assume such facts to be true, because he cannot contradict them. *Finnell v. Walker*, 48 Ill. App. 331; *Waters' Lessee v. Riggin*, 19 Md. 536.

Where a defendant himself testifies to a fact he cannot complain if the court assumes his testimony to be true in its charge to the jury. *State v. Belknap*, 44 Wash. 605, 87 Pac. 934.

It is not prejudicial error to assume that a defendant struck a deceased person, where he admitted such fact. *State v. Ayers*, 86 S. C. 426.

41—In an action for personal in-

juries, the court may assume that plaintiff suffered some pain and injury, where the cause was tried on the theory that she did suffer some injury, but that defendant was not liable because of plaintiff's contributory negligence. *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 42 Pac. 860; 43 Pac. 713.

An instruction assuming that a plaintiff was injured, but submitting the extent of his injuries to the jury, is not erroneous when the fact of injury was not controverted. *Bell v. United Rys. Co. of St. Louis*, 183 Mo. App. 334.

An instruction which assumes the plaintiff's suffering, injury and loss of time is not erroneous when such injury is not questioned or disputed. *Hall v. Manufacturers' Coal & Coke Co.*, 260 Mo. 351.

42—*Louisville, E. & St. L. C. R. Co. v. Utz*, 133 Ind. 265; *Cooper v.*

tiff; ⁴³ also, it is not error to charge that an illegal act has been committed by the defendant, when the answer admits facts that show that he committed acts which are illegal. ⁴⁴

Where, on a trial for assault with intent to murder by shooting, the defense was insanity, and defendant "admitted the shooting as charged, and that it was done under circumstances that would have constituted murder if the defense set up is not good," it was not error to instruct that, "if the defendant was not insane at the time of the shooting, then you ought to find him guilty." ⁴⁵

Where a prisoner indicted for murder does not pretend that, "if guilty of the homicide, he is guilty of anything but murder, but relies in his defense solely upon the ground that he was not guilty of the homicide, the court may properly assume that the homicide was murder." ⁴⁶

If the instructions assume that certain facts are admitted by both parties, they will be sustained on appeal, in the absence of anything in the record to show the contrary, ⁴⁷ and a party cannot complain of the assumption of facts by the court, if the court has fallen into the error at the invitation of the party complaining, and through adopting the language of an instruction requested by him. ⁴⁸

§ 115. Assumption of facts supported by strong and uncontradicted evidence.

As a general rule, where the evidence in support of certain facts is conclusive and there is no evidence conflicting therewith, it is not error to assume the existence of such facts, or to state that they have been proved. ⁴⁹

Denver & R. G. R. Co., 11 Utah 46, 39 Pac. 478.

43—McDermott v. Mahoney, 139 Iowa 292.

44—Wiley v. Keokuk, 6 Kan. 94.

45—People v. Hobson, 17 Cal. 424.

46—State v. Rash, 34 N. C. 382, 55 Am. Dec. 420.

47—Weekes v. Cottingham, 58 Ga.

559; Drinkout v. Eagle Machine Works, 90 Ind. 423; Hinds v. Harbou, 58 Ind. 121; Walsh v. Aetna Life Ins. Co., 30 Iowa 133, 6 Am. Rep. 664.

48—City of Chicago v. Moore, 139 Ill. 201.

49—Alabama. North Alabama Traction Co. v. Thomas, 164 Ala.

So, it has been held that, if a fact is shown by undisputed testimony, the court should treat the fact as established, and refuse to instruct as to the necessity of proof of such

191; *Drennen v. Smith*, 115 Ala. 396; *Marx v. Leinkauff*, 93 Ala. 453; *Nelms v. Williams*, 18 Ala. 650; *Williams v. Shackelford*, 16 Ala. 318; *Gillespie v. Battle*, 15 Ala. 276; *Henderson v. Mabry*, 13 Ala. 713.

Arizona. *Lujan v. State*, — Ariz. —, 141 Pac. 706.

Arkansas. *Prescott & N. W. R. Co. v. Morris*, 92 Ark. 365.

California. *People v. Phillips*, 70 Cal. 61, 11 Pac. 493; *People v. Messersmith*, 61 Cal. 246; *Watson v. Damon*, 54 Cal. 278.

Georgia. *Jones v. State*, 65 Ga. 621.

Illinois. *Petersen v. Elgin, A. & S. Traction Co.*, 238 Ill. 403, aff'g 142 Ill. App. 34; *People v. Casey*, 231 Ill. 261; *Cook County v. Harms*, 108 Ill. 151; *Mackie v. Webster Mfg. Co.*, 175 Ill. App. 385; *City of Paxton v. Frew*, 52 Ill. App. 393; *Garretson v. Becker*, 52 Ill. App. 255.

Indiana. *Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380; *Smith v. State*, 28 Ind. 321; *Archer v. Ostemeier*, 56 Ind. App. 385; *Home Ins. Co. v. Marple*, 1 Ind. App. 411.

Iowa. *Bowell v. Draper*, 149 Iowa 725; *State v. Meshek*, 61 Iowa 316; *Hughes v. Monty*, 24 Iowa 499; *Thorp v. Craig*, 10 Iowa 461.

Kansas. *State v. Mortimer*, 20 Kan. 93; *State v. Herold*, 9 Kan. 194.

Kentucky. *Thompson v. Brannin*, 19 Ky. L. Rep. 454.

Michigan. *Gillett v. Knowles*, 97 Mich. 77; *McDonnell v. Ford*, 87 Mich. 198; *Wisner v. Davenport*, 5 Mich. 501.

Minnesota. *Alden v. City of Minneapolis*, 24 Minn. 254.

Missouri. *Phelps v. Conqueror Zinc Co.*, 218 Mo. 572; *State v. Moore*, 101 Mo. 316; *Carroll v. Missouri Pac. Ry. Co.*, 88 Mo. 248; *Bell v. United Rys. Co. of St. Louis*, 183 Mo. App. 334; *Warrington v. Bird*, 168 Mo. App. 385; *Kelly v. Rowane*, 33 Mo. App. 440; *Herriman v. Chicago & A. R. Co.*, 27 Mo. App. 435.

Montana. *Hogan v. Shuart*, 11 Mont. 498, 28 Pac. 969.

Nebraska. *Gran v. Houston*, 45 Neb. 813; *Camp v. Pollock*, 45 Neb. 771.

Nevada. *Menzies v. Kennedy*, 9 Nev. 152.

Pennsylvania. *Com. v. Mudgett*, 174 Pa. 211.

South Carolina. *Williams v. Connor*, 14 S. C. 621.

Texas. *Western U. Tel. Co. v. Cooper (Tex.)*, 20 S. W. 47; *Trinity & S. Ry. Co. v. Lane*, 79 Tex. 643; *Blum v. Schram*, 58 Tex. 524; *International & G. N. R. Co. v. Stewart*, 57 Tex. 166; *Hermann v. Fenn*, — Tex. Civ. App. —, 129 S. W. 1139; *Western U. Tel. Co. v. Rabon*, — Tex. Civ. App. —, 127 S. W. 580; *Missouri, K. & T. Ry. Co. of Texas v. Hawley*, — Tex. Civ. App. —, 123 S. W. 726; *Missouri, K. & T. Ry. Co. v. Rogers (Tex. Civ. App.)*, 40 S. W. 849; *Reynolds v. Weinman (Tex. Civ. App.)*, 40 S. W. 560; *Houston & T. C. R. Co. v. Berling*, 4 Tex. Civ. App. 544.

Washington. *Edwards v. Territory*, 1 Wash. T. 195.

Wisconsin. *Engmann v. Immel*, 59 Wis. 249.

United States. *Wiborg v. United States*, 163 U. S. 632, 41 L. Ed. 289.

fact,⁵⁰ and that it is error to submit such fact to the jury as being in dispute,⁵¹ because this would tend to confuse and mislead the jury.⁵²

It has also been held that if all the evidence on both sides tends to establish a fact, it should not be left to the jury as an open question,⁵³ since a charge in such case which in effect tells the jury that it is competent for them to find

Where the evidence of a fact is positive and not questioned it is to be taken as an established fact and the charge of the court should proceed upon that basis. *International & G. N. R. Co. v. Stewart*, 57 Tex. 166. See also, *Kelly v. Rowane*, 33 Mo. App. 440.

"The rule which forbids the judge to charge upon the weight of evidence does not require or authorize him to assume as doubtful that which is clear and indisputable, or to assume hypotheses at variance with the certain fact." *Wintz v. Morrison*, 17 Tex. 387. See also, *State v. Tettaton*, 159 Mo. 354.

Where facts are undisputed or are of such a character that reasonable minds can draw therefrom but one inference or conclusion, it is not error to assume such facts in an instruction. *Archer v. Ostemeier*, 56 Ind. App. 385.

The court may, in its instructions, assume the truth of a proposition which is established by undisputed evidence, and appears not to be controverted. *Bell v. United Rys. Co. of St. Louis*, 183 Mo. App. 334.

50—*Muir v. Miller*, 82 Iowa 700; *Wright v. Hardy*, 22 Wis. 334.

51—It is not improper to refuse instructions assuming the existence of material facts in issue, although they were clearly proven by the evidence.

Alabama. *Marks v. Robinson*, 82 Ala. 69.

Illinois. *Hauk v. Brownell*, 120 Ill. 161.

Michigan. *Hunt v. Supreme Council, O. C. F.*, 64 Mich. 671, 8 Am. St. Rep. 855; *Seligman v. Ten Eyck's Estate*, 49 Mich. 109; *Township of Medina v. Perkins*, 48 Mich. 70; *Lange v. Perley*, 47 Mich. 352; *Richardson v. Coddington*, 45 Mich. 338; *Chadwick v. Butler*, 28 Mich. 349; *Pennsylvania Min. Co. v. Brady*, 16 Mich. 332.

New York. *White v. Stillman*, 25 N. Y. 541.

Ohio. *Bellefontaine Ry. Co. v. Snyder*, 24 Ohio St. 670.

Pennsylvania. *Com. v. Ruddle*, 142 Pa. 144; *McFall v. McKeesport & Y. Ice Co.*, 123 Pa. 253.

Texas. *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658; *Texas & P. Ry. Co. v. Moore*, 8 Tex. Civ. App. 289; *Bonner v. Green*, 6 Tex. Civ. App. 100.

Wisconsin. *Gibbons v. Wisconsin Val. R. Co.*, 62 Wis. 546.

United States. *Goodman v. Simonds*, 20 How. 359, 15 L. Ed. 939.

52—*Township of Medina v. Perkins*, 48 Mich. 70; *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658.

53—*Douglass v. Geller*, 32 Kan. 499, 4 Pac. 1039; *Gavigan v. Evans*, 45 Mich. 597; *Druse v. Wheeler*, 26 Mich. 189; *Crossman v. Lurman*, 57 App. Div. (N. Y.) 393.

either way—for or against the existence of the fact so proved—assumes that there is evidence in the case tending as well to disprove such fact as to prove it.⁵⁴

There are some decisions, however, which hold that the assumption of facts supported by strong and uncontradicted evidence, is harmless error and not ground for reversal,⁵⁵ and in one criminal case it has been said to be better for the court to avoid assuming any material fact as proved, no matter how clearly such fact seems to be established.⁵⁶

The general rule that the court may assume the existence of facts when supported by strong and uncontradicted evidence may be illustrated by instructions in personal injury actions which assume the fact of injury and damage,⁵⁷ the age of the person injured,⁵⁸ that the person injured was

54—*Druse v. Wheeler*, 26 Mich. 189.

55—*Illinois*. *Gerke v. Fancher*, 158 Ill. 375; *City of Lanark v. Dougherty*, 45 Ill. App. 266.

Indiana. *Koerner v. State*, 98 Ind. 7; *Astley v. Capron*, 89 Ind. 167; *Fullen v. Coss*, 82 Ind. 548.

Kentucky. *Turpin's Heirs v. McKee's Ex'rs*, 7 Dana 305.

Mississippi. *Cook v. Whitfield*, 41 Miss. 541; *Lamar v. Williams*, 39 Miss. 342; *Heirn v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588n.

Missouri. *Walker v. City of Kansas*, 99 Mo. 647; *Fields v. Wabash, St. L. & P. Ry. Co.*, 80 Mo. 206; *Caldwell v. Stephens*, 57 Mo. 589; *Barr v. Armstrong*, 56 Mo. 577.

Montana. *Mattingly v. Lewisohn*, 13 Mont. 508, 35 Pac. 111.

Oklahoma. *Bleecker v. Miller*, 40 Okla. 374, 138 Pac. 809.

Tennessee. *Farquhar v. Toney*, 5 Humph. 502.

Texas. No harm is done by submitting undisputed facts to the jury.

Atchison, T. & S. F. Ry. Co. v. Cunniffe (Tex. Civ. App.) 57 S. W. 692.

56—*People v. Dick*, 32 Cal. 213.

57—Where there is no conflict in the evidence as to a plaintiff's injury and damage, such facts may be assumed. *Town of Sellersburg v. Ford*, 39 Ind. App. 94.

Where an injury is of such a nature that pain and anguish necessarily follow its infliction, an instruction may assume that there was such pain and mental anguish. *Dunn v. Northeast Electric Ry. Co.*, 81 Mo. App. 42.

58—Where the age of plaintiff is not a contradicted fact, the court may assume that he is an old or young man, as the case may be, in an action for personal injuries. *Bertram v. People's Ry. Co.*, 154 Mo. 639. Where the exact age of a child, for whose death an action is brought, is not material, and her age is not in dispute, the court may assume that she is a young girl, or of a certain age. *Schmidt v. St. Louis R. Co.*, 163 Mo. 645. But an instruction assum-

a passenger,⁵⁹ the place of injury,⁶⁰ or similar facts.⁶¹

It has also been held that the court may state the value of a horse which was killed where no issue was raised upon that question and the evidence was positive and undisputed,⁶² and the value of goods stolen may be stated where the evidence thereto is conclusive.⁶³

It is not error for the court to assume in an instruction,

ing that a child fifteen years old was "of tender years, and imperfect discretion," was held erroneous. *Day v. Citizens' Ry. Co.*, 81 Mo. App. 471.

59—It is not error to assume that a deceased person was a passenger, where the evidence as to such fact is uncontroverted and conclusive. *Petersen v. Elgin, A. & S. Traction Co.*, 238 Ill. 403, aff'g 142 Ill. App. 34.

60—Where the undisputed evidence shows that a car was stopped at a certain place for allowing passengers to get on and off the car, such fact may be assumed. *Birmingham Ry. Light & Power Co. v. McCurdy*, 172 Ala. 488.

61—**Alighting from train—Assumption that passenger was assisted.**

In an action for injuries sustained in alighting from a train where the evidence did not controvert the plaintiff's testimony as to assistance rendered her, the court had a right to assume in his charge that she was assisted. *St. Louis Southwestern Ry. Co. v. Shipley*, — Tex. Civ. App. —, 126 S. W. 952.

Asleep on railroad—Assumption of position of person injured.

In an action for the death of a person killed while asleep on a railroad track, where there was no conflict as to the relative elevation of the intestate's head, such fact might be assumed. *Louisville & N. R. Co. v. Holland*, 173 Ala. 675.

Collision—Assumption that street car was lighted.

In an action for injuries sustained in a collision between a street car and an automobile, the court may assume that the street car was lighted on the inside, the evidence as to such fact being clear and undisputed. *Colborne v. Detroit United Ry.*, 177 Mich. 139.

Master and servant—Assumption that servant would be injured.

An assumption that injury to a servant should have been anticipated by an engineer from the act of moving his engine held proper where the evidence conclusively showed that such engineer knew the servant was engaged in the work of emptying the ash pan. *Missouri, K. & T. Ry. Co. of Texas v. Hampton*, — Tex. Civ. App. —, 142 S. W. 89.

Municipal corporations — Assumption of injury and unguarded ditch.

A charge assuming that a plaintiff fell into an open ditch in a street, and that the municipal authorities had reasonable notice thereof and failed to provide a barrier was not erroneous where such facts were proved by the concurring testimony of a number of witnesses without contradiction. *City of Montgomery v. Wyche*, 169 Ala. 181.

62—*Chapin v. Ann Arbor R. Co.*, 167 Mich. 648.

63—*State v. Fleetwood*, 111 Minn. 70.

the existence of a collateral fact, established by uncontradicted evidence, which tends to prove one of the constituent elements of a crime,⁶⁴ and where the fact that a crime was committed is proved beyond any manner of doubt by evidence which there is neither fact, circumstance or testimony to contradict, an instruction assuming such fact is not erroneous when it does not assume that the defendants committed the crime.⁶⁵

The mere fact that the evidence tending to prove a fact is uncontradicted will not always justify the court in assuming the existence of such fact,⁶⁶ and a fact that must be proved affirmatively is not established by the absence of evidence to the contrary.⁶⁷

Where the credibility of witnesses is involved, the court should not take the question from the jury by assuming the fact in the instructions.⁶⁸

Also, where the fact depends upon inferences to be drawn

64—*Welsh v. State*, 60 Neb. 101.

65—*People v. Spira*, 264 Ill. 243.

66—**Alabama.** *American Oak Extract Co. v. Ryan*, 112 Ala. 337; *Jonas v. Field*, 83 Ala. 449; *Rhodes v. Lowry*, 54 Ala. 4.

California. *People v. Webster*, 111 Cal. 381, 43 Pac. 1114.

Iowa. *Saar v. Fuller*, 71 Iowa 427.

Maryland. *Charleston Insurance & Trust Co. v. Corner*, 2 Gill 411.

New York. *Merchants' Exch. Nat. Bank v. Wallach*, 20 Misc. 309.

Texas. *Byers v. Wallace*, 87 Tex. 503.

This principle was well illustrated in the following case: On a prosecution for rape, the testimony of the prosecuting witness that she was under the age of consent was uncontradicted. The refusal of the trial judge to assume that she was under the age of consent in his instructions was sustained on appeal, for the following reasons: "A jury

in a criminal case is not bound to believe the uncontradicted statement of a witness. * * * The conduct of this witness when upon the stand may have shown her to have been lying. Her appearance may have shown her to have been of mature years. The inherent improbabilities of her testimony may have placed it beyond the pale of belief. Would such uncontradicted testimony be conclusive if the witness, by her appearance, was shown to be wrinkled and gray with age?" *People v. Webster*, 111 Cal. 381, 43 Pac. 1114.

In another case, where only one person testified to the value of certain property, it was held that it could not be assumed that his estimate was correct, though his testimony was uncontradicted. *American Oak Extract Co. v. Ryan*, 112 Ala. 337.

67—*Byers v. Wallace*, 87 Tex. 503.

68—*Saar v. Fuller*, 71 Iowa 427.

from other facts in evidence, it is improper for the court to draw the inference and assume the fact, although there is no conflict in the evidence, as it is the exclusive province of the jury to determine what inferences shall be drawn.⁶⁹

If an instruction assumes the existence of facts, it will be presumed correct on appeal, if the record shows no conflict in the evidence as to the fact assumed.⁷⁰

See also, §§ 60 *et seq.*, *ante*, "Questions of law and fact."

An instruction assuming the existence of a material fact, though based upon the uncontradicted testimony of the plaintiff, is erroneous, since the credibility of an interested

witness is for the jury. *Turner v. Grobe*, 24 Tex. Civ. App. 554.

69—*Schulz v. Schulz*, 113 Mich. 502.

70—*People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310; *Patchell v. Jaqua*, 6 Ind. App. 70.

CHAPTER XII.

CHARGING WITH RESPECT TO MATTERS OF FACT, OR COMMENT- ING ON WEIGHT OF EVIDENCE.

- § 116. Jurisdictions where practice is prohibited.
- § 117. Same—Illustrations of instructions violating prohibition in general.
- § 118. Same—Miscellaneous instructions violating prohibition.
- § 119. Same—Instructions in negligence cases violating prohibition.
- § 120. Same—Instructions as to damages violating prohibition.
- § 121. Same—Instructions violating prohibition in criminal cases.
- § 122. Same—Instructions held not to violate prohibition in general.
- § 123. Same—Miscellaneous instructions not violating prohibition.
- § 124. Same—Instructions in negligence cases not violating prohibition.
- § 125. Same—Instructions in criminal cases not violating prohibition.
- § 126. Same—Curing error by other instructions.
- § 127. Same—Indicating opinion by questions asked the jury.
- § 128. Same—Violation of rule otherwise than by express instructions.
- § 129. Jurisdictions where practice is permissible, or is not prohibited.
- § 130. Same—How strong an expression of opinion is permissible.
- § 131. Same—Necessity of expressing opinion.
- § 132. Same—Necessity of instructing that opinion is merely advisory.
- § 133. Same—Effect of erroneous opinion.
- § 134. Same—When expression of opinion is ground for reversal.

§ 116. Jurisdictions where practice is prohibited.

In the majority of the states of the Union, the trial courts are not permitted to comment on the evidence, in charging the jury, or to state what it does or does not tend to prove; or to express any opinion as to the weight of the evidence or any part of it.¹ This was not the rule at common law,

1—Alabama. Gafford v. State, 125 Ala. 1; Higginbotham v. Higginbotham, 106 Ala. 314; Steele v. State, 83 Ala. 20; Tubb v. Madding, Minor 130.

Arkansas. McLemore v. State,

111 Ark. 457; Cameron v. Vandergriff, 53 Ark. 381; Keith v. State, 49 Ark. 439.

California. Const., art. VI, § 19; Pen. Code, § 1126; People v. MacDonald, 167 Cal. 545, 140 Pac. 256;

where the judge was something more than a mere umpire,

In *re Gird's Estate*, 157 Cal. 534, 137 Am. St. Rep. 131, 108 Pac. 499; *People v. Grimes*, 132 Cal. 30, 64 Pac. 101; *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297; *People v. Verenesen-eckoeckoeckhoff*, 129 Cal. 497, 58 Pac. 156; 62 Pac. 111; *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228; *People v. Barry*, 31 Cal. 357; *Ryan v. Oakland Gas Light & Heat Co.*, 10 Cal. App. 484, 102 Pac. 558.

Florida. *Florida East Coast R. Co. v. Carter*, 67 Fla. 335; *Florida R. Co. v. Dorsey*, 59 Fla. 260; *Adams v. State*, 28 Fla. 511; *Williams v. Dickenson*, 28 Fla. 90; *Ferguson v. Porter*, 3 Fla. 27.

Georgia. *Bourquin v. Bourquin*, 110 Ga. 440; *Florida, C. & P. R. Co. v. Lucas*, 110 Ga. 121; *Ryder v. State*, 100 Ga. 528, 38 L. R. A. 721n, 62 Am. St. Rep. 334.

Illinois. *Rice & Bullen Malting Co. v. International Bank*, 185 Ill. 422, aff'g 86 Ill. 136; *New York, C. & St. L. R. Co. v. Blumenthal*, 160 Ill. 40; *Chicago & A. R. Co. v. Robinson*, 106 Ill. 142; *Frame v. Badger*, 79 Ill. 441; *Humphreys v. Collier*, 1 Ill. 297; *Dowd v. Chicago City Ry. Co.*, 153 Ill. App. 85; *Clark v. Smith*, 87 Ill. App. 409; *Lake Shore & M. S. Ry. Co. v. Taylor*, 46 Ill. App. 506.

Indiana. *Indianapolis Abattoir Co. v. Neidlinger*, 174 Ind. 400; *Ohio & M. Ry. Co. v. Percy*, 128 Ind. 197; *Fulwider v. Ingels*, 87 Ind. 414; *Wood v. Deutehman*, 75 Ind. 148; *Chamness v. Chamness*, 53 Ind. 301; *Fassnacht v. Emsing Gagen Co.*, 18 Ind. App. 80.

Iowa. *Carroll v. Chicago, St. P., M. & O. Ry. Co. (Iowa)* 84 N. W. 1035; *State v. Carter*, 112 Iowa 15;

State v. Dorland, 103 Iowa 168; *Leiber v. Chicago, M. & St. P. Ry. Co.*, 84 Iowa 97; *Nimon v. Reed*, 79 Iowa 524; *Houston v. State*, 4 G. Greene 437.

Kansas. *Lorie v. Adams*, 51 Kan. 692, 33 Pac. 599; *Cavender v. Roberson*, 33 Kan. 626, 7 Pac. 152; *State v. Potter*, 16 Kan. 80; *City of Junction City v. Blades*, 1 Kan. App. 85, 41 Pac. 677.

Kentucky. *Louisville & N. R. Co. v. Lynch*, 137 Ky. 696; *Carter's Ex'rs v. Carter*, 10 B. Mon. 327; *Brady v. Com.*, 11 Bush 285; *Hurt v. Miller*, 3 A. K. Marsh. 337.

Louisiana. *State v. King*, 135 La. 117; *State v. Hahn*, 38 La. Ann. 169; *State v. Jackson*, 35 La. Ann. 769; *Riviere v. McCormick*, 14 La. Ann. 139; *State v. Smith*, 11 La. Ann. 633, 66 Am. Dec. 208. Prior to 1852, at which time a statute prohibiting trial courts from charging as to matters of fact was enacted, an instruction on the weight of the evidence was permissible. See *State v. Green*, 7 La. Ann. 518; *State v. Roger*, 7 La. Ann. 382.

Maine. *State v. Benner*, 64 Me. 267. This decision is under a statute, the practice of charging on the weight of the evidence being permissible formerly. *Stephenson v. Thayer*, 63 Me. 143; *State v. Reed*, 62 Me. 129; *Hayden v. Bartlett*, 35 Me. 203; *Gilbert v. Woodbury*, 22 Me. 246.

Maryland. *Miller v. Miller*, 41 Md. 623; *Mason v. Poulson*, 40 Md. 355; *Chipman v. Stansbury*, 16 Md. 154.

Massachusetts. *Com. v. Briant*, 142 Mass. 463, 56 Am. Rep. 707; *Com. v. Foran*, 110 Mass. 179; *Com. v. Lar-*

and was entitled to state his opinions upon the evidence, and

rabee, 99 Mass. 413. These decisions are under Gen. St. Mass. c. 115, § 5. Prior to the enactment of that statute it was customary in this state to comment on the evidence and charge on the weight thereof. *Com. v. Child*, 10 Pick. 252; *Buckminster v. Perry*, 4 Mass. 594; *Mansfield v. Corbin*, 4 Cush. 213; *Davis v. Jenney*, 1 Metc. 221; *Eddy v. Gray*, 4 Allen 435.

Mississippi. *Kearney v. State*, 68 Miss. 233; *Daniel v. Daniel* (Miss.), 4 So. 95; *Whitney v. Cook*, 53 Miss. 551; *Wesley v. State*, 37 Miss. 327, 75 Am. Dec. 62.

Missouri. *Granby Mining & Smelting Co. v. Davis*, 156 Mo. 422; *State v. Smith*, 53 Mo. 267; *State v. Hundley*, 46 Mo. 414; *Choquette v. Barada*, 28 Mo. 491; *Labeaume v. Dodier*, 1 Mo. 618; *Booker v. Southwest Missouri R. Co.*, 144 Mo. App. 273; *Turner v. Snyder*, 139 Mo. App. 656; *Milligan v. Chicago, B. & Q. R. Co.*, 79 Mo. App. 393; *Hayden v. Parsons*, 70 Mo. App. 493.

Montana. *State v. Mahoney*, 24 Mont. 281, 61 Pac. 647; *Knowles v. Nixon*, 17 Mont. 473, 43 Pac. 628; *State v. Sullivan*, 9 Mont. 174, 22 Pac. 1088.

Nebraska. *Smith v. Meyers*, 52 Neb. 70; *Village of Culbertson v. Holliday*, 50 Neb. 229; *Murphey v. Virgin*, 47 Neb. 692.

Nevada. *State v. Tickel*, 13 Nev. 502; *State v. Ah Tong*, 7 Nev. 148.

North Carolina. *State v. Edwards*, 126 N. C. 1051; *State v. Brewer*, 98 N. C. 607; *Weisenfield v. McLean*, 96 N. C. 248; *Wells v. Clements*, 48 N. C. 168; *Reed v. Shenck*, 13 N. C. 415.

North Dakota. *Territory v. O'Hare*, 1 N. D. 30.

Oklahoma. *Kirk v. Territory*, 10 Okla. 46, 60 Pac. 797.

Oregon. *State v. McAllister*, 67 Ore. 480, 136 Pac. 354; *State v. Daly*, 16 Ore. 240, 18 Pac. 357; *Meyer v. Thompson*, 16 Ore. 194, 18 Pac. 16.

South Carolina. *Moore v. Cummings*, 87 S. C. 166; *State v. Smalls*, 98 S. C. 297; *Martin v. Columbia St. Railway, Light & Power Co.*, 84 S. C. 568; *State v. Godfrey*, 60 S. C. 498; *State v. Whittle*, 59 S. C. 297; *State v. Caddon*, 30 S. C. 609; *State v. Smalls*, 24 S. C. 591; *Woody v. Dean*, 24 S. C. 504; *Polson v. Ingram*, 22 S. C. 545. Prior to the time when Const. S. C. 1868, art. IV, § 26, went into effect, a charge on the weight of the evidence was permissible. See *State v. Smith*, 12 Rich. Law 430; *Verdier v. Verdier*, 8 Rich. Law 135; *Devlin v. Killerease*, 2 McM. 428; *State v. Bennet*, 2 Treadw. Const. 692.

Tennessee. *Earp v. Edgington*, 107 Tenn. 23; *Citizens' St. Ry. Co. v. Burke*, 98 Tenn. 650; *Fitzpatrick v. Fain*, 3 Coldw. 15; *Roper v. Stone*, Cooke 499; *S. E. Jones & Son v. Cherokee Iron Co.*, 14 Lea 157.

Texas. *Stooksbury v. Swan*, 85 Tex. 563; *Johnson v. Brown*, 51 Tex. 65; *Pharr v. State*, 7 Tex. App. 472; *Butler v. State*, 3 Tex. App. 48; *Johnson v. Hytlin*, — Tex. Civ. App. —, 133 S. W. 293; *G. A. Kelly Plow Co. v. London*, — Tex. Civ. App. —, 125 S. W. 974; *St. Louis Southwestern Ry. Co. of Texas v. Taylor*, — Tex. Civ. App. —, 123 S. W. 714; *Texas & P. Ry. Co. v. Durrett*, 26 Tex. Civ. App. 268; *City of San*

what it tended to prove,² but the practice is expressly prohibited by constitutional or statutory provisions.³

The real object of the various enactments is to leave the decision of all questions of fact to the jury entirely uninfluenced by any expression of opinion by the judge,⁴ and if such opinion is expressed or even intimated, whether intentionally or unintentionally, a new trial should be granted.⁵

Antonio v. Porter, 24 Tex. Civ. App. 444; **City of Dallas v. Beeman**, 23 Tex. Civ. App. 315; **Galveston, H. & S. A. Ry. Co. v. English** (Tex. Civ. App.), 59 S. W. 626; **Fulcher v. White** (Tex. Civ. App.), 59 S. W. 628; **Meadows v. Truesdale** (Tex. Civ. App.), 56 S. W. 932; **Barton v. Stroud-Gibson Grocer Co.** (Tex. Civ. App.), 40 S. W. 1050; **Kildow v. Irick** (Tex. Civ. App.), 33 S. W. 315.

Utah. **Schuyler v. Southern Pac. Co.**, 37 Utah 581, 109 Pac. 458; **Evans v. Oregon Short Line R. Co.**, 37 Utah 431, Ann. Cas. 1912 C 259n, 108 Pac. 638.

Virginia. **Tyler v. Chesapeake & O. R. Co.**, 88 Va. 389; **McDowell's Ex'r v. Crawford**, 11 Gratt. 378; **McKinley v. Ensell**, 2 Gratt. 333; **McRae v. Scott**, 4 Rand. 463; **Ross v. Gill**, 1 Wash. 88.

Washington. **In re Westlake Ave.**, 60 Wash. 549, 111 Pac. 780; **Leonard v. Territory**, 2 Wash. T. 381, 7 Pac. 872; **Bardwell v. Ziegler**, 3 Wash. St. 34, 28 Pac. 360.

West Virginia. **State v. Greer**, 22 W. Va. 801; **State v. Hurst**, 11 W. Va. 75.

Wisconsin. **Hempton v. State**, 111 Wis. 127.

See also, cases cited to more specific propositions in the succeeding sections of this article.

Under Const. 1895, art. V, § 26,
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"Judges shall not charge juries in respect to matters of fact but shall declare the law." **State v. Smalls**, 98 S. C. 297.

As to rule in Michigan and New Hampshire, see § 129, *post*.

2—See § 129, *post*.

3—See the codes and statutes of the various states, and the cases cited in the preceding note.

4—**State v. Smalls**, 98 S. C. 297.

"The judge's position would naturally add great weight to any opinion he might express upon any question of fact arising in a case and for this reason he should carefully refrain and avoid expressing any opinion that he may have formed from the facts as to the force, weight and effect, leaving it to the jury to draw their own conclusions and not impress upon them any impression that the testimony may have made in the mind of the judge." **State v. Smalls**, 98 S. C. 297.

A judge must carefully avoid expressing an opinion on the facts, leaving it to the jury to draw their own conclusions, entirely unbiased by any impression which the testimony may make upon the mind of the judge. He must not in any way indicate his opinion of the facts to the jury. **State v. Addy**, 28 S. C. 4.

5—**State v. James**, 31 S. C. 218.

“Among lawyers nothing is better known than that juries rely with great confidence on the integrity and fairness of judges and upon the correctness of their views. For this reason a judge should be careful not to throw the weight of his judicial position into a case either for or against a defendant.”⁶

Under a statute prohibiting an intimation of any “opinion whether a fact is fully or sufficiently proven,” the “facts” referred to have been held to mean those in dispute on which the liability of the defendant depends.⁷

It is improper to single out some part of the evidence and tell the jury what weight should be given to it,⁸ and a charge is perfectly unexceptionable only when the judge confines himself to the duty of setting forth the law applicable to the case, without either expressing or intimating any opinion as to the weight of the evidence, or the credibility of statements made by parties or other witnesses.⁹

6—*People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703.

A judge cannot be too cautious in a criminal case in avoiding all interference with the conclusions of the jury upon the facts. In such cases a word, a look, or a tone may sometimes be of great or even of controlling influence. *People v. Williams*, 17 Cal. 142.

Juries, especially in cases which are strongly litigated upon the facts, watch with anxiety to gather from the court some intimation as to what the judge thinks should be their finding in the facts. They do not usually comprehend the line of demarcation which separates the duties of the court from those of the jury. *Hair v. Little*, 28 Ala. 236.

7—*Laws 1796*, ch. 452 (now *Revised 1905*, § 535). *State v. Rogers*, 168 N. C. 112.

The prohibition against expressing an opinion upon the facts only

applies to those facts which are pertinent to the issues to be decided by the jury and the appellant must show that the remark was prejudicial to him. *McDonald v. MacArthur Bros. Co.*, 154 N. C. 11.

8—Since the enactment of *Rev. St. 1909*, § 5244 (March 21, 1835) it has been regarded as an obnoxious practice for trial courts to single out some part of the evidence and tell the jury what weight should be given to it. *State v. Creeley*, 254 Mo. 382.

See also, ch. XIV, *post*, *Giving Undue Prominence to Evidence, Issues and Theories*.

9—*Ross v. State*, 29 Tex. 500.

The court cannot legally indicate his opinion, either expressly or impliedly, intentionally or otherwise, as to the credibility of the witnesses, or as to the truth of any fact in issue, and the subject of the evidence. The whole matter of finding the facts

In some states, however, there are exceptions to the general rule, due to statutes requiring comment on certain evidence.¹⁰

§ 117. Same—Illustrations of instructions violating prohibition in general.

The rule against commenting on the evidence or expressing an opinion as to its weight is frequently violated. The cases are almost innumerable in which the question has been passed upon. Usually the error is committed through inadvertence, and the question of whether an instruction is erroneous depends upon the construction of the language used. Accordingly it has been thought proper to give a large number of instructions which have been held erroneous, or which have been held proper. Such a collection is necessarily diverse in nature, but the more general instructions such as those dealing with evidence and witnesses will be treated in this section. Similar charges such as those which arise in negligence or criminal cases are treated in separate sections.

In general, it may be said that it is improper to announce to the jury what is the better evidence in the case, or what the jury may so regard,¹¹ to give instructions as to the rela-

of the case must be left entirely to the jury, without suggestions or leadings by the court. *State v. Williams*, 31 S. C. 238.

10—Under Rev. St. Mo. 1909, § 5231, courts are required to instruct on the legal inference or presumption to be drawn from evidence of good character of a defendant, thus directly commanding the courts to comment upon a certain class of evidence. *State v. Creeley*, 254 Mo. 382.

Under Rev. St. Mo. 1909, § 4585, proof that a bank has failed is made prima facie evidence that the officers of such bank had knowledge

that it was insolvent when they received deposits, and in such case it is proper for the court to tell the jury that the failure of the bank makes out a prima facie case of knowledge, though this is a direct comment on the evidence. *State v. Creeley*, 254 Mo. 382.

11—In *re Gird's Estate*, 157 Cal. 534, 137 Am. St. Rep. 131, 108 Pac. 499; *Chicago & A. R. Co. v. Robinson*, 106 Ill. 142; *Toledo, W. & W. Ry. Co. v. Brooks*, 81 Ill. 245; *Indianapolis Abattoir Co. v. Neidlinger*, 174 Ind. 400; *Millner v. Eglin*, 64 Ind. 197, 31 Am. Rep. 121; *State v. Elkins*, 63 Mo. 159; *Texarkana Gas & Electric*

tive value of direct and circumstantial evidence;¹² or to require the jury to give more credit to one class of testimony than another;¹³ such as positive and negative testimony;¹⁴ to instruct that designated testimony is entitled to great weight;¹⁵ is weighty and strong;¹⁶ or that "full weight" should be given designated testimony, instead of "the weight to which, in their opinion, such testimony is justly

Co. v. Lanier, — Tex. Civ. App. —, 126 S. W. 67.

12—A party should not ask for instructions relating to the weight to be given circumstantial evidence introduced by his adversary. Such a request comes under the general rule that it is dangerous to single out a particular line of evidence, and to instruct as to its weight. *Carroll v. Chicago, St. P., M. & O. Ry. Co. (Iowa)*, 84 N. W. 1035.

Since the rule of circumstantial evidence covers all the facts in a case, an instruction which singles out one fact in the case and instructs the jury with reference to circumstantial evidence as that fact alone, is on the weight of evidence. *Beard v. State*, 57 Tex. Cr. App. 323.

13—*Kirk v. Territory*, 10 Okla. 46, 60 Pac. 797.

Instruction that it is duty of jury to give more weight to testimony of disinterested witness than one who is interested, or party testifying in his own behalf, is properly refused. *Louisville & N. R. Co. v. Watson*, 90 Ala. 68, 13 Am. Neg. Cas. 27.

14—It is improper to instruct the jury that positive testimony is entitled to greater weight than negative testimony, where the witnesses are equal in credibility and opportunity to know the facts, as the weight of such testimony is exclusively for the jury. *Milligan v. Chicago, B. & Q. R. Co.*, 79 Mo. App.

393. See also, *Metropolitan R. Co. v. Martin*, 15 App. Cas. (D. C.) 552.

A charge to the effect that the testimony of a witness testifying positively is entitled to more weight than that of one who testifies negatively is open to serious criticism, unless it embraces an instruction that the jury in weighing the testimony of such witnesses should consider and pass upon the question of their credibility. *Wright v. Western & A. R. Co.*, 139 Ga. 343.

15—**Alabama.** *Steele v. State*, 83 Ala. 20.

Florida. *Williams v. Dickenson*, 28 Fla. 90.

Georgia. *Bourquin v. Bourquin*, 110 Ga. 440; *Ryder v. State*, 100 Ga. 528, 38 L. R. A. 721n, 62 Am. St. Rep. 334.

Missouri. *State v. Hundley*, 46 Mo. 414.

Montana. *State v. Gleim*, 17 Mont. 17, 31 L. R. A. 294, 52 Am. St. Rep. 655, 41 Pac. 998.

Nebraska. *Smith v. Meyers*, 52 Neb. 70.

South Carolina. To tell the jury what force they should give to evidence of threats or to any other evidence on a contested issue of fact is beyond the province of the judge. *Farmer v. Sellers*, 89 S. C. 492.

16—*Cecil v. Johnson*, 11 B. Mon. (Ky.) 35; *Earp v. Edgington*, 107 Tenn. 23.

entitled";¹⁷ to state that one kind of evidence cannot outweigh another kind;¹⁸ or that certain evidence is strong evidence to disprove.¹⁹ It is also improper to state that there is a conflict in the evidence, when that is denied;²⁰ to state what the evidence tends to show;²¹ to state that the evidence shows certain facts;²² to assume the existence of a material fact;²³ to intimate that a fact has or has not been established;²⁴ to express an opinion of the legal value of a fact testified to;²⁵ to state that the evidence preponderates in favor of one side of the case;²⁶ that, from the facts proven,

17—Davis v. Hays, 89 Ala. 563.

18—Bowie v. Maddox, 29 Ga. 285, 74 Am. Dec. 61.

19—Jenkins v. Tobin, 31 Ark. 307.

20—Raoul v. Newman, 59 Ga. 412; Black v. Thornton, 30 Ga. 361.

Compare People v. Flynn, 73 Cal. 511, where it was held that "the mere statement by the court in its instructions that there is a conflict in the evidence in certain respects is not an expression of opinion upon the weight of the evidence."

21—City of Junction City v. Blades, 1 Kan. App. 85. See also, State v. Donovan, 61 Iowa 369; Missouri Pac. Ry. Co. v. Christman, 65 Tex. 369; Seeley v. State, 43 Tex. Cr. App. 66.

22—Leiber v. Chicago, M. & St. P. Ry. Co., 84 Iowa 97; Kinney v. North Carolina R. Co., 122 N. C. 961; Fitzpatrick v. Fain, 3 Coldw. (Tenn.) 15.

In the trial of a cause, testimony may be offered as to a particular fact, and it is not a comment upon the testimony to specially refer to that fact, but it would be otherwise if the court should undertake to refer specially to items of evidence, as to its weight, etc., in support of the fact itself. State v. Galliton, 176 Mo. App. 115.

23—Martin v. Leslie, 93 Ill. App. 44; Ellerbe v. State, 79 Miss. 10; Halsey v. Bell (Tex. Civ. App.), 62 S. W. 1088. See also, §§ 102, *et seq.*, *ante*, "Assumption of facts."

An instruction, in an action by a traveler against a city, which assumes "that plaintiff was wanting either in ability, skill, or care," is upon the weight of evidence. City of San Antonio v. Porter, 24 Tex. Civ. App. 444.

24—Alabama. Anniston City Land Co. v. Edmondson, 127 Ala. 445.

Georgia. Suddeth v. State, 112 Ga. 407; Florida, C. & P. R. Co. v. Lucas, 110 Ga. 121; Rushin v. Shields, 11 Ga. 636, 56 Am. Dec. 436.

Kansas. Lorie v. Adams, 51 Kan. 692, 33 Pac. 599.

Texas. Short v. Kelly (Tex. Civ. App.), 62 S. W. 944.

It is error to express an opinion as to what has been proved, and to state that a controverted fact has been proved by undisputed evidence. Florida, C. & P. R. Co. v. Lucas, 110 Ga. 121.

25—State v. Swayze, 30 La. Ann. 1323.

26—Thompson v. Thompson, 17 B. Mon. (Ky.) 28.

plaintiffs were entitled to recover;²⁷ that, "if you think there is some evidence in favor of the plaintiff's side of the case, whether it be little or great, it is your duty to find in her favor";²⁸ or that, if the jury believe the evidence, they must find for a party named;²⁹ to state that certain evidence is conclusive;³⁰ that a fact is conclusively proven;³¹ or to instruct that certain evidence is good and effectual in law to maintain the issue on behalf of the party producing it;³² that certain evidence *prima facie* establishes a fact;³³ that certain indicia of fraud raise a "violent presumption";³⁴ that, "if you [the jury] believe * * *, that would be a strong circumstance to show";³⁵ or that a fact is a strong and almost irresistible circumstance.³⁶

On the contrary, it is improper to state that the evidence is insufficient;³⁷ that designated evidence is weak or of little value;³⁸ to state that, while there is some evidence to go to the jury, it is a bare *scintilla*, leaving the matter not proved;³⁹ to state that matters alleged in the declaration are

27—*Ayres v. Moulton*, 5 Coldw. (Tenn.) 154.

An instruction that "plaintiff has established his right to recover sixty-five dollars for the purchase price of the insulating material" is properly refused where the evidence is conflicting on such issue. *Kettering Mercantile Co. v. Sheppard*, — N. M. —, 142 Pac. 1128.

28—*Bunting v. Saltz*, 84 Cal. 168, 24 Pac. 167.

29—*Smith v. Collins*, 94 Ala. 394; *Gibson v. Snow Hardware Co.*, 94 Ala. 346.

30—*Burkham v. Mastin*, 54 Ala. 122.

31—*Bardwell v. Ziegler*, 3 Wash. St. 34, 28 Pac. 360.

32—*Keel v. Herbert*, 1 Wash. (Va.) 203.

33—*Hartshorn v. Byrne*, 147 Ill. 418.

34—*Shealy v. Edwards*, 75 Ala. 411.

35—*Phillips v. Williams*, 39 Ga. 602.

An instruction that a certain fact in evidence is a "strong circumstance" showing a particular intention invades the province of the jury, and is erroneous. *Clark v. Smith*, 87 Ill. App. 409.

36—*Marr v. Marr*, 5 Sneed (Tenn.) 385.

37—*Johnson v. People*, 94 Ill. 505; *Farmers' & Merchants' Bank v. Harris*, 2 Humph. (Tenn.) 311.

38—*Kauffman v. Maier*, 94 Cal. 269, 18 L. R. A. 124n, 29 Pac. 481; *West v. Black*, 65 Ga. 647; *Wannack v. City of Macon*, 53 Ga. 162; *Mauro v. Platt*, 62 Ill. 450.

39—*Boing v. Raleigh & Gaston R. Co.*, 87 N. C. 360.

disproved by the evidence;⁴⁰ that upon all the evidence, if believed, plaintiff is not entitled to recover;⁴¹ or to state that the evidence did not show what plaintiff claimed it did;⁴² and a requested instruction that "even should you find for the plaintiff he can recover in this action only his actual damages" is properly refused, as the word "even" carries with it an intimation of the court's opinion to the effect that it is not probable they will so find.⁴³

It is also improper to state that certain testimony was immaterial;⁴⁴ to instruct directly or by intimation that evidence is entitled to little weight;⁴⁵ or to instruct that, although parol proof of the verbal admissions of a party often affords satisfactory evidence, yet, as a general rule, statements of witnesses as to verbal admissions of a party should be received with great caution, as that kind of evidence is subject to much imperfection and mistake.⁴⁶

An instruction defining the term "preponderance of the evidence" as meaning not necessarily the greater number of witnesses is erroneous, being upon the weight of the evidence,⁴⁷ and it is improper to intimate that the jury should give greater weight to the testimony of one witness than to that of another;⁴⁸ to state that evidence offered by one party

40—James v. Brooks, 6 Heisk. (Tenn.) 150.

41—Sherrill v. Western U. Tel. Co., 116 N. C. 655.

42—Southern Life Ins. Co. v. Wilkinson, 53 Ga. 548.

43—Manistee Mill Co. v. Hobdy, 165 Ala. 411, 138 Am. St. Rep. 73.

44—Jessup v. Gragg, 12 Ga. 261.

45—State v. Hundley, 46 Mo. 414; Knowles v. Nixon, 17 Mont. 473, 43 Pac. 628.

It is proper to refuse to comment adversely upon the testimony of a witness. Granby Mining & Smelting Co. v. Davis, 156 Mo. 422.

46—Kauffman v. Maier, 94 Cal. 269, 18 L. R. A. 124n, 29 Pac. 481.

47—St. Louis S. W. Ry. Co. v. Smith (Tex. Civ. App.), 63 S. W. 1064; Dallas Cotton Mills v. Ashley (Tex. Civ. App.), 63 S. W. 160.

48—Bynum v. Southern Pump & Pipe Co., 63 Ala. 462.

An instruction that "all other things being equal evidence of witnesses given in the presence of the court and jury is entitled to greater weight than that of witnesses whose depositions have been taken and read in evidence" is erroneous. Works v. Stevens, 76 Ind. 181.

An instruction telling the jury that, in determining what consideration induced the defendant to sign the note, they are to give greater

is entitled to more weight than that offered by the other;⁴⁹ that the testimony of a party to the suit might not be sufficient to warrant a finding upon it, if it appeared that he could have brought other testimony to the fact;⁵⁰ that, "if you find that defendant testified," etc., and "if you find that his actions speak louder than words thus testified to";⁵¹ that the testimony of defendant and one of the witnesses was evenly balanced;⁵² to tell the jury to consider any particular statement of a witness as a mistake, and to give full credence to the remainder of his testimony;⁵³ or to state that if the jury believe from the evidence of a particular witness that all his knowledge of a fact testified about by him is derived from the books of the party calling him, and if they find that the testimony of such witness is all the evidence on that subject, then there is no evidence before them as to that fact.⁵⁴

§ 118. Same—Miscellaneous instructions violating prohibition.

It has been held improper to give an instruction which assumes to determine a question of intention;⁵⁵ to state that "slight circumstances will carry" conviction of the existence of fraud;⁵⁶ or to tell the jury that certain facts are not

weight to a letter written by the plaintiff to the defendant just after the signing than the memory of defendant at that time, is erroneous. *McHard v. Ives*, 5 Ill. App. 400, aff'd 103 Ill. 97.

An instruction that, if the jury find the testimony of the plaintiff to be the only positive evidence in support of material allegations, and that it is contradicted in all material points by an unimpeached witness, they must find for defendant, is erroneous. *Delvee v. Boardman*, 20 Iowa 446.

49—*Lyon v. George*, 44 Md. 295.

50—*Baines v. Ullmann*, 71 Tex. 529.

51—*Wilkinson v. Searcy*, 76 Ala. 176.

52—*Canada v. Curry*, 73 Ind. 246.

53—*Citizens' St. Ry. Co. v. Burke*, 98 Tenn. 650.

54—*Wolcott v. Heath*, 78 Ill. 433.

55—*Oliver v. State*, 17 Ala. 587; *Barton v. Stroud-Gibson Grocer Co.* (Tex. Civ. App.), 40 S. W. 1050.

56—*Higginbotham v. Campbell*, 85 Ga. 638, in which it was said that it would be correct to charge that "slight circumstances may be sufficient to carry * * *"

fraudulent if there was any controversy as to the existence of the facts.⁵⁷

So, also, it has been held improper to state that certain evidence, if believed by the jury, "is not sufficient to authorize them to find a due presentation of the claim" sued on;⁵⁸ to characterize a sale alleged to have been made as a "so-called sale";⁵⁹ to state that a party was a fair purchaser for a valuable consideration;⁶⁰ that the jury cannot find for plaintiff because there is no good or valid consideration for the promise or undertaking alleged in his declaration proved;⁶¹ to state that the judge had heard no evidence of an agreement that would operate as an estoppel to the plaintiff;⁶² that, from the whole testimony before them, the demand of the plaintiffs was not barred by the statute of limitations;⁶³ that a decision read by counsel from a volume of reports was so much like the case at bar in its facts and in the law it declares that it seemed unnecessary to say anything further on the subject;⁶⁴ or to state that "this is a case in which you have to rely upon just such evidence as can be obtained; on account of the death of persons who might know facts; you are left to a limited source for evidence."⁶⁵

Where the evidence is conflicting as to when an ice season closed, an instruction that it closed during the month of November is upon the weight of the evidence and improper;⁶⁶ and an instruction that certain articles constituting a museum had no general market value is on the

57—*Cleveland v. Empire Mills*, 6 Tex. Civ. App. 479.

58—*Frazier's Ex'r v. Praytor*, 36 Ala. 691.

59—*Kuhlenbeck v. Hotz*, 53 Ill. App. 675.

60—*Fowler v. Lee*, 4 Munf. (Va.) 373.

61—*Ferguson v. Porter*, 3 Fla. 27.

62—*Howard v. Wofford*, 16 S. C. 148.

63—*Fisher's Ex'r v. Duncan*, 1 Hen. & M. (Va.) 563, 3 Am. Dec. 605.

64—*Moore v. Robinson*, 62 Ala. 537.

65—*McVicker v. Conkle*, 96 Ga. 584.

66—*A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.*, — Tex. Civ. App. —, 147 S. W. 717.

weight of the evidence when the evidence as to the nature of the articles and the manner of their collection and preparation tend to show that they were all such specimens as might have a market value.⁶⁷

An unequal division of one's property by will among children is a proper subject to be shown and commented upon before the jury in argument, but such principle does not warrant the court to so instruct the jury, as this would be a comment on the evidence.⁶⁸

An instruction that a city council, by receiving and filing the report of a city engineer, did not ratify the acts of the engineer set forth in the report, is on the weight of the evidence and improper.⁶⁹

In a suit for the value of horses alleged to have been purchased by B., where it was proved, among other things, that the horses were purchased for the use of the Overland Mail Line, an instruction that, under the evidence, B. was to be considered the sole proprietor of that line, was held a violation of the rule prohibiting charges as to matters of fact.⁷⁰

Where an agent took a deed for land in settlement of an account without authority from his principals, having no knowledge as to the value of the land or other important facts, it was held error to charge the jury that the deed, when sent them, furnished full knowledge of the facts, and that the receipt of it was all that was required to put them in possession of the facts.⁷¹

Where a suit was brought because of the premature issue of an execution, it was held error to charge "that the issuance of an execution immediately upon the rendition of a judgment, upon the filing of a proper affidavit, without waiting for the lapse of ten days, is summary, and might be ren-

67—Yoakum v. Dunn, 1 Tex. Civ. App. 524.

68—Andrew v. Linebaugh, 260 Mo. 623.

69—City of Dallas v. Beeman, 23 Tex. Civ. App. 315.

70—Pico v. Stevens, 18 Cal. 376.

71—Meyer v. Smith, 3 Tex. Civ. App. 37.

dered exceedingly harsh and oppressive," as calculated to lead the jury to believe that the court thought a great wrong had been done.⁷²

In a suit involving boundaries, in which an order of survey had been made, and the report of the surveyor submitted in evidence, there being conflicting evidence, it was held error, as charging upon the weight of the evidence, to instruct the jury that the surveyor's report must be taken as correct and true until it is shown to be erroneous, and that the burden of proof is upon the defendant to show that this report is erroneous.⁷³

§ 119. Same—Instructions in negligence cases violating prohibition.

It is improper to state that certain evidence shows negligence,⁷⁴ or for the court to assume the existence of a mate-

72—Clifford v. Lee (Tex. Civ. App.) 23 S. W. 843.

73—Kerlicks v. Meyer, 84 Tex. 158.

74—Illinois. New York, C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40; William Graver Tank Works v. McGee, 58 Ill. App. 250.

Missouri. Blair v. Mound City Ry. Co., 31 Mo. App. 224.

South Carolina. Turbyfill v. Atlanta & C. Air Line Ry., 83 S. C. 325; China v. City of Sumter, 51 S. C. 453.

Texas. Costley v. Galveston City Ry. Co., 70 Tex. 112; Galveston, H. & S. A. Ry. Co. v. Knippa (Tex. Civ. App.), 27 S. W. 730; San Antonio & A. P. Ry. Co. v. Long, 4 Tex. Civ. App. 497. And see cases cited *post*, this note.

Negligence is a mixed question of law and fact, and while it is the duty of the court to define negligence, it is the duty of the jury to draw the inference from the facts. An instruction intimating to the

jury the inference from the facts therein carefully set out in detail, should not be given. Turbyfill v. Atlanta & C. Air Line Ry., 83 S. C. 325.

A charge that "if it appears that a railway company is running its train at a very fast rate of speed, and that a person is on a street or highway in a safe place, and that such person sees or knows that such train is rapidly approaching and is very near, and notwithstanding this suddenly, carelessly, and negligently attempts to run across the track just in front of such train and this combined and concurred with the rapidly moving train as a proximate cause to such injury, then there can be no recovery," held properly refused. Turbyfill v. Atlanta & C. Air Line Ry., 83 S. C. 325.

An instruction declaring it negligence *per se* for the complainant, with knowledge of the dangerous condition of a street, to drive along it, if she ought reasonably to have

rial fact,⁷⁵ and an instruction that, "if you find and believe from the evidence that plaintiff was deaf or hard of hearing at the time of the accident complained of, then, and in that event, you are instructed that such deafness, or partial deafness, would require greater vigilance of plaintiff in the exercise of his eyesight in approaching said crossing," has been held properly refused as being a discussion of, and comment upon, the evidence, and, in effect, a charge upon the weight of the evidence.⁷⁶

avoided it, held properly refused. *City of San Antonio v. Porter*, 24 Tex. Civ. App. 444.

An instruction that "if the city place obstructions there, not giving any notice and he (the plaintiff) sustained damages, it would be an act of negligence and mismanagement and the city would be responsible" held an invasion of the province of the jury and an expression of opinion as to a material question of fact, warranting a new trial. *China v. City of Sumter*, 51 S. C. 453.

An instruction that certain acts of the plaintiff were "all that the law required of her, so far as diligence on her part in getting off the car is concerned," and that, under such circumstance, the starting of the car was an "act of negligence," held erroneous. *Blair v. Mound City Ry. Co.*, 31 Mo. App. 224.

75—In an action for personal injuries caused by a fall from an electric car, an instruction that "the care which the defendant owed the plaintiff as its passenger was that high degree of care which very cautious, competent and prudent persons would have exercised under like or similar circumstances of danger" was erroneous as on the weight of evidence in that the words "of

danger" assumed that the plaintiff was in a position of danger. *Northern Texas Traction Co. v. Moberly*, — Tex. Civ. App. —, 109 S. W. 483.

In an action by a person injured while alighting from a street car, a charge that "the plaintiff as shown by the evidence, was a passenger on the car of the defendant company at the time and place of the alleged injury, and that in law he continued to be a passenger until he had a reasonable time under all the facts and circumstances shown to you by the evidence in this cause to alight from said car," etc., was erroneous as assuming that the plaintiff did not have a reasonable time to alight. *El Paso Elec. Ry. Co. v. Boer*, — Tex. Civ. App. —, 108 S. W. 199.

In an action for injuries to a servant an instruction that "the plaintiff admits that he knew of the dangers of working around this particular machine on which he was injured" was properly refused, there being no such admission in the pleadings, and the court had no right to comment on the facts. *Cook v. Pittock & Leadbetter Lumber Co.*, 51 Wash. 316, 98 Pac. 1130. See also, §§ 102, *et seq.*, *ante*, "Assumption of facts."

76—*Texas & P. R. Co. v. Durrett*, 26 Tex. Civ. App. 268.

So, also, in an action for delay in delivering a telegram, a requested instruction that the plaintiff's wife was presumed to know the schedule of trains which would enable her to go to her sister's funeral has been held properly refused as on the weight of evidence.⁷⁷

In an action against a railroad company for damages for injuries inflicted in a collision, an instruction that, "when it is shown by the proof that an injury was received by reason of and as the direct result of an unusual occurrence, then the law presumes the occurrence so causing the injury to have happened by reason of negligence, unless it further appears by the proof that such unusual occurrence was not the result of negligence, but, on the contrary, was caused by some circumstance or cause which the exercise of the greatest care and prudence could not have prevented," has been held clearly erroneous.⁷⁸

In an action for injuries to live stock, an instruction that there was no evidence which would warrant a finding that the cattle were roughly handled while in the possession of one defendant was held erroneous as on the weight of the evidence, where there was evidence tending to show such fact.⁷⁹

In an action for injury to rice, a charge that the defendant was not liable for the consequences of a storm that had only occurred twice in a generation was a charge on the facts.⁸⁰

An instruction that it was the defendant's duty to use ordinary care to furnish for its employees a suitably lighted switch yard, and that, if the injury was caused by a failure to exercise such care in that respect, the jury should find for the plaintiff, is erroneous, as such charge can only mean one of two things, viz.: Either that it was the legal duty

77—Western U. Tel. Co. v. Taylor,
— Tex. Civ. App. —, 167 S. W. 289.

78—Texas Cent. Ry. Co. v. Bur-
nett, 80 Tex. 536.

79—Houston & T. C. R. Co. v.

Hawkins & Nance, — Tex. Civ. App.
—, 167 S. W. 190.

80—Carolina Rice Co. v. West
Point Mill. Co., 98 S. C. 476.

of appellant to use ordinary care to have its yard suitably lighted, regardless of whether or not said yard would be reasonably safe without such light, or that, in the opinion of the court, said yard would not be reasonably safe unless same was suitably lighted. Under either of these interpretations, the charge is obviously upon the weight of the evidence.⁸¹

While an experienced servant knows or has a better opportunity of knowing the dangers of a particular employment than an ordinary man, both are chargeable with what they know or ought to know, and for the court to lay stress in his charge as to any difference between the two as a matter of law would be upon the weight of evidence.⁸²

In an action against a railroad company for damages caused by fire, an instruction that the volume of sparks emitted, and other fires caused by the railroad company, might be considered by the jury, has been held to be on the weight of the evidence,⁸³ and an instruction, in an action for damages caused by a prairie fire, that "fire is a dangerous element, and a degree of care is required, in making use of it, corresponding to the danger, and that a man has the right to start a fire on his own premises, providing the circumstances are such as show that the act may be done with reasonable safety to the property of others," has also been held erroneous.⁸⁴

§ 120. Same—Instructions as to damages violating prohibition.

It is improper to state that plaintiff is "entitled" to com-

81—Galveston, H. & S. A. Ry. Co. v. English (Tex. Civ. App.) 59 S. W. 626.

82—Consumers' Lignite Co. v. Cameron, — Tex. Civ. App. —, 134 S. W. 283.

83—Galveston, H. & S. A. Ry. Co. v. Knippa (Tex. Civ. App.) 27 S. W. 730. The correctness of this

holding is questionable. In Texas, the province of the jury seems to be guarded more jealously than in any other state of the Union, and the rulings of its courts go to the very verge of the law in maintaining the prerogative of the jury.

84—Meadows v. Truesdell (Tex. Civ. App.) 56 S. W. 932.

pensatory damages;⁸⁵ or to tell the jury that, "no damages having been alleged, and no damages having been proved, they could not render a verdict for damages."⁸⁶

Also, an instruction that "the medical experts who testified for the plaintiffs were naturally inclined to view the circumstances that make for the plaintiff's side in a favorable light and contrary circumstances in an unfavorable light," is erroneous as an expression of opinion on the weight of evidence and is properly refused.⁸⁷

§ 121. Same—Instructions violating prohibition in criminal cases.

In criminal cases it is improper to give an instruction which intimates that it is the jury's duty to convict,⁸⁸ and it has been held improper to give instructions wherein the court states that the evidence shows certain facts,⁸⁹ or to comment upon one phase of the evidence;⁹⁰ to give instruc-

85—*Browning v. Jones*, 52 Ill. App. 597.

86—*Levi v. Legg*, 23 S. C. 282.

87—*Ferebee v. Norfolk Southern R. Co.*, 167 N. C. 290.

88—"An instruction couched in language which implies the expectation of the court that a verdict of guilty will be returned, or an intimation that it is the duty of the jury to convict, or which tends to shift the burden of proof," is improper. *Bauer v. State*, 3 Okla. Cr. 529, 107 Pac. 525. See also, *People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703.

89—*People v. Casey*, 65 Cal. 260, 3 Pac. 874.

In a criminal prosecution, an instruction that the proof shows beyond all controversy that certain facts have been established is erroneous, though defendant has introduced no evidence. *State v. Carter*, 112 Iowa 15.

All fact issues arising in a criminal case must be determined by the jury, who are the sole judges of the credibility of all witnesses, and who cannot be compelled to credit the testimony of any witness, whether controverted or not, and it is therefore improper for the court to take from the consideration of the jury material allegations concerning which there is no controversy in the testimony. *State v. Bige*, 112 Iowa 433.

90—In a prosecution for larceny an instruction that even though the jury should find that the entrails of one of the hogs alleged to have been stolen was found in an ice house in the possession of the defendant, yet unless the jury should find beyond all reasonable doubt that the said entrails were placed there with the knowledge and consent of the defendant, such fact was not evidence of his guilt, was properly refused as

tions as to the relative value of direct and circumstantial evidence;⁹¹ to state that circumstantial evidence, when fully and conclusively made out, is sufficient to sustain a conviction;⁹² that "the guilt of the defendant rests upon what is known as 'circumstantial evidence'";⁹³ that certain evidence of a fact is a suspicious circumstance against defendant;⁹⁴ that certain evidence is short, clear, and to the point, and leaves not much room for doubt;⁹⁵ to tell the jury that, upon a given state of facts, they can have no reasonable doubt;⁹⁶ to discuss defendant's testimony in such a manner as to give the jury the impression that the court thought it was of little value;⁹⁷ or to instruct that, "if you disbelieve all the evidence for the state, and believe every word of evidence for the defense, I charge you that the defendant is guilty; but of course you can look to all the evidence, and make up your verdict on it."⁹⁸

Instructions containing directions or advice in respect to inferences of fact to be drawn by the jury from the evidence are properly refused,⁹⁹ and it is improper to instruct that the fact that defendant did not disprove circumstances, if the jury believe he has the means of disproving them if

a comment upon one phase of the evidence. *State v. Shaffer*, 253 Mo. 320.

91—An instruction that, though error is sometimes committed from a reliance on circumstantial evidence, yet this species of evidence, in the opinion of all those who are most conversant with the administration of justice, is not only proper and necessary, but it is sometimes even more satisfactory than the testimony of a single individual, who swears that he has seen a fact committed, and that even persons professing to have been eye witnesses of the fact may speak falsely, is obviously a charge to the jury as to the relative value of direct and circumstantial

evidence, and is within the prohibition of the constitution of the state of California. *People v. O'Brien*, 130 Cal. 1, 62 Pac. 297.

92—*Horton v. State* (Tex. App.) 19 S. W. 899. See also, ch. XXXI, *post*, "Instructions on Circumstantial Evidence."

93—*State v. Duffy*, 6 Nev. 138.

94—*Massey v. State*, 1 Tex. App. 564.

95—*State v. Asberry*, 37 La. Ann. 124.

96—*Wilcox v. State*, 3 Heisk. (Tenn.) 110.

97—*State v. Wyse*, 32 S. C. 45.

98—*White v. State*, 56 Ga. 385.

99—*State v. Mahoney*, 24 Mont. 281, 61 Pac. 647.

false, lends additional weight to such as are proved;¹ that, unless the jury disbelieved the testimony of the defendant, the weight of testimony tended to prove that his act was not criminal;² to give an instruction minimizing the effect of evidence;³ or telling the jury that they may disbelieve the testimony of a witness if any statement made by him is untrue;⁴ to state that the jury is not bound to consider the testimony of defendant as true, in view of the temptation to procure an acquittal;⁵ that the jury must discard from their consideration any part or the whole of the testimony of any witness that they may regard as improbable or untrue;⁶ that the jury must put upon any part of the testimony a construction favorable to the defendant, if rea-

1—Leonard v. Territory, 2 Wash. T. 381, 7 Pac. 872.

2—People v. Cowgill, 93 Cal. 596, 29 Pac. 228.

3—Where four defendants were jointly indicted and jointly tried for murder, an instruction as to the statements of the defendants as witnesses, that "three of them were put under oath and sworn as witnesses in behalf of the other defendants, but whatever they said would not be considered in their own behalf at all, but as a statement by the defendants to be considered by you and given such weight as you see proper as a statement by the defendants and not as evidence" was erroneous, as the effect was or might have been to minimize in the minds of the jury the weight of the evidence given by the defendants. Roberson v. State, 14 Ga. App. 557.

4—On a trial for murder, an instruction that "you are the sole judges of the weight of the testimony and the credibility of each witness, and if, from the evidence in this case, you believe any witness

testified falsely to a material fact, it is your duty and you should disregard the testimony of such witness," is erroneous as a charge on the weight of evidence telling the jury that if they believe any statement untrue, they must disbelieve all the witness said, whether the statement was made wilfully, knowingly or corruptly and whether they do or not believe other statements to be true. Davis v. State, 89 Miss. 119.

5—In a prosecution for extortion an instruction that, "You are not bound to consider the testimony of the defendants as absolutely true * * * and you are to consider the great temptation which one so situated is under, so to speak, as to procure his acquittal" was erroneous as seeming to leave an implication that it was incumbent upon them to consider the defendant's testimony as false and for that reason to reject it. State v. Bartlett, 50 Ore. 440, 126 Am. St. Rep. 751, 93 Pac. 243.

6—Bishop v. State, 43 Tex. 391.

sonable;⁷ that, under the evidence in the case, the jury cannot convict the defendants of murder in the second degree, there being some evidence to establish their crime, though contradicted by other evidence;⁸ that the jury might convict the defendant if they found there was any evidence in certain circumstances, singled out or otherwise, which they thought corroborated a witness who was an accomplice;⁹ that if the jury believe the testimony of certain named witnesses, they should either convict or acquit;¹⁰ or that "you will determine from the evidence whether there was or was not a confession under such a warning, as before defined, and voluntarily and freely made, as before instructed. If you so find, you will convict defendant."¹¹

A requested charge that if confessions "are so contradicted in themselves that they cannot be reconciled, then you may discard them from your consideration in arriving at a verdict in this case" should not be given as the fact that confessions were contradictory within themselves would not affect the admissibility, but would be a circumstance for the jury in determining their weight.¹²

In a prosecution for larceny an instruction that if the defendant made the confessions attributed to him, the law presumed the statements so made to be true, was in effect an expression of opinion by the court on the weight of the evidence.¹³

An instruction that the mere silence of the defendant at the time of being arrested should not be considered as a circumstance against him is properly refused, being on the weight of the evidence.¹⁴

An instruction that "there has been manifest perjury by

7—Smith v. State, 88 Ala. 23.

8—State v. Potter, 16 Kan. 80.

9—Dickenson v. State (Tex. Cr. App.) 63 S. W. 328.

10—Green v. State, 60 Tex. Cr. App. 530.

11—McVeigh v. State, 43 Tex. Cr. App. 17.

12—Goode v. State, 57 Tex. Cr. App. 220.

13—McLemore v. State, 111 Ark. 457.

14—Clark v. State (Tex. Cr. App.) 59 S. W. 887.

witnesses who have testified in this case, as counsel for both sides have claimed in their argument. They of course differ as to which witnesses have testified falsely. It is for you to determine from all the evidence which includes the appearance of the witnesses when testifying as well as what they said what evidence you credit," is erroneous as a comment on the evidence since the court found and stated that one set of witnesses had committed perjury.¹⁵

In a prosecution for arson, a charge that the defense of alibi must be received by the jury with caution is erroneous as a charge on the facts.¹⁶

In a prosecution for rape the designation of the prosecutrix as a "courteous, kind and modest" witness is improper,¹⁷ and in such a prosecution where the defendant's plea of not guilty puts in issue the *corpus delicti*, an instruction that "you need not bother yourselves much about the *corpus delicti*" is erroneous, as a plain intimation, if not a positive expression of the judge's opinion that the *corpus delicti* had been sufficiently proved.¹⁸

Other instructions which have been held erroneous in prosecutions for pandering,¹⁹ homicide²⁰ or the commission

15—State v. Chavez, — N. M. —, 142 Pac. 922.

16—State v. Smalls, 98 S. C. 297.

17—People v. MacDonald, 167 Cal. 545, 140 Pac. 256.

18—State v. Johnson, 85 S. C. 265.

19—In a prosecution for pandering, an instruction as to securing a room in a house of prostitution at the woman's request, concluding with the words, "It is therefore proper for you to consider her request to go there as meaning the same in law as consent to go there," was a virtual instruction that it was a fact proven by the testimony that she had made the request, and that the defendant had obtained the room on such request, wherefore the

charge was erroneous. Jones v. State, 72 Tex. Cr. App. 496.

20—In a prosecution for homicide an instruction that "The instrument or means by which a homicide is committed are to be taken into consideration in judging the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed unless from the manner in which it was used such intention evidently appears" was held on the weight of the evidence where the facts showed that defendant used a deadly weapon, a pistol, in shooting the deceased when he thought that such deceased was going to draw a pistol to shoot

of the crime against nature ²¹ are set out below in the notes.

§ 122. Same—Instructions held not to violate prohibition in general.

It is not improper for the court to state an uncontroverted fact; ²² or a fact supported by strong and uncontradicted evidence; ²³ to give an instruction declaring the law appli-

him. *Andrus v. State*, — Tex. Cr. App. —, 165 S. W. 189.

On an indictment for murder, an instruction that, if the defendant inflicted the wound, and if such wound caused death, the case was murder, was held erroneous because it applied a principle of law to the facts of the case, although it did not express a direct opinion. *Wall v. State*, 112 Ga. 336.

An instruction "that the indictment in the case is for murder in the first degree, and that the state's contention in the case is that the offense is either murder in the first degree or nothing, and that the verdict should be a verdict of acquittal, or for murder in the first degree, and that the state's contention in this respect is correct," is upon the effect of the evidence, and, if not requested by either party in writing, is in violation of the statutes of the state of Alabama. *Gafford v. State*, 125 Ala. 1.

21—In a prosecution for committing the crime against nature, an instruction wherein the judge told the jury that a man with normal sexual instincts was not "capable" of committing the crime charged and that if the jury was satisfied that a person was possessed of unnatural or abnormal sexual sense, they might "infer that he had a motive, a reason, or a force impelling him to do

such an act" was erroneous as the court practically assumed the position of an expert witness and gave his opinion of the kind of person who could commit the crime. *State v. McAllister*, 67 Ore. 480, 136 Pac. 354.

22—*Halsell v. Neal*, 23 Tex. Civ. App. 26; *White v. Jansen*, 81 Wash. 435, 142 Pac. 1140.

Instructions assuming facts which are admitted by both parties are not improper. *State v. Angel*, 29 N. C. 27; *San Antonio & A. P. Ry. Co. v. Ilse* (Tex. Civ. App.), 59 S. W. 564.

23—**California.** *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310.

Georgia. *Marshall v. Morris*, 16 Ga. 368.

Maine. *McLellon v. Wheeler*, 70 Me. 285.

Montana. *Hogan v. Shuart*, 11 Mont. 498, 28 Pac. 969.

Texas. *Denham v. Trinity County Lumber Co.*, 73 Tex. 78. See also, *McGhee v. Wells*, 57 S. C. 280, 76 Am. St. Rep. 567.

The rule which forbids a judge to charge on the weight of the evidence does not require or authorize him to assume as doubtful that which is clear and indisputable. *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658.

If the presiding judge inadvertently assumes as uncontroverted matters in evidence upon which either party proposes to raise an is-

cable to a given state of facts;²⁴ to direct the jury to the real issue, when the argument of counsel is such as to distract their minds therefrom;²⁵ to call the jury's attention to questions of fact by way of interrogatories addressed to them upon matters important for their consideration in arriving at a correct conclusion upon the main question;²⁶ to state the issues raised by the pleadings;²⁷ or the contentions of a party.²⁸ Where certain classes of evidence, by law, are presumed to prove certain things, it is not improper for the court to tell the jury what facts they prove or tend to prove.²⁹

sue to the jury, it is the duty of counsel to call the attention of the judge to the fact. *Harvey v. Dodge*, 73 Me. 316.

24—*Yarborough v. State*, 86 Ga. 396.

Instructions declaring the law upon a hypothetical state of facts do not violate statutory or constitutional provisions forbidding a charge on matters of fact. *State v. Whittle*, 59 S. C. 297; *Jones v. Hiers*, 57 S. C. 427; *Waters Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 508; *Phoenix Ins. Co. of Hartford, Conn. v. Neal*, 23 Tex. Civ. App. 427.

Instructions reciting the facts as claimed to have been proved, and giving the law thereon, without giving or intimating any opinion as to whether such facts have or have not been proved are not erroneous. *Pritchett v. Overman*, 3 G. Greene (Iowa) 531; *State v. Smith*, 11 La. Ann. 633; *Andrews v. Parker*, 48 Tex. 94.

A charge that cohabitation and declarations of the parties that they are husband and wife do not constitute a marriage in the absence of an agreement express or implied, is not a comment on the evidence, but a mere statement of law. *Schwingle*

v. Keifer, — Tex. Civ. App. —, 135 S. W. 194.

25—*State v. West*, 43 La. Ann. 1006.

26—*State v. Day*, 79 Me. 125.

27—*Crosland Co. v. Pearson*, 86 S. C. 313.

An instruction not intended as a comment on the facts, but merely for the purpose of stating the issues or contentions of the respective parties, is not erroneous. *Gilchrist v. Hartley*, 198 Pa. 132; *Westbury v. Simmons*, 57 S. C. 467; *Sherman, S. & S. Ry. Co. v. Bell* (Tex. Civ. App.) 58 S. W. 147.

28—An instruction that a certain fact exists is not erroneous, although the fact is disputed, where the context shows that the statement was made as the contention of one of the parties. *West v. Banigan*, 51 App. Div. (N. Y.) 328.

29—While the courts are prohibited generally from selecting certain parts of the evidence and telling the jury how they shall weigh the same, there are certain classes of evidence which, by law, are presumed to prove certain things, and as to those particular classes of evidence it is not improper for the court to tell the jury what facts they prove

It has also been held not improper to limit the effect of evidence which is competent for some purposes but not for others;³⁰ to state that there is no evidence as to a particular fact or issue, when such is the case;³¹ to state that the testimony of a witness, if true, will establish a specified fact, leaving the jury to decide upon his credibility; to state that there is "some evidence tending to show" a fact;³² to state that certain evidence is admissible;³³ to state the purpose for which certain evidence is admitted;³⁴ to assume the nonexistence of evidence which is excluded or not offered;³⁵ to state that if the evidence is not reconcilable, the jury must decide what witnesses are the most credible;³⁶ to state that the jury are not bound to accept as true the opinion of expert witnesses;³⁷ to tell the jury that the evidence is

or tend to prove. *State v. Creeley*, 254 Mo. 382. See § 116, *ante*, stating general rule and exceptions.

30—*Jacobs v. Totty*, 76 Tex. 343; *Messer v. State*, 43 Tex. Cr. App. 97; *Jasper v. State* (Tex. Cr. App.) 61 S. W. 392; *Bruno v. State* (Tex. Cr. App.) 58 S. W. 85.

31—*People v. Welch*, 49 Cal. 174; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *King v. King*, 155 Mo. 406; *Reed v. Shenck*, 13 N. C. 415.

It is the duty of the court to tell the jury that there is no evidence of a particular fact if there is none. *Wells v. Clements*, 48 N. C. 168.

32—*Michie v. Cochran*, 93 Va. 641.

33—An instruction stating that certain evidence objected to is admissible, nothing else being said which would lead the jury to believe that the court thought such evidence controlled the case is not improper. *Carroll v. Roberts*, 23 Ga. 492.

See also, *State v. Munson*, 76 Mo. 109, in which it was held that an instruction that "all the evi-

dence produced and admitted in the case is legal evidence; whether it is credible, or worthy of credit, is a matter for the jury to determine, from all the facts and circumstances in proof," was clearly not a comment on the weight of the evidence.

34—*Davis v. Gerber*, 69 Mich. 246; *Howerton v. Holt*, 23 Tex. 57.

An instruction should not state what the evidence tends to prove, without submitting at the same time the question of its credibility. *Davis v. Gerber*, 69 Mich. 246.

35—*Territory v. Gay*, 2 Dak. 125.

36—*Sneed v. Creath*, 8 N. C. 309; *Rideus v. State*, 41 Tex. 199.

37—An instruction that the jury are not bound to accept as true the opinion of expert witnesses, but the jury may give such opinions such weight as the jury may, under all the evidence consider them entitled to, or the jury may disregard such opinions, if unreasonable, held not erroneous. *Wiley v. St. Joseph Gas Co.*, 132 Mo. App. 380.

open to two constructions, if the court does not intimate which construction is the correct one;³⁸ to inform the jury that there is some evidence in the case of a circumstantial nature;³⁹ to state that "plaintiff brings evidence to show";⁴⁰ to instruct that, "if the jury believe from the evidence that the defendants did certain things, * * *," then the defendants are liable for all damages sustained;⁴¹ to state that if the jury believe certain facts to have been proved, they must find a stated verdict;⁴² to limit the amount of the verdict to the amount claimed in the petition;⁴³ to tell the jury to find for the plaintiff if the jury finds that certain facts exist, and to find for the defendant if they find that such facts do not exist;⁴⁴ or to caution the jury not to let a certain circumstance prevent their looking to the whole evidence in making up their verdict.⁴⁵

In some jurisdictions it has been held not improper to sum up or recapitulate the evidence,⁴⁶ though this is pro-

38—Wyley v. Stanford, 22 Ga. 385.

39—People v. Wong Ah Foo, 69 Cal. 180, 10 Pac. 375.

40—Central R. Co. v. Freeman, 75 Ga. 331.

41—Lagrone v. Timmerman, 46 S. C. 372.

42—State v. Mitchell, 41 La. Ann. 1073; Thompson v. Johnson (Tex. Civ. App.) 58 S. W. 1030.

43—Oglesby v. Missouri Pac. Ry. Co. (Mo.) 37 S. W. 829.

44—Ryan v. Los Angeles Ice & Cold Storage Co., 112 Cal. 244, 32 L. R. A. (N. S.) 524, 44 Pac. 471. See also, Messer v. State, 43 Tex. Cr. App. 97.

45—Anderson v. Matindale, 61 Tex. 188.

46—Maine. York v. Maine Cent. R. Co., 84 Me. 128.

South Carolina. Hiott v. Pierson, 35 S. C. 611; State v. Dawkins, 32 S. C. 17; State v. Glover, 27 S. C. 602; State v. Summers, 19 S. C. 95.

The court's discretion in this regard is not affected by statutes or constitutional provisions prohibiting the trial judge from commenting on the evidence, and expressing an opinion as to its weight. *Com. v. Barry*, 9 Allen (Mass.) 276; *State v. Freeman*, 100 N. C. 429; *Hiott v. Pierson*, 35 S. C. 611. In *Com. v. Barry*, *ante*, it was said: "The prohibition must be regarded as a restraint only on the expression of an opinion by the court on the question whether a particular fact or series of facts involved in the issue of a case is or is not established by the evidence. In other words, it is to be construed so as to prevent courts from interfering with the province of juries by any statement of their own judgment or conclusion upon matters of fact. This construction effectually accomplishes the great object of guarding against any bias or undue influence which might be

hibited in other states by organic or statutory provisions.⁴⁷

In the jurisdictions where the practice is permissible, it has been held proper for the judge to analyze, compare, and explain the evidence;⁴⁸ to call the jury's attention to the evidence in the case, and state his recollection of what has or has not been testified to, submitting the whole matter to their consideration and judgment;⁴⁹ to read extracts from the evidence of a witness at the request of the jury, the parties being present, and not objecting;⁵⁰ or to repeat the uncontradicted testimony of witnesses, and point out the inquiries suggested thereby.⁵¹ It has also been held that a simple enumeration of circumstances, though leading to an irresistible conclusion of fact, cannot be considered as an expression of opinion on such fact;⁵² and a misstatement of the evidence in summing up is not an expression of opinion, and that it is the duty of counsel to call the judge's attention to his error, in order that it may be corrected.⁵³

§ 123. Same—Miscellaneous instructions not violating prohibition.

The language of a charge that, "I am not sure and I frankly confess that I am not sure that I understand fully the claim upon which the plaintiff bases the eleven thousand and some odd dollars," is an expression of diffidence, mean-

created in the minds of jurors, if the weight of the opinion of the court should be permitted to be thrown into the scale in deciding upon issues of fact; but further than this the legislature did not intend to go. The statute was not designed to deprive the court of all power to deal with the facts proved. On the contrary, the last clause of the section very clearly contemplates that the duty of the court may not be fully discharged by a mere statement of the law. By providing that the court may also state the testimony, the manifest purpose of the legislature

was to recognize and affirm the power and authority of the court, to be exercised according to its discretion, to sum up the evidence, to state its legal effect and bearing on the issues, and to indicate its proper application under the rules of law."

47—See § 136, *post*.

48—*Hamlin v. Treat*, 87 Me. 210.

49—*Eddy v. Gray*, 4 Allen (Mass.) 435.

50—*Green v. State*, 43 Ga. 368.

51—*State v. Glover*, 27 S. C. 602.

52—*State v. Noble*, 47 N. C. 418.

53—*Grows v. Maine Cent. R. Co.*, 69 Me. 412.

ing that the judge did not know whether it had been proven or not, but such language is not an expression by the judge that the facts had or had not been fully proven.⁵⁴

Where a party has, by the introduction of title papers in evidence, shown a connected claim of valid transfers to land from and under the sovereignty of the soil down to himself, except one link in the chain, which was supplied by undisputed heirship from one in whom the title had vested, an instruction that such party has shown title to the land is not a charge on the weight of evidence, but a proper charge upon the legal effect of uncontradicted testimony.⁵⁵

In an action for an assault by a conductor of a street car, an instruction under hypothesis "if the jury was reasonably satisfied, from the evidence, that she paid the ten cent fare," was not a charge on the effect of the evidence.⁵⁶

At the trial of an action brought by the assignee of a bankrupt for the conversion of goods conveyed by the bankrupt to the defendants by a mortgage alleged to be a fraudulent preference, the judge instructed the jury that if the defendants knew or had reasonable cause to believe that the bankrupt was insolvent, and, with that knowledge, took nearly all his property to secure themselves, knowing that the law required that his property should be divided equally among his creditors, these facts would go far towards supporting the inference that they had reasonable cause to believe that the bankrupt intended the mortgage as a preference. It was held that this instruction was not a charge with respect to matters of fact, within the statutory prohibition.⁵⁷

In an action against a sheriff for seizure of oxen, where the defense was a waiver by the plaintiff of the statute right of exemption, the presiding justice instructed the jury:

54—McDonald v. MacArthur Bros. Co., 154 N. C. 11.

55—Teal v. Terrell, 58 Tex. 257.

56—Birmingham Railway, Light & Power Co. v. Lee, 153 Ala. 386.

57—Forbes v. Howe, 102 Mass. 427, 3 Am. Rep. 475.

"If the plaintiff gave his consent, and said to the officer, 'There, all that property in that yard, comprising these oxen and those cows, are mine, and you can take the oxen or any of the rest of them you see fit,' * * * that would be a waiver; the action cannot be maintained," followed by a statement of the plaintiff's denial of this, and of his version of the matter, and, "if this is all he said, you would come to the conclusion, probably, that there was not any consent." This was held not a decision by the judge of any question of fact within the province of the jury.⁵⁸

§ 124. Same—Instructions in negligence cases not violating prohibition.

Instructions in negligence cases which merely state the nature of the suit⁵⁹ or which state uncontroverted or admitted facts;⁶⁰ which declare the law applicable to a given state of facts,⁶¹ or state what facts constitute negligence, leaving the question to the jury;⁶² or which direct the jury

58—Fogg v. Littlefield, 68 Me. 52.

59—An instruction that "this is a suit by," etc., "to recover damages alleged in plaintiff's petition to have resulted * * * by reason of being thrown from one of defendant's street cars; the fall alleged to have been caused by the negligence of the conductor in charge of the car," held not upon the weight of the evidence. Dallas Consol. Elec. St. Ry. Co. v. Stone, — Tex. Civ. App. —, 166 S. W. 708, 8 N. C. C. A. 698.

60—In an action for injuries to a coal miner where the plaintiff alleged that it was his duty to fasten together five or six cars, and he testified there were five cars, an instruction that if the jury found from the preponderance of the evidence that the plaintiff fastened together five cars, etc., was not erroneous as telling the jury that only five cars were

fastened together. Burnet Fuel Co. v. Ellis, — Tex. Civ. App. —, 162 S. W. 911.

61—An instruction, in an action by a servant against a master for personal injuries, that the jury should find that plaintiff was not guilty of contributory negligence, and if certain facts, alleged to show negligence on the part of defendant, had happened, and if the defendant was guilty of negligence, as explained in other instructions, then the jury should find such actual damages as would compensate plaintiff, merely applies the law to the very facts of the case, and is not upon the weight of the evidence. Houston & T. C. Ry. Co. v. White, 23 Tex. Civ. App. 280.

62—Where an instruction defined and explained negligence and contributory negligence, and mentioned

to find for the plaintiff if they find that certain facts exist, or to find for the defendant if they find that such facts do not exist,⁶³ are not erroneous.

In an action for injuries caused by an automobile, an instruction as to the duty of a driver of an automobile containing the phrase "moving quietly as it does" is not erroneous as a comment on the facts when the court refers to automobiles in general.⁶⁴

In an action for the wrongful death of a servant caused by the explosion of a pipe line leading from a boiler, an instruction that if the jury believed from the evidence that the "T" in question [a pipe in the shape of a T used to connect three pipes] was defective and dangerous in its use, and that such condition could have been discovered by certain tests and that defendant failed to use such tests, etc., was not erroneous as it did not indicate the opinion of the court as to the facts.⁶⁵

In an action for personal injuries due to being struck by a motor truck, an instruction referring to the place where the accident happened as "in the thickly settled part of the city" was not such a comment upon the facts as necessitated a reversal, where the place of accident was not very material.⁶⁶

In an action for damages to grazing lands caused by the specifications of negligence alleged in the complaint and stated that if a failure to perform one of the things alleged was established and if "you find that in the exercise of due care they [defendant] should have done some one or all of these things," etc., it was not objectionable as telling the jury what facts constituted negligence, as the quoted words clearly left the question to the jury. *Wade v. Southern Ry.*, 89 S. C. 280.

63—An instruction that, if the jury believe from the evidence certain facts, a *prima facie* case of

negligence is made out against the defendant, and that, if the jury believe certain other facts, this *prima facie* case is rebutted, is not open to the objection that it is on the weight of the evidence. *Texas & P. Ry. Co. v. Rice*, 24 Tex. Civ. App. 374.

64—*Domke v. Gunning*, 62 Wash. 629, 114 Pac. 436.

65—*Texas Power & Light Co. v. Bird*, — Tex. Civ. App. —, 165 S. W. 8.

66—*Sheffield v. Union Oil Co. of California*, 82 Wash. 386, 144 Pac. 529.

sheep, an instruction that "the evidence shows the following surveys were alleged to have been damaged," naming them, and concluding with the words "you will consider said surveys in arriving at your verdict" was not on the weight of evidence, the evident purpose of the instruction being to confine the jury to the surveys named.⁶⁷

§ 125. Same—Instructions in criminal cases not violating prohibition.

The following instructions in criminal cases have been objected to as being on the weight of the evidence, and held not objectionable on that ground: Instructions merely stating the issues;⁶⁸ or contentions;⁶⁹ or generally requiring the jury to ascertain the truth;⁷⁰ instructions containing a hypothetical statement of the facts;⁷¹ instructions stating admitted or undisputed facts;⁷² instructions stat-

67—*Tippett v. Corder*, — Tex. Civ. App. —, 117 S. W. 186.

68—*State v. Glenn*, 88 S. C. 162.

69—An instruction that the state contends that the defendant shot down deceased when there was no danger to his life, etc., and when deceased was fleeing from the conflict, held to be a mere statement of the state's contention. *State v. Glenn*, 88 S. C. 162.

70—An instruction that: "You are prepared to hear the charge of the court and to retire after hearing that charge and go over the testimony and extricate from the testimony the truth of the case," is general and merely requires the jury to ascertain the truth of the case from the testimony, and such instruction is not objectionable as declaring that there is both truth and falsity in the testimony. *State v. Jones*, 90 S. C. 290.

71—*State v. Glenn*, 88 S. C. 162.

A charge that if the defendant

shot out of a spirit of revenge when there was no danger of losing his life, etc., and he pursued a man who was retreating, "you could not say that was self-defense," held only a hypothetical statement of facts. *State v. Glenn*, 88 S. C. 162.

72—*State v. Glenn*, 88 S. C. 162.

The constitutional requirement that the judge shall not state the facts in charging the jury, does not prohibit such reference to the undisputed evidence as is necessary to enable the jury to apprehend the law applicable to the concrete issue of fact which they are to decide. *State v. Driggers*, 84 S. C. 526, 137 Am. St. Rep. 855, 19 Ann. Cas. 1166.

An instruction in a prosecution for murder that, "Now, in this case, you will ask yourself the question: Was it necessary to shoot the first time? Was it necessary to shoot the second time? Was it necessary to shoot the third time? Was it necessary to shoot the fourth or fifth time?"

ing the law applicable to the facts;⁷³ instructions stating that certain circumstances may be considered in determining the defendant's guilt;⁷⁴ instructions that evidence of other offenses may be considered;⁷⁵ instructions that there is "some evidence tending to show" a certain fact;⁷⁶

If you find there were shots fired, was it necessary to shoot at all?" is not erroneous where there was no dispute in the evidence that defendant shot four or five times. *State v. Glenn*, 88 S. C. 162.

73—An instruction that if defendant, an adult male committed an aggravated assault upon G, a female person by catching hold of the clothes of G with his left hand and by putting his right hand under her clothing and upon her leg against her will and consent, they would find him guilty, etc., was not a charge on the weight of evidence but a direct application of the law to the facts. *Sample v. State*, 52 Tex. Cr. App. 505, 124 Am. St. Rep. 1103.

74—An instruction stating certain facts and continuing with the words, "these are circumstances which tend to establish the defendant's guilt, but are not alone sufficient to warrant a conviction" is not erroneous as a declaration as to the weight to be given to the evidence, but is a mere statement that the facts might be considered for the purpose of determining the issue. *Hogue v. State*, 93 Ark. 316.

75—An instruction that the jury should not consider the testimony as to other offenses for any other purpose than in passing on the credibility of defendant as a witness, if they believed there was other testimony showing or tending to show that defendant had been charged with other offenses, is not on the weight of the

testimony. *Overstreet v. State*, — Tex. Cr. App. —, 150 S. W. 899.

On a prosecution for indecent exposure, an instruction that "the evidence introduced in this case of acts of the exposure of the person of the defendant other than the act charged in the information, you cannot consider as substantive evidence as to the guilt of the defendant; but it can only be considered as bearing on the intent of the defendant, and you cannot consider it for any other purpose" was not erroneous as on the weight of the evidence in that the word "substantive" gave the idea that there was sufficient evidence to convict without such evidence. *Harvey v. State*, 57 Tex. Cr. App. 5, 136 Am. St. Rep. 971.

On a prosecution for larceny of money by means of a conspiracy to defraud through pretended horse races, an instruction as to the general scheme for defrauding people, and stating that evidence had been introduced showing that other parties had been defrauded to show such conspiracy, but also stating that before such evidence could be considered it must be found that defendant entered into a general conspiracy of that character, was not erroneous in referring to the evidence and its tendency in that it indicated an opinion of the court on a material fact. *State v. Dobbins*, 152 Iowa 632, 42 L. R. A. (N. S.) 735n.

76—*People v. Flannelly*, 128 Cal. 83, 60 Pac. 670.

instructions containing illustrations not referring to the facts of the case at bar.⁷⁷

While the giving of separate instructions in such manner as to single them out is not commendable, it does not constitute prejudicial error where the court in the whole charge directs the jury to consider all the facts and circumstances proved in the case.⁷⁸

When a defendant has, after the commission of crime and before trial, made statements tending to show his guilty connection with such crime, and such statements are proven by the state, the jury may believe what he has said against himself and reject what he has said tending to show his innocence, and in such case the giving of instructions which comment on the evidence do not constitute reversible error.⁷⁹

In a prosecution for rape, an instruction as to extrajudicial statements in the nature of confessions, that "if verbal statements of the defendant have been proved in this case, you may take them into consideration with all other facts

An instruction in a criminal case stating, "Here is evidence that the homicide was committed within the corporate limits, * * * and there is other evidence of it, to which I will call your attention," etc., is not a violation of a statute forbidding the court to express an opinion as to whether a fact is fully or sufficiently proved. *State v. Edwards*, 126 N. C. 1051. There is no objection to a charge declaring that evidence has been offered tending to prove a certain material fact in the case, if it is disclosed by the record that the statement is true beyond any possible question. *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670.

77—*State v. Godfrey*, 60 S. C. 498.

An instruction on a trial for keeping a gaming house, that "the state relies on certain facts from which you reach certain conclusions; for

instance, if you go to a private house in this city about 2 o'clock in the day, and see the family sitting around the table in the dining room, with a roast turkey on one end of the table, and a boiled ham on the other, you would naturally conclude that those people were at dinner, that that was their dinner hour, and that they were at dinner. You draw the inference from the facts shown. Now you can tell a gambling den from the facts shown, from the facts proven, and reach your conclusion" was merely intended as an illustration to show the manner of considering circumstantial evidence, and was not prejudicial. *State v. Lane*, 82 S. C. 144.

78—*Tillman v. State*, 112 Ark. 236.

79—*State v. Creeley*, 254 Mo. 382.

and circumstances. What the proof may show you, if anything, that the defendant had said against himself, is presumed to be true, because against himself, but anything you may believe from the evidence the defendant said in his own behalf, you are not obliged to believe, but you may treat the same as true or false, just as you believe it true or false, when considered with a view to all the facts and circumstances in the case," was held to approach very nearly to a comment upon the evidence, and in justice to the defendant it was required that the statements made after the offense should be considered altogether by the jury, as the defendant was also entitled to the benefit of statements in favor of himself.⁸⁰

On a prosecution for homicide an instruction that if the jury believed beyond a reasonable doubt that the defendant with implied malice and with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in a passion aroused without adequate cause and not in defense of himself and with intent to kill, did shoot and kill, etc., you will find him guilty of murder in the second degree, was not on the weight of evidence as charging that the accused had implied malice against the deceased when he shot him.⁸¹

On a trial for murder, a charge that the state contends that the defendant did with a certain pistol inflict a mortal wound on W. and the state contends that this wound was inflicted with malice aforethought, either express or implied, and under the law and facts of this case the defendant would be guilty of the offense of murder as charged, was not erroneous.⁸²

An instruction in a murder case that evidence to establish an alibi, like any other evidence, may be open to special observation, as persons may perhaps fabricate it with

80—State v. Nibarger, 255 Mo. 289.

82—Hawkins v. State, 141 Ga. 212.

81—Young v. State, 54 Tex. Cr. App. 417.

greater hopes of success or less fear of punishment than most other kinds of evidence, does not tell the jury that in the instant case they are to attach less weight to the evidence of alibi than to other evidence.⁸³

On a trial for murder, where it appeared that defendant and deceased had married sisters, and an attempt to justify the killing was based on the fact that deceased had tried to get defendant's wife to desert him, the court charged that, "if you believe from the evidence that the deceased (H.) either persuaded the wife of the prisoner to leave his bed and board, or afforded her shelter or protection (if she quit him of her own accord), in neither case would such fact excuse the killing." This was held not an intimation of opinion as to what had been proved by the evidence.⁸⁴

On a prosecution for grand larceny, the court instructed the jury that, if satisfied beyond a reasonable doubt "that defendant killed or had the calf killed by the witnesses, and that she then cut out the brand and cut off the ears of the calf, and burned up the ears and part of the hide so cut out, this would be a circumstance to be considered by you, indicating that the defendant was not the owner of the calf, and of her knowledge that she was not the owner." It was held that the word "indicating," as used in the instruction, would be understood by the jury as tending to show a certain result, and that the language of the instruction is not in violation of the constitutional provision prohibiting the court from charging the jury with respect to matters of fact.⁸⁵

An instruction that, "unless the evidence established beyond a reasonable doubt that the defendant filed a false claim with intent to defraud, * * * they [the jury] must acquit; that it was not enough to prove that the claim was false, but the state must further prove beyond a reason-

83—*People v. Wong Ah Foo*, 69 Cal. 180, 10 Pac. 375.

85—*State v. Loveless*, 17 Nev. 424, 30 Pac. 1080.

84—*State v. Dennison*, 44 La. Ann. 135.

able doubt that the defendant filed it with the intention of defrauding, * * * and, if the state has not so proved that fact, they must acquit; but that the intention with which the act charged was done * * * might be inferred from all the facts and circumstances proved in the cause,"—was not erroneous.⁸⁶

§ 126. Same—Curing error by other instructions.

Where a judge has expressed an opinion as to the facts the error is not obviated by the fact that other portions of his charge tell the jury that all questions of fact are exclusively for them,⁸⁷ neither is the error cured by the giving of further instructions of like import,⁸⁸ or by repeated

86—*Ferris v. State*, 156 Ind. 224. See also, *Aston v. State* (Tex. Cr. App.) 61 S. W. 307.

87—*People v. Kindleberger*, 100 Cal. 367, 34 Pac. 852; *China v. City of Sumter*, 51 S. C. 453.

Error is not cured by giving of instruction at the same time with the expression of opinion. *Shorb v. Kinzie*, 100 Ind. 429.

88—Where the court comments on the evidence, or intimates or expresses an opinion as to its weight and sufficiency, the error in so doing is not cured by the giving of further instructions that the jury are the sole judges of the weight of the evidence and the credibility of the witnesses.

Arkansas. *Bauschka v. Western Coal & Mining Co.*, 95 Ark. 477.

California. *People v. Kindleberger*, 100 Cal. 367, 34 Pac. 852; *People v. Chew Sing Wing*, 88 Cal. 268, 25 Pac. 1099.

Indiana. *Shorb v. Kinzie*, 100 Ind. 429.

Michigan. *People v. Lyons*, 49 Mich. 78.

Nevada. *State v. Ah Tong*, 7 Nev. 148.

North Carolina. *State v. Dick*, 60 N. C. 440.

North Dakota. Territory v. O'Hare, 1 N. D. 30.

South Carolina. *State v. White*, 15 S. C. 393.

Contra, *Humphreys v. Collier*, Breese (Ill.) 299; *White v. Territory*, 1 Wash. St. 279, 24 Pac. 447.

Error in instructing the jury that the testimony of a witness is entitled to little weight is not cured by an instruction that the jury are the sole judges of the weight of a witness' testimony. *People v. Lyons*, 49 Mich. 78.

Error is not cured by an instruction that the jury are not bound by any opinion which the court may have expressed on the evidence. *People v. Chew Sing Wing*, 88 Cal. 268, 25 Pac. 1099.

The error is not cured by an instruction that the court cannot express any opinion on the facts. *People v. Kindleberger*, 100 Cal. 367, 34 Pac. 852; *Stata v. White*, 15 S. C. 393.

statements that the jury are the exclusive judges of the weight of the evidence and the credibility of the witnesses.⁸⁹

“The impression having been once made, it would be very difficult if not impossible thus to obliterate it, and the result would be that the jury would be more or less influenced by an opinion coming from so high a source as an intelligent judge, whose mind has been trained to weigh testimony and determine its force and effect.”⁹⁰ However, the fact that the court, at the time of giving the instruction complained of, explains fully that the jury are the judges of the facts, ought to go a long way in supporting an instruction where the error is not clear, but is only arrived at by a nice construction of language incautiously used.⁹¹

§ 127. Same—Indicating opinion by questions asked the jury.

Error in charging on the weight of the evidence may result from the giving of instructions in the form of interrogatories to the jury. Such questions may be so worded as to clearly express the judge’s opinion, in which case the error is reversible just as if the instruction was in the form

89—Territory v. O’Hare, 1 N. D. 30.

Where the court made an argumentative comparison of the relative credibility of the principal witnesses for the defense and the principal witnesses for the prosecution, their testimony being vital and in direct conflict, and in so doing disparaged the credibility of witnesses for the defense, and conveyed to the jury in plain terms that the court entertained strong suspicions of the witnesses for the defense, it was held reversible error, notwithstanding the court repeatedly told the jury that they were the exclusive judges of the weight of the evidence and the credibility of the wit-

nesses. Territory v. O’Hare, 1 N. D. 30.

90—China v. City of Sumter, 51 S. C. 453.

91—See People v. Carey, 125 Mich. 535.

An instruction that “a mere showing of delay in the movement of live stock is not sufficient to make the defendants liable therefor without a showing by the plaintiff that such delay is due to the negligence of the defendants,” held not upon the weight of the evidence when read with the general charge wherefore its giving was not error. Good v. Texas & P. Ry. Co., — Tex. Civ. App. —, 166 S. W. 670.

of a direct and categorical statement,⁹² thus it has been held error for the judge, in charging the jury, to ask, "Is that the way an honest man would act? * * * Do honest people act so?" as such questions amounted to an expression of opinion on the facts.⁹³

§ 128. Same—Violation of rule otherwise than by express instructions.

The error of expressing or intimating an opinion as to the weight of evidence, or the credibility of witnesses, will work a reversal, although such opinion is not stated in an express instruction. Such an opinion may be expressed during the course of the trial,⁹⁴ in rulings as to evidence,⁹⁵

92—*State v. Norton*, 28 S. C. 572; *State v. Addy*, 28 S. C. 4; *State v. Jenkins*, 21 S. C. 595; *Freidrich v. Territory*, 2 Wash. St. 358, 26 Pac. 976.

93—*State v. Jenkins*, 21 S. C. 595.

94—The trial court has no more right to volunteer before the jury his opinion upon a material fact in controversy, while deciding a question of law on the trial, than he has to charge the jury in respect to such fact. If he express an opinion, it is a wrong, requiring redress as imperatively in case of a mere inadvertence as in the case of a wilful evasion of the law. *State v. Harkin*, 7 Nev. 377.

Where the trial court, during the course of the trial of a civil case, said: "This was a civil suit, but that, if the jury considered the evidence, * * * they would find the case decidedly criminal," such remark was held reversible error. *Fuhrman v. City of Huntsville*, 54 Ala. 263.

Where the defense to a suit to recover the price of a map was that the view of the defendant's resi-

dence therein was not correct, and defendant's counsel asked the judge if he would know the view shown on the map to be the view of defendant's residence, to which he replied that he did not know that he would, this was held reversible error. *Andreas v. Ketcham*, 77 Ill. 377.

95—Unless expression of opinion is rendered necessary in ruling on the admissibility of evidence, such expression of opinion, whether addressed to the jury or to counsel, or whether given as an instruction or not, will, in general, be a ground for reversal.

Alabama. *Fuhrman v. City of Huntsville*, 54 Ala. 263.

California. *McMinn v. Whelan*, 27 Cal. 300.

Illinois. *Andreas v. Ketcham*, 77 Ill. 377.

Nevada. *State v. Harkin*, 7 Nev. 377.

North Carolina. *State v. Dick*, 60 N. C. 440.

The right to a decision on the facts by a jury uninfluenced and unbiased by the opinion of the judge * * *

or by words or conduct showing belief or disbelief in the testimony of a witness.⁹⁶

It has been held not improper however to state the reasons as to the admissibility or rejection of evidence though such statement necessarily involved an expression of opinion as to other evidence,⁹⁷ and in one case in ruling upon the

cannot be lawfully denied, by the simple evasion of looking at the counsel instead of at the jury, or of foisting the opinion into a ruling upon testimony. *State v. Harkin*, 7 Nev. 383.

Where the court, in declining defendant's request to withdraw certain confessions, told the state's attorney he might withdraw them if he liked, but he declined to do so, the reviewing court said: "This seems to us to be an expression of opinion, on the part of the judge, that the case was sufficiently proved without the aid of the confessions," and the judgment was reversed. *State v. Dick*, 60 N. C. 440.

96—The influence of the trial judge with the jury is necessarily great because of his authoritative position, and by words or actions he may materially prejudice the rights of a party. By words or conduct he may, on the one hand, support the character or testimony of a witness, or, on the other, may destroy the same, in the estimation of the jury, and thus his personal influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the others. *McMinn v. Whelan*, 27 Cal. 320.

A remark of the judge vouching for the respectability of a witness whose character was called into question during the course of the trial was held reversible error where

the testimony of such witness was material. *McMinn v. Whelan*, 27 Cal. 300.

97—If the admissibility of certain evidence depends upon the establishment of some necessary preliminary facts, it is not improper for the judge, in passing on such question, to announce, for the guidance and benefit of counsel, the reasons which controlled him in the admission or rejection of the evidence; that this necessarily involves the expression of an opinion upon the evidence already introduced, and that such opinion cannot be assigned for error. This rule is well illustrated by a case in which the admissibility of certain evidence depended on the preliminary proof of a promise by one of the parties. In deciding that the evidence was admissible, the court said "that, as the case then stood, a *prima facie* promise had been proven," and this remark was assigned as error. The reviewing court said that, "while the expression of the learned judge that, as the case then stood, a *prima facie* promise had been proven, might be the subject of criticism if presented to the jury as a formal instruction, we think it meant no more, as used, than that evidence had been given tending to show the promise, sufficient to lay the foundation for the introduction of the proposed testimony." *Reed v. Clark*, 47 Cal. 200.

admissibility of certain testimony and in admitting it as part of the *res gestæ*, a statement that, "the law does not lay down any specific time as to what length of time shall intervene. Of course, unless it is part of the *res gestæ*, that would not be relevant. This witness says in his opinion, no more than five minutes had elapsed; under the evidence I will admit what he says," was held not erroneous as an expression of an opinion on the evidence.⁹⁸

A statement by the judge, on refusing a requested instruction that "I do not regard this request as being in accordance with the evidence,—it is upon a state of facts which the evidence does not warrant" has also been held not improper.⁹⁹ Of course, if the court expresses an opinion during the conduct of the trial, but not in the presence or hearing of the jury, there can be no ground of complaint,¹ and an opinion expressed by the court during the progress of the trial, which does not appear to have been given in charge to the jury, or to have been in any way connected with a refusal to charge, or with the admission or rejection of testimony, has been held not a subject of appellate review.²

§ 129. Jurisdictions where practice is permissible, or is not prohibited.

At common law it was proper for the trial judge in charging the jury to express his opinion as to the weight of the evidence, or any part of it, or to comment on the evidence or state what it tended, or did not tend to prove,³ and

98—*Amos v. State*, 14 Ga. App. 589.

99—*Pillsbury v. Sweet*, 80 Me. 392.

1—*Phillips v. Beene*, 16 Ala. 720.

2—*Phillips v. Beene*, 16 Ala. 720.

3—*Hale, Hist. Com. Law* 147; *Fisher's Case*, 1 Cobbett, State Tr. 395; *Solarte v. Melville*, 7 Barn. & C. 435; *Petty v. Anderson*, 3 Bing.

170; *Belcher v. Prittie*, 4 Moore & S. 295, 10 Bing. 408; *Foster v. Steele*, 5 Scott 28; *Attorney General v. Good*, 1 McClel. & Y. 285; *Pennell v. Dawson*, 18 C. B. 355; *Davidson v. Stanley*, 2 Man. & G. 721; *Calmady v. Rowe*, 6 C. B. 892; *Colledge's Case*, 8 Cobbett, State Tr. 550; *Sutton v. Sadler*, 3 C. B. (N. S.) 87.

such rule obtains in jurisdictions where no statutory or constitutional provisions prohibiting the practice, have been enacted,⁴ and in the federal courts,⁵ which are not affected by such statutes,⁶ or by the various state constitutional

4—Connecticut. *Dick v. Colonial Trust Co.*, 88 Conn. 93; *Smith v. Ford*, 82 Conn. 653; *Barnes v. City of Waterbury*, 82 Conn. 518; *Setchel v. Keigwin*, 57 Conn. 473; *Comstock's Appeal*, 55 Conn. 214; *First Baptist Church and Congregation in Stamford v. Rouse*, 21 Conn. 160.

Minnesota. *Larson v. Barlow*, 112 Minn. 246; *First Nat. Bank of Decorah v. Holan*, 63 Minn. 525; *Ames v. Cannon R. Mfg. Co.*, 27 Minn. 245.

New Jersey. *State v. Overton*, 85 N. J. L. 287; *Foley v. Loughran*, 60 N. J. L. 464; *Engle v. State*, 50 N. J. L. 272; *Castner v. Sliker*, 33 N. J. L. 507.

New York. *Hurlburt v. Hurlburt*, 128 N. Y. 420; *Allis v. Leonard*, 58 N. Y. 288; *Althorf v. Wolfe*, 22 N. Y. 355; s. c., 2 Hilt. 344; *Hager v. Hager*, 38 Barb. 92; *Stephens v. People*, 4 Parker Cr. 396.

Ohio. *Abram's Lessee v. Will*, 6 Ohio 165; *Bossert v. State*, Wright 113.

Pennsylvania. *Commonwealth v. Marcinko*, 242 Pa. 388; *Monier v. Pennsylvania Rapid Transit Co.*, 227 Pa. 273; *Didier v. Pennsylvania Co.*, 146 Pa. St. 582; *Shovlin v. Commonwealth*, 106 Pa. St. 369; *Cathcart v. Commonwealth*, 37 Pa. St. 108; *Porter v. Seiler*, 23 Pa. St. 424; *Springer v. Stiver*, 16 Pa. Super. Ct. 184.

Rhode Island. *State v. Lynott*, 5 R. I. 295.

Utah. *People v. Lee*, 2 Utah 441.

Vermont. *Seviour v. Rutland R. Co.*, — Vt. —, 91 Atl. 1039; *Sawyer v. Phaley*, 33 Vt. 69; *Yale v. Seely*,

15 Vt. 221; *Stevens v. Talcott*, 11 Vt. 25.

Wisconsin. *Goldsworthy v. Town of Linden*, 75 Wis. 24; *Massuere v. Dickens*, 70 Wis. 83; *Ketchum v. Ebert*, 33 Wis. 611; *Benedict v. State*, 14 Wis. 459.

5—United States. *Simmons v. United States*, 142 U. S. 148, 35 L. Ed. 968; *Aetna Life Ins. Co. v. Ward*, 140 U. S. 76, 35 L. Ed. 371; *Pinkerton v. Ledoux*, 129 U. S. 346, 32 L. Ed. 706; *Rucker v. Wheeler*, 127 U. S. 85, 32 L. Ed. 102; *Russell v. Ely*, 2 Black. 575, 17 L. Ed. 258; *Mitchell v. Harmony*, 13 How. 129, 14 L. Ed. 82; *M'Lanahan v. Universal Ins. Co.*, 1 Pet. 181, 7 L. Ed. 104; *Vanarsdale v. Hax*, 47 C. C. A. 31, 107 Fed. 878; *Aerheart v. St. Louis, I. M. & S. Ry. Co.*, 40 C. C. A. 171, 99 Fed. 907; *Illinois Cent. R. Co. v. Davidson*, 22 C. C. A. 306, 76 Fed. 517; *Watts v. Southern Bell Telephone & Telegraph Co.*, 66 Fed. 453; *St. Louis, I. M. & S. Ry. Co. v. Phillips*, 13 C. C. A. 315, 66 Fed. 35; *Chicago, R. I. & P. Ry. Co. v. Stahley*, 11 C. C. A. 88, 62 Fed. 363; *Consequa v. Willings*, 1 Pet. C. C. 225, Fed. Cas. No. 3, 128.

6—The right of judges of the federal courts to comment on the evidence, and express opinions as to matters of fact in causes tried before them, is not affected by statutes of states in which they are holding court, forbidding this practice. These statutes can in no wise control the court's discretion in this regard. *Vicksburg & M. R. Co. v.*

provisions.⁷ In some of the states where the right exists, it is seldom exercised;⁸ and in one state the practice has been declared obsolete.⁹

Putnam, 118 U. S. 545, 30 L. Ed. 257; Nudd v. Burrows, 91 U. S. (1 Otto.) 440, 23 L. Ed. 290. See also, Indianapolis & St. L. R. R. v. Horst, 93 U. S. (3 Otto.) 291, 23 L. Ed. 898.

In construing the act of congress (Act Cong. June 1, 1872 [17 St. at Large, p. 197, § 5]) declaring "that the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts * * * shall conform, as near as may be," to the same things "existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held," the Supreme Court of the United States held that this act did not apply to instructions to the jury, and in enumerating the evils which this statute was intended to remedy said: "The personal administration by the judge of his duties while sitting upon the bench was not complained of. No one objected, or sought a remedy in that direction. * * * The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form nor mode of proceeding, within the meaning of those terms as found in the context." Nudd v. Burrows, 91 U. S. (1 Otto.) 440, 23 L. Ed. 290.

7—The right of federal judges to express an opinion on the facts is not affected by organic provisions of states in which they are sitting, prohibiting the practice. Organic provisions

have no more effect on this right than statutes. St. Louis, I. M. & S. R. v. Vickers, 122 U. S. 360, 30 L. Ed. 1161.

8—Seviour v. Rutland R. Co., — Vt. —, 91 Atl. 1039.

9—State v. Pike, 49 N. H. 399, 6 Am. Rep. 533.

Rule in New Hampshire.

In some of the earlier decisions it is said that it is not the ordinary practice for the court to express an opinion in regard to the weight of the evidence. (Cook v. Brown, 34 N. H. 460; Haven v. Richardson, 5 N. H. 126.) In another early decision it appeared that the trial judge had expressed an opinion on the evidence which was clearly favorable to the party complaining, and the judgment was affirmed. The reviewing court said: "If the verdict had been for the plaintiff, and the exception were by the defendant, it would deserve consideration whether this bearing upon the motives of the party who caused the publication might not have had its effect upon the verdict." (McDougall v. Shirley, 18 N. H. 109.) In a later decision, the court said that the practice of expressing an opinion on the weight of the evidence had become obsolete (State v. Pike, 49 N. H. 399, 6 Am. Rep. 533), and decisions subsequent to this contain expressions which seem to bear out this view. (See Orr v. Quimby, 54 N. H. 632; Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339.) It has nevertheless been held that it is not irregular for the trial judge to make

In Michigan the later decisions are against the right of the court to express an opinion as to the weight of the evidence or the credibility of witnesses.¹⁰

§ 130. Same—How strong an expression of opinion is permissible.

In general the trial judge may freely express the impressions made on his mind by the evidence, thus giving the jury the benefit of his judicial experience and suggesting to

such suggestions in relation to the facts as they may suppose will be useful to the jury, the matter being left to them for decision. (*Cook v. Brown*, 34 N. H. 460; *Flanders v. Colby*, 28 N. H. 34; *Patterson v. Colebrook*, 9 Fost. [N. H.] 94.) Accordingly, it was held not improper for the court to suggest to the jury that they could judge better of the credit to be given to a witness by his appearance on the stand than by any other circumstances. (*Flanders v. Colby*, 28 N. H. 34.)

10—Rule in Michigan.

In the earliest decision on this question in Michigan, it was held that the parties had no right to demand instructions intimating an opinion on the evidence. (*Perrott v. Shearer*, 17 Mich. 48.) In the next decision there is a *dictum* to the effect that the judge may express an opinion as to the credibility of witnesses if he expressly direct the jury to decide the question for themselves, without reference to his views. (*Sheahan v. Barry*, 27 Mich. 217.) This decision was followed by another, upholding a refusal to instruct as to what weight should be given to the evidence, on the ground that such an instruction would constitute a usurpation of the province of the jury. (*Blackwood v. Brown*,

32 Mich. 104.) The next decision in point of time enunciated the doctrine that it was error to intimate an opinion on the credibility of a witness, and that the judgment of the jury must in no degree be subordinate to the judge's opinion of the facts. (*Mawich v. Elsey*, 47 Mich. 10.) The next three decisions hold that it is erroneous for the court to express any opinion on the weight of the evidence or the credibility of witnesses. (*Letts v. Letts*, 91 Mich. 596; *Wessels v. Beeman*, 87 Mich. 481; *People v. Lyons*, 49 Mich. 78.) A later decision seems to recognize the correctness of what was said in the first, but says that the rule must not be extended to cases where the instruction implies a duty on the part of the jury to yield their judgment to that of the judge. (*Blumeno v. Grand Rapids & I. R. Co.*, 101 Mich. 325.)

The cases of *Perrott v. Shearer* and *Letts v. Letts*, *ante*, were cited in a comparatively recent case in which it was held that a charge which clearly intimates to the jury the opinion of the court that they ought to disallow a claim is erroneous. (*Buell v. Adams*, 157 Mich. 248.)

them points of weakness or strength that they might otherwise overlook,¹¹ provided always that the ultimate decision of disputed matters of fact is fairly left to them,¹² and the expression of opinion does not amount to a binding direction.¹³

In one case it was said that there is no fixed rule deter-

11—*State v. Overton*, 85 N. J. L. 287.

The judge is the best adviser the jury can have. *Com. v. Zuern*, 16 Pa. Super. Ct. 588.

12—*Dick v. Colonial Trust Co.*, 88 Conn. 93; *Larson v. Barlow*, 112 Minn. 246; *State v. Overton*, 85 N. J. L. 287; *Seviour v. Rutland R. Co.*, — Vt. —, 91 Atl. 1039.

The jury must be impressed with the feeling that the responsibility of their verdict rests on them alone, and not on the court. *Holder v. State*, 5 Ga. 444.

13—*Commonwealth v. Marcinko*, 242 Pa. 388.

The jury must be made aware of their right and duty to decide the facts on their own responsibility. The ultimate decision of the facts must be fairly left to the jury, the expression of opinion must stop short of a binding direction.

Connecticut. *Comstock's Appeal*, 55 Conn. 214.

Minnesota. *First Nat. Bank of Decorah v. Holan*, 63 Minn. 525.

New Jersey. *Foley v. Loughran*, 60 N. J. L. 464.

New York. *Nolton v. Moses*, 3 Barb. 31; *Bulkeley v. Keteltas*, 4 Sandf. 450; *Dean v. Hewit*, 5 Wend. 257.

Pennsylvania. *Pool v. White*, 175 Pa. St. 459; *Cathcart v. Com.*, 37 Pa. St. 108; *Com. v. Zuern*, 16 Pa. Super. Ct. 588; *Springer v. Stiver*, 16 Pa. Super. Ct. 184; *Com. v. Warner*, 13

Pa. Super. Ct. 461; *Com. v. Winkelman*, 12 Pa. Super. Ct. 497.

Rhode Island. *State v. Lynott*, 5 R. I. 295.

Vermont. *Sawyer v. Phaley*, 33 Vt. 69; *Stevens v. Talcott*, 11 Vt. 25.

Wisconsin. *Massuere v. Dickens*, 70 Wis. 91; *Ketchum v. Ebert*, 33 Wis. 611; *Fowler v. Colton*, 1 Pin. 331.

United States. *Haines v. McLaughlin*, 135 U. S. 584, 34 L. Ed. 290; *Rucker v. Wheeler*, 127 U. S. 85, 32 L. Ed. 102; *Eastern Transp. Line v. Hope*, 95 U. S. (5 Otto.) 297, 24 L. Ed. 477; *Garrard v. Reynolds' Lessee*, 4 How. (U. S.) 123, 11 L. Ed. 903; *Vanarsdale v. Hax*, 47 C. C. A. 31, 107 Fed. 878; *Herrick v. Quigley*, 41 C. C. A. 294, 101 Fed. 187; *Aerheart v. St. Louis, I. M. & S. Ry. Co.*, 40 C. C. A. 171, 99 Fed. 907; *Illinois Cent. R. Co. v. Davidson*, 22 C. C. A. 306, 76 Fed. 517; *Watts v. Southern Bell Tel. & Tel. Co.*, 66 Fed. 453; *Chicago, R. I. & P. Ry. Co. v. Stahley*, 11 C. C. A. 88, 62 Fed. 363; *Achison, T. & S. F. R. Co. v. Howard*, 1 C. C. A. 29, 49 Fed. 206; *Sorenson v. Northern Pac. R. Co.*, 36 Fed. 166.

English. *Fisher's Case*, 1 Cobbett, State Tr. 395; *Brembridge v. Osborne*, 1 Starkie 374; *Pennell v. Dawson*, 18 C. B. 355; *Belcher v. Prittie*, 4 Moore & S. 295; *Foster v. Steele*, 5 Scott 28.

mining how strong an expression of opinion the court may make in regard to the truth or weight of the testimony,¹⁴ and very strong expressions of opinion have been upheld, the view being taken that considerable latitude must be left with the trial court in commenting on the evidence.¹⁵

Thus an instruction has been held not prejudicial when it was objected to as ridiculing the defendant's evidence,¹⁶ and in an action for damages for breach of warranty of a sale of a threshing separator, an instruction containing the words, "The contract will be sent to the jury box with you, gentlemen, and you can wrestle with it at your pleasure. I cannot read it in the present light," was held not an unfavorable comment on the contract as having been printed in small type.¹⁷

Where a railroad company is sued for injuries to a plaintiff at a crossing, and the engineer is accused of heartless or grossly negligent conduct, and testifies, the court may state that the reply of a witness seems to be that of a "manly man."¹⁸

The latitude of the federal judges in charging a jury on the facts is great, and the court has the right to express his opinion and advise the jury upon the plaintiff's failure to produce a certain witness if the jury is given to understand that it is not bound by such opinion;¹⁹ also, an instruction that, if the jury find on the issues in favor of

14—*State v. Roger*, 7 La. Ann. 382.

15—**Pennsylvania.** *Fredericks v. Northern Cent. R. Co.*, 157 Pa. St. 103, 22 L. R. A. 306n; *Com. v. Doughty*, 139 Pa. St. 383; *Leibig v. Steiner*, 94 Pa. St. 472; *Johnston v. Com.*, 85 Pa. St. 54, 27 Am. Rep. 622; *Sailor v. Hertzogg*, 10 Pa. St. 296.

United States. *Doyle v. Boston & A. R. Co.*, 27 C. C. A. 264, 82 Fed. 869.

English. *Davidson v. Stanley*, 2 Man. & G. 721; *Belcher v. Prittie*, 4 Moore & S. 295; *Foster v. Steele*, 5

Scott, 28; *Calmady v. Rowe*, 6 C. B. 861; *Doe d. Strickland v. Strickland*, 8 C. B. 743; *Duberley v. Gunning*, 4 Term R. 651; *Sawyer v. Phaley*, 33 Vt. 69; *Rex v. Burdett*, 4 Barn. & Ald. 167.

16—*Benedict v. Everard*, 73 Conn. 157.

17—*Buchanan v. Minneapolis Threshing Mach. Co.*, 17 N. D. 343.

18—*Simmons v. Pennsylvania R. Co.*, 199 Pa. St. 232.

19—*Young v. Corrigan*, 127 C. C. A. 174, 210 Fed. 442.

plaintiff, "the court will accept a reasonable and fair verdict as a proper settlement of the controversy between the parties," while objectionable in that the jury have nothing to do with the question whether the court will or will not accept their verdict, does not take from the jury their power to pass upon the facts in the case under the instructions of the court.²⁰

Probably the only limitation on this right is that the court should not give a binding instruction to find one way or the other;²¹ or a direction so positive as to prevent them from exercising their own judgment.²²

Error cannot be assigned, though the opinion of the judge may have great influence upon the verdict,²³ and is unfavorable to the party complaining.²⁴

§ 131. Same—Necessity of expressing opinion.

In many cases it is the duty of the trial judge to state his opinion as to the evidence,²⁵ but as a general rule the prac-

20—*Herrick v. Quigley*, 41 C. C. A. 294, 101 Fed. 187.

21—*Massoth v. Delaware & H. Canal Co.*, 64 N. Y. 524; *Johnston v. Com.*, 85 Pa. St. 54; *Sailor v. Hertzog*, 10 Pa. St. 296; *Pennell v. Dawson*, 18 C. B. (Eng.) 355.

In charging the jury in a homicide case the judge may express his opinion on the weight and effect of the evidence and he may say to the jury that there is no evidence in the case to reduce the crime to manslaughter, but he may not express such an opinion when it is not warranted by the evidence or would amount to binding instructions. *Commonwealth v. Marcinko*, 242 Pa. 388.

Compare *Burke v. Maxwell's Adm'rs*, 81 Pa. St. 139, where it was held error for the judge to tell the jury that, if he were in the jury box, he would find against the plaintiff,

even though this statement was qualified by saying that they are not bound by his views of the evidence; overruling *Rutland Mfg. Co. v. Quinlan*, 1 Wkly. Notes Cas. (Pa.) 456. An instruction by the court "that, in his opinion, it was the duty of the jury to convict the defendant," is misleading, and ground for a new trial. *Breese v. United States*, 48 C. C. A. 36, 108 Fed. 804, rev'g 106 Fed. 680. Compare *Johnston v. Com.*, 85 Pa. St. 60.

22—*New York Firemen Ins. Co. v. Walden*, 12 Johns. (N. Y.) 513, 7 Am. Dec. 340; *People v. Quin*, 1 Parker Cr. Cas. (N. Y.) 340.

23—*Sawyer v. Phaley*, 33 Vt. 69.

24—*Hurlburt v. Hurlburt*, 128 N. Y. 420, 26 Am. St. Rep. 482; *Follmer v. McGinley*, 146 Pa. St. 517.

25—*State v. Overton*, 85 N. J. L. 287.

tice is discretionary,²⁶ and the court is under no obligation to comment on the evidence, and express an opinion on the weight and effect thereof, even on request.²⁷

§ 132. Same—Necessity of instructing that opinion is merely advisory.

It is the province of the jury to determine the existence or nonexistence of facts, while on the other hand the decision of all questions of law is a matter exclusively for the court.²⁸

Accordingly, every charge should distinguish clearly between the law and the fact so that the jury cannot misunderstand their rights or their duty, nor mistake the opinion of the judge upon matters of fact for his direction in point of law. It is of vital importance that this distinction be kept steadily in view.²⁹

26—Whether the court shall express an opinion to the jury on the weight of the evidence is always a matter of discretion, and the court may exercise it or not, according as it deems best. *Dick v. Colonial Trust Co.*, 88 Conn. 93; *Bruch v. Carter*, 32 N. J. L. 565; *Stevens v. Talcott*, 11 Vt. 25; *Breese v. United States*, 45 C. C. A. 535, 106 Fed. 680.

27—*Connecticut*. *Cohen v. Pemberton*, 53 Conn. 235.

Indiana. *Shank v. State*, 25 Ind. 208.

Maine. *George v. Stubbs*, 26 Me. 243.

New Jersey. *Bruch v. Carter*, 32 N. J. L. 565.

New York. *Moore v. Meacham*, 10 N. Y. 207; *Burling v. Gunther*, 12 Daly 6; *Bryce v. Meyer*, Daily Reg., Sept. 18, 1883.

Pennsylvania. *Philadelphia & T. R. Co. v. Hagan*, 47 Pa. St. 244, 86 Am. Dec. 541; *Lorain v. Hall*, 33 Pa. St. 270; *Thomas v. Thomas*, 21 Pa.

St. 315; *Haldeman v. Martin*, 10 Pa. St. 369; *Clark v. Partridge*, 2 Pa. St. 13; *Linderman v. Sheldon*, 7 Phila. 168.

Vermont. *Doon v. Ravey*, 49 Vt. 293; *Stevens v. Talcott*, 11 Vt. 25; *Vincent v. Stinehour*, 7 Vt. 62; *Brainard v. Burton*, 5 Vt. 97.

United States. *Burdell v. Denig*, 92 U. S. (2 Otto.) 716, 23 L. Ed. 764; *Marine Ins. Co. of Alexandria v. Young*, 5 Cranch 187, 3 L. Ed. 74; *Smith v. Carrington*, 4 Cranch 62, 2 L. Ed. 550; *Crane v. Morris*, 6 Pet. 598, 8 L. Ed. 514; *Van Ness v. Pacard*, 2 Pet. 137, 7 L. Ed. 374; *United States v. Burnham*, 1 Mason 57, Fed. Cas. No. 14,690; *Consequa v. Willings*, Pet. C. C. 225, Fed. Cas. No. 3,128; *Brickill v. City of Baltimore*, 8 C. C. A. 500, 60 Fed. 98.

28—See ch. VII, *ante*.

29—*New York Firemen Ins. Co. v. Walden*, 12 Johns. (N. Y.) 513, 7 Am. Dec. 340.

If the court states his opinion to the jury on the facts, it should be stated as an opinion merely, and not as a positive direction, and it should be impressed upon the jury that they are to decide the facts upon their own views of the evidence, and that the judge only interposes his opinion in order to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt.³⁰ Thus, it is customary,³¹ and undoubtedly the better practice, to tell the jury expressly that they are to decide all questions of fact on their own responsibility, and that they are not bound by the opinion of the court, which is advisory only; and causes have been reversed for failure to direct the jury that they are not bound by the opinion of the court on questions of fact.³² However, if the language of the charge is such that

30—*New York Firemen Ins. Co. v. Walden*, 12 Johns. (N. Y.) 519.

"The line which separates the two provinces must not be overlooked by the court. Care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence and the instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory, and in no wise intended to fetter the exercise finally of their own independent judgment. Within these limitations, it is the right and duty of the court to aid them by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts, and

their combined effect, stripped of every consideration which might otherwise mislead or confuse them.

* * * Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid." *Nudd v. Burrows*, 91 U. S. (1 Otto) 437, 23 L. Ed. 289.

31—*New York*. *Sindram v. People*, 88 N. Y. 203; *Hoffman v. New York Cent. & H. R. R. Co.*, 46 N. Y. Super. Ct. 526.

Pennsylvania. *Bonner v. Herrick*, 99 Pa. St. 225.

Vermont. *Sawyer v. Phaley*, 33 Vt. 69; *Yale v. Seely*, 15 Vt. 221.

United States. *Haines v. McLaughlin*, 135 U. S. 584; 34 L. Ed. 290; *Rucker v. Wheeler*, 127 U. S. 85, 32 L. Ed. 102; *Garrard v. Reynolds' Lessee*, 4 How. 123, 11 L. Ed. 903; *Illinois Cent. R. Co. v. Davidson*, 22 C. C. A. 306, 76 Fed. 517; *Sorenson v. Northern Pac. R. Co.*, 36 Fed. 166.

32—*Anderson v. Avis*, 10 C. C. A.

the jury cannot reasonably infer that the statements in the charge in reference to matters of fact are more than a mere opinion of the judge, to be adopted and applied according as it agrees with the jury's own views, a failure to tell the jury that they are not bound by the court's opinion is not assignable as error,³³ and in one case it was held that the court might state its opinion on a fact without telling the jury they were not bound thereby, and that, if a party feared that it might have undue influence on the jury, he should request a charge that the jury are exclusive judges of such facts.³⁴

§ 133. Same—Effect of erroneous opinion.

The fact that the opinion expressed by the court is erroneous is not ground for reversal, if the instruction is such that the jury clearly understand that they are to use their own judgment in determining the facts, and that the court's opinion does not bind them.³⁵

Thus, in an action where a plaintiff claimed a certain sum of money was personally loaned to the defendant and there was a dispute as to the entries in a book of account, an instruction containing the words "How such an error could be made it is difficult to conceive," was held not erroneous even though it was easy to conceive how the error was made, the issues being fairly left to the jury.³⁶

Even if entire accuracy in the statement of facts may not be obtained, yet if the case is left fully and clearly to the

347, 62 Fed. 227. Where the court indicates to the jury his view of the facts, he should also charge the jury that they are the exclusive judges of the facts, and are not bound by the court's views. *Vanarsdale v. Hax*, 47 C. C. A. 31, 107 Fed. 878.

33—*First Baptist Church v. Rouse*, 21 Conn. 166; *Hunt v. Bennett*, 4 E. D. Smith (N. Y.) 647; *Ketchum v. Ebert*, 33 Wis. 611; *Hansen v. Boyd*, 161 U. S. 404, 40 L. Ed. 749.

34—*Ames v. Cannon River Mfg. Co.*, 27 Minn. 245.

35—*Knapp v. Griffin*, 140 Pa. St. 604; *Oyster v. Longnecker*, 16 Pa. St. 269; *Long v. Ramsay*, 1 Serg. & R. (Pa.) 72; Cf. *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530.

36—*Larson v. Barlow*, 112 Minn. 246.

jury, under instructions not calculated to mislead, there is no available error.³⁷

§ 134. Same—When expression of opinion is ground for reversal.

As has been noted in previous sections,³⁸ an expression of opinion amounting to a binding charge is error warranting reversal,³⁹ and the cause will also be reversed where the court's remarks are such as are likely to mislead.⁴⁰

Thus, when the effect of an instruction is to take from the jury all testimony except that of a particular witness, and to leave to the jury the construction of a paper properly for the court, the error is not cured by telling the jury that the whole testimony is for it to pass upon.⁴¹

37—Leibig v. Steiner, 94 Pa. St. 472; Bitner v. Bitner, 65 Pa. St. 347; Repsher v. Wattson, 17 Pa. St. 365.

38—See §§ 132, 133, *ante*.

39—Burdick v. People, 58 Barb. (N. Y.) 51; Moran v. McClearn, 4 Lans. (N. Y.) 288; Schanck v. Morris, 2 Sweeny (N. Y.) 464; Sailor v. Hertzogg, 10 Pa. 296.

40—Burke v. Maxwell's Adm'rs, 81 Pa. 139; Connelly v. Walker, 45 Pa. 449. Generally, as to misleading instructions, see §§ 164-169, *post*.

41—Heydrick v. Hutchinson, 165 Pa. St. 208.

CHAPTER XIII.

SUMMING UP THE EVIDENCE.

- § 135. Introduction—Definition and distinctions.
- § 136. Jurisdictions where practice is permissible or prohibited.
- § 137. Same—Effect of constitutional or statutory provisions as to charging on facts.
- § 138. Necessity of summing up evidence.
- § 139. Method of summing up—Necessity of stating all the evidence.
- § 140. Same—Necessity of using precise language of witness.
- § 141. Same—Necessity of giving evidence in order in which it was admitted.
- § 142. Same—Absence of evidence.
- § 143. Same—Issues and theories.
- § 144. Same—Repetition of testimony—Requests of jury.
- § 145. Effect of misstating evidence.
- § 146. Instructions violating statutes or constitutional provisions prohibiting summing up of evidence.

§ 135. Introduction—Definition and distinctions.

It has been noted in the previous chapter that at common law, and in some jurisdictions, it is proper and usual for the trial judge in charging the jury to comment on the evidence and state what it does or does not tend to prove, or to express his opinion as to the weight of the evidence.¹

It was also the unquestionable right of the trial judge, at common law, to sum up or recapitulate the evidence adduced in the trial of the cause before him, and this practice still prevails in a number of states,² and in some jurisdictions where the court is forbidden by statutes or constitutional provisions from expressing any opinion as to the credibility of witnesses and as to the weight and effect of evidence.

1—See ch. XII, §§ 129-134, *ante*. 2—See § 136, *post*.

In this connection it may not be improper to call attention to the fact that the term "summing up the evidence" is often inaccurately used both by bench and bar, as inclusive both of a statement and recapitulation of the evidence, and of an expression of opinion as to the weight of evidence and as to the credibility of witnesses. The use of such expression is very misleading. In Blackstone's Commentaries the practice of summing up the evidence is described as follows: "When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principle issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence."³

It is the belief of the writer that the term "summing up the evidence" should be carefully limited to the function ascribed to it by Blackstone, and in this work, the term is so used.

The reasons in support of the practice of summing up the evidence are well stated in one of our decisions in the following words: "The great reliance, indeed, for truth in the verdict of a jury, is on the intelligence, integrity, and independence of the jurors; but while they are deemed competent to that end, experience and the knowledge of mankind produce the conviction that, unused as they are to judicial inquiries, often depending upon artificial reasoning, they are more competent when aided by the more extensive knowledge and more perfect experience of a judge, versed in human affairs, accustomed to consider, discuss, and digest masses of complicated evidence, to separate the material from the immaterial parts, and to combine the former so as to display the full force of each and all its parts."⁴

3—3 Bl. Comm. 375.

4—State v. Lipsey, 14 N. C. 485.

§ 136. Jurisdictions where practice is permissible or prohibited.

The practice of summing up and recapitulating the evidence exists in the United States both in jurisdictions where the court may express his opinion as to the weight of evidence,⁵ and also in jurisdictions where such practice is prohibited by statutory or constitutional provisions.⁶

In general, the rights of the court in this regard are considered original and inherent, and they cannot be taken away except by constitutional or statutory provisions,⁷ although there are decisions in one state against such doctrine.⁸

In some states the statutes prohibit the practice of summing up the evidence.⁹

5—**Connecticut.** First Bapt. Church in Stamford v. Rouse, 21 Conn. 167.

Minnesota. State v. Minneapolis Milk Co., 124 Minn. 34, 51 L. R. A. (N. S.) 244n. State v. Rose, 47 Minn. 47.

New Jersey. Donnelly v. State, 26 N. J. L. 480.

New York. People v. Fanning, 131 N. Y. 663; People v. Fanshawe, 65 Hun 77.

Ohio. Morgan v. State, 48 Ohio St. 371.

Pennsylvania. Com. v. McManus, 143 Pa. 64, 14 L. R. A. 89.

Wisconsin. Hannon v. State, 70 Wis. 448.

United States. District of Columbia v. Robinson, 180 U. S. 92, 45 L. Ed. 440, aff'g 14 App. Cas. (D. C.) 512; Starr v. United States, 153 U. S. 614, 38 L. Ed. 841; Mitchell v. Harmony, 13 How. 129, 14 L. Ed. 82; Games v. Stiles, 14 Pet. 322, 10 L. Ed. 476; Tracy v. Swartwout, 10 Pet. 80, 9 L. Ed. 354; M'Lanahan v. Universal Ins. Co., 1 Pet. 170, 7 L. Ed. 98.

6—See § 137, *post*.

7—State v. Lipsey, 14 N. C. 485.

8—In Indiana, the earlier decisions affirm the judge's right to sum up the evidence. Barker v. State, 48 Ind. 163; Driskill v. State, 7 Ind. 338.

In later decisions the practice is held erroneous. Cunningham v. State ex rel. Zartman, 65 Ind. 377; Killian v. Eigenmann, 57 Ind. 480.

But see Pittsburgh, C. & St. L. Ry. Co. v. Sponier, 85 Ind. 165, containing *dictum* that the court may sum up the evidence.

None of these decisions seems to be based on any statutory authority, but inasmuch as there is a conflict of authority in this state, the decisions are of small value.—Ed.

9—Code Crim. Proc. Tex., art. 715, prohibits the court from summing up the evidence in criminal cases, and this prohibition is rigidly enforced by the courts. Hannah v. State, 1 Tex. App. 579; Porter v. State, 1 Tex. App. 396; Gibbs v. State, 1 Tex. App. 13.

Ann. Code Miss. 1892, § 732, provides that "the judge * * * shall

§ 137. Same—Effect of constitutional or statutory provisions as to charging on facts.

The practice of summing up the evidence exists in a number of states where statutory or constitutional provisions prohibit the court from charging juries with respect to matters of fact or commenting on the evidence,¹⁰ and it has been held that such provisions do not affect the right of the trial judge to sum up the evidence.¹¹

In some states, the statutes or constitutional provisions expressly authorize the practice, as where such provisions contain language that the trial judge "may state the testimony and declare the law,"¹² or "may state the evidence

not sum up or comment on the testimony." *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

In Louisiana it was formerly proper for the court to sum up the evidence. *State v. Green*, 7 La. Ann. 518; *State v. Chandler*, 5 La. Ann. 489, 52 Am. Dec. 599, but as regards criminal cases, the rule was changed by a statute, passed in 1853, which provided, among other things, that the court "shall abstain from stating or recapitulating the evidence so as to influence their [the jury's] decision on the facts. He shall not state or repeat to the jury the testimony of any witness, nor shall he give any opinion as to what facts have been proved or disproved." *State v. Asberry*, 37 La. Ann. 125.

In Michigan, under a statute requiring the court to instruct only as to the law of the case, it is error to state and review the evidence. *Comp. Laws Mich.*, § 10243, *How. Ann. St.*, § 11847, *Judicature Act of 1915*, ch. 18, § 58; *Renaud v. City of Bay City*, 124 Mich. 29, holding, in an action against the city for injuries from a defective sidewalk, that an instruction that "in this case there

are some funny things. * * * City officers * * * swear that the walk was perfectly safe, and go right along and repair it, * * * and almost immediately rebuild it," was erroneous. But compare *People v. Carey*, 125 Mich. 535.

In Oregon, *Hill's Ann. Laws Ore.*, § 200 prohibits the trial court from presenting the facts of a case to the jury. *Smitson v. Southern Pac. Co.*, 37 Ore. 74, 60 Pac. 907.

10—*Colorado*. *Rose v. Otis*, 5 Colo. App. 472, 39 Pac. 77.

Georgia. *City & Suburban Ry. Co. v. Findley*, 76 Ga. 311; *Whitlow v. State*, 74 Ga. 819; *Bray v. State*, 69 Ga. 765; *Wright v. Central Railroad & Banking Co.*, 16 Ga. 46.

Kansas. *Bellew v. Ahrburg*, 23 Kan. 287.

Maine. *Hamlin v. Treat*, 87 Me. 310.

11—*Shiels v. Stark*, 14 Ga. 429.

12—*California*. *Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799; *People v. Doyell*, 48 Cal. 85; *Miller v. Stewart*, 24 Cal. 502.

Massachusetts. *Com. v. Barry*, 9 Allen 278.

when the same is disputed,"¹³ and it has been held that such provisions are not repugnant to other provisions prohibiting the court from charging on the weight of the evidence.¹⁴

Where the same statute or constitution contains both provisions, it is held that, while the court cannot state his opinion as to the weight of the evidence, his right to sum up the evidence after the manner of the common-law practice remains unaffected, and that the provision permitting him to sum up is merely declaratory and in affirmation of his common-law right.¹⁵

Under constitutional provisions declaring that "judges shall not charge juries with regard to matters of fact, but

Nevada. *State v. Smith*, 10 Nev. 106; *State v. Duffy*, 6 Nev. 138.

North Carolina. *State v. Boyle*, 104 N. C. 819; *State v. Noblett*, 47 N. C. 418; *Bailey v. Poole*, 35 N. C. 404; *State v. Lipsey*, 14 N. C. 485.

Tennessee. *Ayres v. Moulton*, 5 Cold. 154; *Case v. Williams*, 2 Cold. 239; *Lannum v. Brooks' Lessee*, 4 Hayw. 121; *Hughes v. State*, 8 Humph. 75; *Ivey v. Hodges*, 4 Humph. 154; *Atchison v. State*, 13 Lea 279.

In South Carolina, the constitutional provision that the judge "may state the testimony and declare the law" authorized the practice of summing up the evidence. *Davis v. Elmore*, 40 S. C. 533; *Moore v. Columbia & G. R. Co.*, 38 S. C. 1; *Massey v. Wallace*, 32 S. C. 149; *Richards v. Munro*, 30 S. C. 284; *Walker v. Laney*, 27 S. C. 150; *State v. Moorman*, 27 S. C. 22; *Woody v. Dean*, 24 S. C. 505; *Benedict v. Rose*, 16 S. C. 630; *State v. Green*, 5 Rich. 65.

This provision was amended in 1895 and the practice is now prohibited in that state. See this section, *post*.

13—Code Ala. 1886, § 2754 (now Code Ala. 1907, § 5362), has been held not in limitation or restraint of the court's original and inherent power to state the admitted facts to the jury. *Tidwell v. State*, 70 Ala. 33.

Under Code of 1896, § 2326 (now Code Ala. 1907, § 5362), the court may state what the evidence of a particular witness was when the same is in dispute. *Folmar v. Silery*, 132 Ala. 297.

14—*People v. Dick*, 34 Cal. 663; *Com. v. Barry*, 9 Allen (Mass.) 278.

15—*Com. v. Barry*, 9 Allen (Mass.) 278; *State v. Lipsey*, 14 N. C. 485.

"By providing that the court may also state the testimony, the manifest purpose of the legislature was to recognize and affirm the power and authority of the court, to be exercised according to its discretion, to sum up the evidence, to state its legal effect and bearing on the issues, and to indicate its proper application under the rules of law." *Com. v. Barry*, 9 Allen (Mass.) 278.

shall declare the law," it is improper to sum up or recapitulate the evidence.¹⁶

§ 138. Necessity of summing up evidence.

The power of the trial judge to sum up or recapitulate the evidence, at common law, was discretionary. He might sum up the evidence if he saw fit to do so, or refuse to sum up if this course seemed best to him. There was no rule making it imperative on the judge to repeat the evidence.¹⁷

16—Arkansas Const., art. 7, § 23, declaring that "judges shall not charge juries with regard to matters of fact, but shall declare the law," in effect prohibits the trial judge from summing up as at common law. *Fitzpatrick v. State*, 37 Ark. 238.

Under Const. S. C. 1895, art. 5, § 26, as amended, declaring that, "judges shall not charge juries in respect to matters of fact, but shall declare the law," the courts have held that the framers of the new constitution intended to abrogate the practice of summing up the evidence, and that it is no longer permissible. *Burnett v. Crawford*, 50 S. C. 161; *State v. Stello*, 49 S. C. 488; *Norris v. Clinkscales*, 47 S. C. 488.

In construing this provision for the first time, the reviewing court said: "The prohibition, 'judges shall not charge juries in respect to matters of fact,' now stands alone in section 26, unqualified by the permission to 'state the testimony,' which permission has been stricken out by amendment; and any direct reference to the testimony in charging a jury, any expression as to what is in evidence, any remark that would amount to a stating of the testimony, in whole or in part, is absolutely prohibited." But as it would be impossible to declare the

law applicable to a case on trial without connecting the legal principles involved with some state of facts, actual or hypothetical, "it was the intention of the framers of the new constitution, in amending" the provision, "that the trial judge, in charging the law of the case, should lay before the jury that law as applicable to a supposed state of facts, but that in so doing he should carefully avoid repeating the evidence on the facts at issue, making no statement of the testimony, either in whole or in part." *Norris v. Clinkscales*, 47 S. C. 488.

17—"It cannot be traced or ascertained * * * that any rule of the common law exists that makes it imperative on a judge to repeat the evidence to the jury. * * * If, on the trial of a cause, the witnesses are numerous, the evidence complicated, and the main question or principal issue obscured by various and conflicting testimony, he may, in his discretion, sum up the whole to the jury, that they may apply it properly, and have their attention directed to the essential points in controversy. No judge would ever refuse to impart such assistance when it was requested by a jury, nor would he withhold it in any case wherein the nature of the

This rule obtains in states where the practice of summing up the evidence is permissible, and the judge is not bound to recapitulate the evidence with or without request, unless statutory or constitutional provisions impose such duty.¹⁸

In one jurisdiction, the decisions construing a statute providing that the court "shall state, in a plain and correct manner, the evidence given in the case, and declare and explain the law arising thereon," are not altogether harmonious,¹⁹ but in such state it has been held that a failure of the judge to recite the testimony in his charge to the jury is not assignable as error, where it was expressly agreed by counsel on both sides that it need not be recapitulated.²⁰

evidence or the conduct of the cause led him to believe that his aid would enable them to discharge their constitutional functions with more correctness or facility; but it must, of necessity, depend on the circumstances of each case, whether the judge believes that his aid would be of any efficacy,—whether the case be not so plain and intelligible as to render his interference unnecessary, or the evidence so equally balanced as to make it unsafe. All these considerations the law has wisely confided to the sound discretion of the judge." *State v. Morris*, 10 N. C. 390.

18—**Georgia.** *Wright v. Central Railroad & Banking Co.*, 16 Ga. 46.

Minnesota. *Lowe v. Minneapolis St. Ry. Co.*, 37 Minn. 283.

Ohio. *Morgan v. State*, 48 Ohio St. 371.

Tennessee. *Lannum v. Brooks' Lessee*, 4 Hayw. 121; *Ivey v. Hodges*, 4 Humph. 154.

19—Under Code N. C., § 413 (now Pell's Rev. of 1908, § 535), it has been held that "no implication can arise from this law that he must

charge the jury, but, if he does charge them, he must do it according to the rule there laid down," and a refusal of a request to sum up the evidence was sustained. *State v. Morris*, 10 N. C. 391.

In another case, where a request had been made that the evidence be summed up, the judgment was reversed because the court did not do so. It is somewhat difficult to determine from the language of the opinion whether the court considered it erroneous not to sum up when requested, or whether it considered a failure to do so would have been erroneous, even though no request had been made. *State v. Boyle*, 104 N. C. 800.

A subsequent decision (in which special stress was laid on the fact that, in the case just mentioned, a request had been made) holds that, in the absence of a request, the court need not eliminate the material facts on both sides, and apply the principles of law to them. *State v. Brady*, 107 N. C. 822.

20—*Wiseman v. Penland*, 79 N. C. 197.

§ 139. Method of summing up—Necessity of stating all the evidence.

When the court attempts to sum up the evidence he must do so accurately and impartially,²¹ and not in a manner naturally to confuse the jury or to lead them to a particular result.²²

But the court is not bound to state all the evidence that has been brought out during the course of the trial,²³ or to notice every position discussed by counsel.²⁴

The power of the judge in this regard is largely discretionary,²⁵ but it is ordinarily sufficient if the attention of the jury is called to the contentions of the parties and the principal evidence bearing upon these contentions;²⁶ and an instruction collating the facts and stating the rule of law applicable has been held proper.²⁷

21—*State v. Minneapolis Milk Co.*, 124 Minn. 34, 51 L. R. A. (N. S.) 244n; *Com. v. Warner*, 13 Pa. Super. Ct. 461.

22—*State v. Minneapolis Milk Co.*, 124 Minn. 34, 51 L. R. A. (N. S.) 244n.

23—Iowa. *Hubbard v. Montgomery County*, 140 Iowa 520.

New York. *People v. McGonegal*, 62 Hun 622.

North Carolina. *State v. Ussery*, 118 N. C. 1177; *Boon v. Murphy*, 108 N. C. 187; *State v. Haney*, 19 N. C. 390; *State v. Lipsey*, 14 N. C. 485; *State v. Morris*, 10 N. C. 388.

Pennsylvania. *Borham v. Davis*, 146 Pa. St. 72; *Com. v. Warner*, 13 Pa. Super. Ct. 461.

South Carolina. *Kaminitsky v. Northeastern R. Co.*, 25 S. C. 53.

United States. *Allis v. United States*, 155 U. S. 123, 39 L. Ed. 94.

The court is not bound to refer every item of evidence which the jury might properly consider in reaching the conclusion as to a plaintiff's contributory negligence.

Hubbard v. Montgomery County, 140 Iowa 520.

There is no known "rule that compels a court to recapitulate all the items of the evidence, nor even all bearing upon a single question." *Allis v. United States*, 155 U. S. 123, 39 L. Ed. 94.

24—*Simpson v. Blount*, 14 N. C. 34.

25—The minuteness with which a trial judge, in his charge to the jury, shall state the evidence, is to a large extent discretionary with him. *State v. Morris*, 10 N. C. 388; *Fowler v. Smith*, 153 Pa. St. 639; *Borham v. Davis*, 146 Pa. St. 72.

26—The act of the judge in calling the attention of the jury to the contention of the parties and the principal evidence bearing upon these contentions is proper; the judge need not undertake to recapitulate all the evidence. *Bank v. Sumner*, 119 N. C. 591.

27—*Medearis v. Anchor Mut. Fire Ins. Co.*, 104 Iowa 88, 65 Am. St. 428.

The court's duty is properly per-

Reference to the minor details of the testimony should be omitted,²⁸ but if the judge recapitulates the evidence on one side, it is his duty to also recapitulate it on the other side and not indicate by the matter or manner of the charge what his own views are as to the effect of the testimony.²⁹

formed when he directs the jury's attention to the principal questions they are called upon to try, and explains the law applicable thereto. *Boon v. Murphy*, 108 N. C. 187; *State v. Haney*, 19 N. C. 390.

It is the duty of a judge, when he sums up, to collate the evidence and bring it together in one view on each side, with such remarks and illustrations as may properly direct the attention of the jury to the merits of the case. It is also his duty to bring to the notice of the jury principles of law or facts which have an important bearing on the case. *Bailey v. Poole*, 35 N. C. 404.

28—A trial judge should refer to the evidence only so far as is necessary to present the leading issues and should omit reference to the minor details of the testimony. *Farkas v. Brown*, 4 Ga. App. 130.

It is undoubtedly the better practice, in recapitulating the evidence, to divest it of all immaterial circumstances. *State v. Moses*, 13 N. C. 452.

"The real point of controversy often and generally depends on a very small portion of the testimony introduced. In the course of a trial, points made upon prolix and complicated documents, or after the most wearisome examination of witnesses, are abandoned, sometimes expressly, but oftener tacitly, because not sufficiently raised by the proof adduced, or answered by fuller proof on the other side. * * * To advert to everything that has thus oc-

curred during the trial, though not pressed by the party, though yielded by him, immaterial or absurd, would be a harmful consumption of time, obscure the truth, and confound the minds of the jurors.'" *State v. Lipsey*, 14 N. C. 485.

29—*Lamar v. King*, 168 Ala. 285.

The judge must present the facts on both sides in such a manner that they will have their fullest legitimate operation. *State v. Moses*, 13 N. C. 452.

If the charge is such a plain departure from impartiality in collating the evidence as of itself to convey to the jury an impression of the judge's opinion, the reviewing court will set aside the verdict. *State v. Lipsey*, 14 N. C. 485.

It is not just to present the proof prominently on one side and omit the countervailing evidence on the other side entirely. *Wright v. Central Railroad & Banking Co.*, 16 Ga. 46. See also, *L. I. Aaron Co. v. Hirschfeld*, 89 Ill. App. 205.

If a judge, in his charge, presents only the inferences that can be drawn on one side, arrayed *in solido*, so as to constitute an imposing argument to the jury without summing up on the other side, the judgment should be reversed. *State v. Moses*, 13 N. C. 452.

It has, however, been held not a ground for reversal that the judge stated the facts on one side with more fullness, clearness, and emphasis than he did on the other. *McPherson v. McPherson*, 21 S. C. 273.

Strong points on either side should not be omitted or slurred over.³⁰

In the case of an omission of matter deemed material, counsel should call the court's attention to it and pray an instruction.³¹

§ 140. Same—Necessity of using precise language of witness.

Ordinarily a statement of the substance of a witness' testimony is sufficient.³²

In one state, however, it has been held safer to recite the witness' exact language,³³ but in this jurisdiction it was held not erroneous for the judge, in stating the testimony, to read another person's memorandum, instead of stating the testimony from his own recollection, or reading it from a memorandum made by himself.³⁴

It has been held that, where a trial has lasted for several days, a refusal to state the evidence on a certain point, the court having offered to read parts of the testimony, was not erroneous, since the court could not be expected to remember all the testimony.³⁵

§ 141. Same—Necessity of giving evidence in order in which it was admitted.

It is not necessary for the court to read or recite the evidence in the order in which it was given, but the questions of fact which arise may be pointed out and the atten-

³⁰ 30—*Borham v. Davis*, 146 Pa. 72.

³¹ 31—*Simpson v. Blount*, 14 N. C. 34.

An omission to state evidence favorable to a party is not assignable as error unless pointed out at the time. *Bank v. Sumner*, 119 N. C. 591.

³²—It is not necessary to give the exact language of a witness. *People v. Doyell*, 48 Cal. 85; *State v. Moses*, 13 N. C. 452; *Krepps v. Carlisle*, 157

Pa. St. 358; *Strawn v. Shank*, 110 Pa. St. 259.

³³—If the court undertakes, in a criminal case, to give a part of the testimony, it is safer to recite the witness' language as taken down by the shorthand reporter, or in the judge's notes. *People v. Doyell*, 48 Cal. 85.

³⁴—*People v. Boggs*, 20 Cal. 432.

³⁵—*Myer v. Brooklyn City R. Co.*, 10 Misc. Rep. (N. Y.) 11.

tion of the jury called to the evidence applicable to such questions.³⁶

The words of each witness need not be stated separately. The witnesses may be grouped, and the substance of the testimony of a group of witnesses given, if it is fairly done.³⁷

In addition to stating the testimony of a witness, the court may state all the circumstances attendant upon the examination to show how they are contradictory, and how reconcilable, and then to submit a reasonable inference which may be drawn.³⁸

However, it is not improper to read or recite the evidence in the order in which it was given.³⁹

§ 142. Same—Absence of evidence.

The power of the court to sum up or recapitulate the evidence includes the right to state that there is no evidence as to a particular fact, when such is the case.⁴⁰

Thus, in an action for wrongful death, on the issue of contributory negligence, it has been held not improper to state that no living witness could be produced on such issue.⁴¹

36—State v. Summers, 19 S. C. 94.

The judge may place the evidence before the jury in the order in which it relates to the propositions which it is adduced to support or contradict. State v. Boyle, 104 N. C. 800; State v. Jones, 97 N. C. 469; State v. James, 31 S. C. 235; State v. White, 15 S. C. 392.

The court may eliminate the controverted facts, arrange the testimony in its bearing on their different aspects, and instruct the jury as to the law applicable thereto, in such manner as will enable them to see and comprehend the matters which are essential to an intelligent and impartial verdict. State v. Boyle, 104 N. C. 800.

37—Maynard v. Tyler, 168 Mass. 107.

38—State v. Moses, 13 N. C. 452.

The judge may make suggestions, fairly warranted by the evidence, to show the jury how it might be reconciled in some parts, and the difficulty of doing so in others. Com. v. McManus, 143 Pa. St. 64, 14 L. R. A. 89.

39—State v. Addy, 28 S. C. 13.

40—People v. Dick, 34 Cal. 663.

41—A statement that "what was the occasion for stopping at this point neither of the unfortunate victims is here to explain to us, and there is no evidence, probably, that can ever be obtained to explain it," has been held to mean that no living witness could probably be produced

§ 143. Same—Issues and theories.

The right to sum up the evidence includes the right to state that there is some evidence in support of a particular issue,⁴² and the court may properly state the theories which the evidence claims to prove, or the claims of the parties regarding the evidence.⁴³

In fact, it is regarded as the duty of the court to state the claims of both parties upon all questions of fact that arise in a case, in order that the jury may clearly understand them,⁴⁴ and that the court may explain properly the law applicable to the case.⁴⁵

Each litigant has a right to have his theory of the case presented to the jury,⁴⁶ and the instructions must submit

on the point at issue, and the instruction could not be understood as meaning that there was no circumstantial evidence in the case on this point. *Sutton v. Town of Vernon*, 62 Conn. 1.

42—*Harington v. Neely*, 7 Baxt. (Tenn.) 442.

43—*Hawes v. State*, 88 Ala. 37; *State v. Smith*, 49 Conn. 388.

Where the court charges that there is evidence on behalf of the plaintiff of a fact alleged by the plaintiff, and the court also charges that there is evidence on the part of the defendant to the contrary, the court is merely attempting to call the attention of the jury to the theories of the respective parties, and there is no violation of the statute which forbids the court from presenting the facts of the case to the jury. *Smitsen v. Southern Pac. Co.*, 37 Ore. 74, 60 Pac. 907.

44—*Dexter v. McCready*, 54 Conn. 174; *Mimms v. State*, 16 Ohio St. 221.

It is the duty of the judge to give the law applicable to all theories presented by the testimony. *Lamar v. King*, 168 Ala. 285.

A judge should give instructions applying the law to any theory of prosecution or defense that is in the case, which is all that should be asked in a case of disputed facts. *Wendt v. Village of Richmond*, 164 Mich. 173.

In an action for injuries sustained while attempting to alight from a street car it would have been error not to present defendant's side of the case. *Pack v. Camden Interstate R. Co.*, 154 Ky. 535.

Where the court has stated hypothetically the alleged facts constituting the theory of one of the parties, and given the law applicable to that theory, it is the duty of the court, if the evidence so authorizes, to state the alleged facts constituting the theory of the other party, and state the law applicable thereto, but this duty does not devolve on the court if the latter party's theory is unsupported by any evidence. *Banks v. State*, 89 Ga. 75.

45—*Mimms v. State*, 16 Ohio St. 221.

46—*West v. Shaw*, 61 Wash. 227, 112 Pac. 243.

every phase of the case made by the evidence, and every legitimate deduction to be drawn therefrom,⁴⁷ even though the court may not believe the evidence to be true.⁴⁸

§ 144. Same—Repetition of testimony—Requests of jury.

The court is not required to recapitulate the testimony adduced during the trial a second time, although one of the parties request that it be done,⁴⁹ but the right to state the evidence authorizes the trial judge to state the testimony of any witness at the request of the jury,⁵⁰ and it has been held that, after so doing, he may refuse to allow counsel to give his version of it after he had argued the case.⁵¹

§ 145. Effect of misstating evidence.

It is error warranting reversal to make an inaccurate statement of the evidence which has an important bearing on the jury's view of the case,⁵² or to erroneously state the evidence upon a pivotal fact in the case,⁵³ even though such mistake is made inadvertently and the evidence has been correctly stated elsewhere in the charge,⁵⁴ provided, of course, that such charge has the effect of misleading the jury to the prejudice of one of the parties.⁵⁵

A defendant is entitled to have an instruction as to the legal effect of the facts submitted to the jury, if found, when his evidence tends to prove them. *Allen v. Durham Traction Co.*, 144 N. C. 288.

47—*Christian v. State*, 71 Tex. Cr. App. 566; *Freeman v. State*, 52 Tex. Cr. App. 500.

48—The fact that the evidence may be such that the court may believe it untrue will not change this rule. *Freeman v. State*, 52 Tex. Cr. App. 500.

49—*Aston v. Craigmiles*, 70 N. C. 316.

50—*People v. Ybarra*, 17 Cal. 166; *State v. Smith*, 10 Nev. 106; *Atchison v. State*, 13 Lea (Tenn.) 279.

51—*Atchison v. State*, 13 Lea (Tenn.) 279.

52—*American Oak Extract Co. v. Ryan*, 104 Ala. 267; *Collins v. Leafey*, 23 Wkly. Notes Cas. (Pa.) 264.

53—*Steinbrunner v. Pittsburgh & W. Ry. Co.*, 146 Pa. St. 504, 28 Am. St. Rep. 806.

54—*Steinbrunner v. Pittsburgh & W. Ry. Co.*, 146 Pa. St. 504, 28 Am. St. Rep. 806.

55—*California*. *People v. Boggs*, 20 Cal. 432.

Kansas. *Bellew v. Ahrburg*, 23 Kan. 287.

Michigan. *People v. Caldwell*, 107 Mich. 374.

Pennsylvania. *Knapp v. Griffin*, 140 Pa. St. 604.

United States. *Texas & P. Ry. Co.*

According to some decisions, however, the court's attention should be called to the misstatement and a request made that it be corrected.⁵⁶

As illustrative of error in misstating the evidence, it may be stated that an instruction conveying the impression that only one witness has testified to an alleged contract, is erroneous when as a matter of fact there were two,⁵⁷ and in an action for commissions, an instruction which did not correctly state the terms of the contract alleged and proved was erroneous, and such charge was not cured by a subsequent instruction inconsistent therewith.⁵⁸

In an action of assumpsit for the price and value of coal claimed to have been sold to defendants, an instruction referring to a conversation with one of the defendants, which the evidence showed did not occur until a later time was misleading and prejudicial.⁵⁹

§ 146. Instructions violating statutes or constitutional provisions prohibiting summing up of evidence.

Under a constitutional provision that the judges shall not charge juries with respect to matters of fact, but shall declare the law, it has been held not error to give an instruction stating the facts in hypothetical form for the purpose

v. Gentry, 163 U. S. 353, 41 L. Ed. 186.

For a misstatement of the evidence to be a ground for reversal, it must be a misstatement of some substantial part of the testimony, and it must also be calculated to mislead the jury. *Bellew v. Ahrburg*, 23 Kan. 287.

56—*New York*. *Arnstein v. Haulenbeek*, 16 Daly 382.

Pennsylvania. *Knapp v. Griffin*, 140 Pa. St. 604.

South Carolina. *Rumph v. Hiott*, 35 S. C. 444; *State v. Davis*, 27 S. C. 609.

Wisconsin. *Muetze v. Tuteur*, 77 Wis. 236, 9 L. R. A. 86, 20 Am. St.

Rep. 115; *Braunsdorf v. Fellner*, 76 Wis. 1.

It is necessary to suggest correction at once, and not silently reserve it for future exception, in order to preserve for review error in a recapitulation of the evidence. *Rumph v. Hiott*, 35 S. C. 444; *State v. Davis*, 27 S. C. 609; *Muetze v. Tuteur*, 77 Wis. 236, 9 L. R. A. 86, 20 Am. St. Rep. 115.

57—*Idaho Mercantile Co. v. Kalanquin*, 8 Idaho 101, 66 Pac. 933.

58—*Cobb v. Dunlevie*, 63 W. Va. 398.

59—*Cone v. American Electric Fuse Co.*, 145 Mich. 536.

of declaring the law applicable to the case, the evidence not being recited.⁶⁰

It has, however, been held improper to ask the jury whether a witness has testified to certain facts which have in fact been testified to,⁶¹ or to give an instruction stating: "Does C. testify that his father never paid any rent on the land, and that he had it in exclusive possession? Does B. testify that G. used the land as his own, worked it, fenced it, ditched it, cleaned it, built barns and stables, and the other tenants out of possession allowed him to go on doing that for twenty years and upwards? They cannot now come into court and ask that he be disturbed."⁶²

Under a statute prohibiting summing up of the evidence an instruction that, if the jury believe the testimony of a designated witness (setting out what the testimony was), they might find for plaintiff, has been held erroneous for stating what that testimony was, that being a matter to be determined entirely by the jury.⁶³

60—*Jenkins v. Charleston St. Ry. Co.*, 58 S. C. 373.

61—*State v. Stello*, 49 S. C. 488.

62—*Burnett v. Crawford*, 50 S. C. 168.

63—*Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

CHAPTER XIV.

GIVING UNDUE PROMINENCE TO EVIDENCE, ISSUES, AND THEORIES.

- § 147. Giving undue prominence to certain evidence or facts.
- § 148. Same—Instructions held erroneous as singling out and giving undue prominence to the evidence.
- § 149. Same—Instructions held not erroneous as singling out and giving undue prominence to the evidence.
- § 150. Singling out particular witnesses.
- § 151. Same—Illustrations.
- § 152. Repetition.
- § 153. Same—Illustrations.
- § 154. Singling out issues and theories.

§ 147. Giving undue prominence to certain evidence or facts.

It is a well settled rule of practice that the court must not instruct specially upon particular portions of the evidence, thereby giving undue prominence to such evidence,¹

1—**Alabama.** *Southern R. Co. v. Weatherlow*, 164 Ala. 151; *Henderson v. State*, 11 Ala. App. 37.

Arkansas. *Bush v. State*, 37 Ark. 215.

California. *People v. Sanders*, 114 Cal. 216, 46 Pac. 153.

Georgia. *Flowers v. Flowers*, 89 Ga. 632, 18 L. R. A. 75n.

Illinois. Instructions should not single out and give undue prominence to particular facts. *Swigart v. Savely*, 176 Ill. App. 369; *Painkinsky v. Illinois Cent. R. Co.*, 165 Ill. App. 556; *Rosinski v. Burton*, 163 Ill. App. 162; *Nave v. Gross*, 162 Ill. App. 83.

An instruction giving undue prominence to particular facts or circumstances is improper. *Floto v. Floto*, 233 Ill. 605; *Eckels v. Muttschall*, 230 Ill. 462, aff'g 131 Ill. App. 639; *Wickes v. Walden*, 228 Ill. 56; *Stern v. Bradner Smith & Co.*, 225 Ill. 430, 116 Am. St. Rep. 151, aff'g 127 Ill. App. 640; *Police-men's Benev. Ass'n of Chicago v. Ryce*, 213 Ill. 9, 104 Am. St. Rep. 190, aff'g 115 Ill. App. 95; *Ballah v. Peoria Life Ass'n*, 159 Ill. App. 222; *Harvey v. McQuirk*, 158 Ill. App. 50; *Dangerfield v. Hope*, 157 Ill. App. 63; *Ventriss v. Pana Coal Co.*, 155 Ill. App. 152; *Karkowski v. LaSalle*

and requests for instructions which are open to this objec-

County Carbon Coal Co., 154 Ill. App. 400, aff'd 248 Ill. 195; Sheridan v. Chicago & O. P. El. R. Co., 153 Ill. App. 70; Harding v. St. Louis Nat. Stock Yards, 149 Ill. App. 370, aff'd 242 Ill. 444; Haywood v. Dering Coal Co., 145 Ill. App. 506.

Indiana. Barker v. State, 48 Ind. 163; McCorkle v. Simpson, 42 Ind. 453; Baxter v. Baxter, 46 Ind. App. 514.

Iowa. Case v. Chicago G. W. R. Co., 147 Iowa 747.

Kansas. Gross v. Shaffer, 29 Kan. 442.

Kentucky. Moran v. Higgins, 19 Ky. L. Rep. 456.

Michigan. Heddle v. City Elec. Ry. Co., 112 Mich. 547; Banner v. Schlessinger, 109 Mich. 262.

Minnesota. Kincaid v. Jungkunz, 109 Minn. 400; Goodhue Farmers' Warehouse Co. v. Davis, 81 Minn. 210.

Mississippi. Godwin v. State, 73 Miss. 873; Prine v. State, 73 Miss. 838.

Missouri. Meriwether v. Publishers, 224 Mo. 617; Jackson v. Kansas City, Ft. S. & M. R. Co., 157 Mo. 621, 80 Am. St. Rep. 650; Meyer v. Pacific R. Co., 40 Mo. 151; Mead v. Brotherton, 30 Mo. 201; Lucks v. Northwestern Sav. Bank, 148 Mo. App. 376; Kirn v. E. E. Souther Iron Co., 146 Mo. App. 451; Pourcelly v. Lewis, 8 Mo. App. 593.

Nebraska. Argabright v. State, 49 Neb. 760.

North Carolina. Wilson v. White, 80 N. C. 280.

Ohio. Callahan v. State, 21 Ohio St. 306.

Oregon. Church v. Melville, 17 Ore. 413, 21 Pac. 387.

Pennsylvania. Reichenbach v. Ruddach, 127 Pa. St. 564.

South Carolina. Carr v. Mouzon, 86 S. C. 461; Montgomery v. Scott, 10 Rich. 449.

Texas. Goodbar v. City Nat. Bank of Sulphur Springs, 78 Tex. 461; Galveston, H. & S. A. Ry. Co. v. Kutae, 76 Tex. 473; Medlin v. Wilkins, 60 Tex. 409; Bell v. Hutchings (Tex. Civ. App.), 41 S. W. 200; International & G. N. R. Co. v. Newman (Tex. Civ. App.), 40 S. W. 854; De Rossett v. State, — Tex. Cr. App. —, 168 S. W. 531; Cunningham v. State, — Tex. Cr. App. —, 166 S. W. 519; Hahn v. State, — Tex. Cr. App. —, 165 S. W. 218; Kauffman v. State, 53 Tex. Cr. App. 209; Parnell v. State, 51 Tex. Cr. App. 620.

Vermont. Reed v. Reed, 56 Vt. 492.

Virginia. Montgomery v. Com., 98 Va. 852; New York, P. & N. R. Co. v. Thomas, 92 Va. 606.

Washington. Sexton v. School Dist. No. 34, Spokane Co., 9 Wash. 5, 36 Pac. 1052.

United States. Coffin v. United States, 162 U. S. 664, 40 L. Ed. 1109. Compare Virgie v. Stetson, 73 Me. 452; State v. Smith, 65 Me. 257; Millay v. Millay, 18 Me. 387.

An instruction singling out and giving undue prominence to a fact is erroneous. Kirn v. E. E. Souther Iron Co., 146 Mo. App. 451.

It is never permissible for a court to single out the evidence and charge upon the same. Parnell v. State, 51 Tex. Cr. App. 620.

It does not devolve upon the trial court to single out isolated parts of the evidence and tell the jury, *seriatim*, that these several points

tion may be properly refused,² even though such instructions assert a correct principle of law.³

The reason for this rule is that such instructions are both

do not authorize a conviction. *Kauffman v. State*, 53 Tex. Cr. App. 209.

The court cannot pick out one item of evidence tending to establish any state of facts, when there are also others, and charge on that one item. *De Rossett v. State*, — Tex. Cr. App. —, 168 S. W. 531.

2—**Alabama.** *Bley v. Lewis*, — Ala. —, 66 So. 454; *Clayton v. State*, 185 Ala. 13; *Birmingham Railway, Light & Power Co. v. Adkins*, 8 Ala. App. 555; *Jefferson v. State*, 8 Ala. App. 364; *Brooks v. State*, 8 Ala. App. 277; *Wingate v. State*, 1 Ala. App. 40.

California. *People v. Hawes*, 98 Cal. 648, 33 Pac. 791.

Connecticut. *Harris v. City of Ansonia*, 73 Conn. 359.

Georgia. *Model Mill Co. v. McEver*, 95 Ga. 701.

Illinois. *Scott v. People*, 141 Ill. 195; *City of Aurora v. Hillman*, 90 Ill. 61; *Callaghan v. Myers*, 89 Ill. 566; *Grube v. Nichols*, 36 Ill. 95; *Donahue v. Egan*, 85 Ill. App. 20.

Indiana. *Toledo, St. L. & K. C. R. Co. v. Mylott*, 6 Ind. App. 438.

Iowa. *Merrill v. Hole*, 85 Iowa 66; *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50 Iowa 656.

Kansas. *City of Atchison v. King*, 9 Kan. 550; *Anderson v. Canter*, 10 Kan. App. 167, 63 Pac. 285.

Massachusetts. *Poole v. Boston & M. R. R.*, 216 Mass. 12.

Michigan. *Dawson v. Falls City Boat Club*, 125 Mich. 433; *People v. Pope*, 108 Mich. 361; *Busch v. Wilcox*, 82 Mich. 315.

Missouri. *State v. Raftery*, 252 Mo. 72; *State v. Cantlin*, 118 Mo.

100; *Chaney v. Phoenix Ins. Co.*, 62 Mo. App. 45.

North Carolina. *State v. Clara*, 53 N. C. 25.

Tennessee. *Gulf Compress Co. v. Stuyvesant Ins. Co. of Pennsylvania*, 129 Tenn. 586; *Cooper v. State*, 123 Tenn. 37.

Texas. *Schunior v. Russell*, 83 Tex. 83; *Panhandle Nat. Bank v. Emery*, 78 Tex. 498; *Minter v. State*, 70 Tex. Cr. App. 634.

Vermont. *Reed v. Reed*, 56 Vt. 492.

It has been held not a ground for reversal that the court failed to give an instruction limiting the effect of evidence, not competent for some purposes, where to do so would have the effect of calling the attention of the jury to a very strong criminating fact, and so the omission was not calculated to injure the accused.

Alabama. *Southern Ry. Co. v. Reaves*, 129 Ala. 457; *Pearson v. Adams*, 129 Ala. 157; *Huskey v. State*, 129 Ala. 94; *Decatur Car Wheel & Manufacturing Co. v. Mehaffey*, 128 Ala. 242; *Gilmore v. State*, 126 Ala. 20.

Kentucky. *Travelers' Ins. Co. v. Clark*, 109 Ky. 350, 95 Am. St. Rep. 374.

Nebraska. *Chapman v. State*, 61 Neb. 888.

Texas. *Thornley v. State*, 36 Tex. Cr. App. 118, 61 Am. St. Rep. 837.

West Virginia. *State v. Morrison*, 49 W. Va. 210.

United States. *Connecticut Mut. Life Ins. Co. v. Hillmon*, 46 C. C. A. 668, 107 Fed. 834.

3—*Eaton v. State*, 8 Ala. App. 136.

argumentative⁴ and misleading,⁵ as having a tendency to induce the jury to give undue weight to the evidence singled out.⁶

It has also been held that such instructions are violative of constitutional provisions as to charging on the facts.⁷

If the court either upon its own motion or at the request of a party selects or makes special mention of some one alleged fact or feature of the testimony and instructs upon its legal effect, this particular phase of the case is given undue prominence and may work substantial injustice.⁸

The trial judge cannot emphasize special parts of the testimony to the exclusion of other parts, laying stress now upon this and now upon that portion of the evidence,⁹ and an instruction which centers the jury's attention upon a mere detail, thereby giving it undue prominence, and thus obscuring the questions involved, is erroneous.¹⁰

"It is error for the court to single out a certain fact or circumstance and instruct the jury as to the legal inference to be deduced from that particular fact to the exclusion

4—*Louisville & N. R. Co. v. Hurt*, 101 Ala. 34; *Martin v. Johnson*, 89 Ill. 537; *Chapman v. State*, 61 Neb. 888; *Reed v. Reed*, 56 Vt. 492.

5—*Barbour v. Shebor*, 177 Ala. 304.

6—*McCartney v. McMullen*, 38 Ill. 237; *Strehmann v. City of Chicago*, 93 Ill. App. 206; *Safe Deposit & Trust Co. of Baltimore v. Berry*, 93 Md. 560; *Medlin v. Wilkins*, 60 Tex. 409; *De Rossett v. State*, — Tex. Cr. App. —, 168 S. W. 531; *State v. Morrison*, 49 W. Va. 210.

7—The Constitution does not allow the presiding judge to state the evidence. Much less does it allow him to single out any particular act or omission of the defendant and instruct that if that appears the jury may infer that the defendant was negligent. *Finch v. Atlanta & C. A.*

L. Ry., 87 S. C. 190. See also, *State v. Johnson*, 85 S. C. 265.

8—*Gray v. Chicago, R. I. & P. R. Co.*, 160 Iowa 1.

9—*Gulf Compress Co. v. Stuyvesant Ins. Co. of Pennsylvania*, 129 Tenn. 586.

All the evidence is for the consideration of the jury, and the practice of making detached portions prominent should not be encouraged. *Hatch v. Marsh*, 71 Ill. 370.

10—*Geddes v. Van Rhee*, 126 Minn. 517.

It is error to single out a particular fact appearing from the evidence and instruct the jury that such fact alone is insufficient to warrant or prevent a recovery. *Swan v. Boston Store of Chicago*, 177 Ill. App. 349, 7 N. C. C. A. 938.

of other facts,"¹¹ and an instruction directing a verdict, which calls attention to certain portions of the evidence and thereby emphasizes the same, is misleading.¹²

Instructions should not be so drawn as to direct the attention of the jury only to the facts which are favorable to one of the parties, leaving out of view those which sustain or tend to sustain the contention of his adversary.¹³

There are some exceptions to the general rule as to singling out and giving undue prominence to particular facts, however. Thus it has been held that such rule has no application where plaintiff's entire case rests upon a single undisputed fact,¹⁴ and it has been said that the court may

11—*Kellogg v. Ford*, 70 Ore. 213, 139 Pac. 751.

The instructions "should be so framed that all parts of the evidence should be considered and weighed by the jury," and not be based on isolated parts of the evidence. *Reese v. Beck*, 24 Ala. 662; *Newton v. State*, 37 Ark. 333; *Winter v. Bandel*, 30 Ark. 383; *Phillips v. Roberts*, 90 Ill. 492; *Moore v. Wright*, 90 Ill. 470; *City of Aurora v. Hillman*, 90 Ill. 61; *Ogden v. Kirby*, 79 Ill. 557; *Wilson v. White*, 80 N. C. 280.

12—*Miller v. Eversole*, 184 Ill. App. 362.

An instruction which singles out an inconclusive fact and directs a verdict thereon, or which particularly directs the attention of the jury and gives undue prominence to certain facts and portions of the evidence, is properly refused. *Swigart v. Savely*, 176 Ill. App. 369.

13—*Georgia*. *Flowers v. Flowers*, 92 Ga. 688.

Illinois. *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Protection Life Ins. Co. v. Dill*, 91 Ill. 174; *Graves v. Colwell*, 90 Ill. 612; *Moore v. Wright*, 90 Ill. 470; *City of Aurora v. Hillman*,

90 Ill. 61; *Martin v. Johnson*, 89 Ill. 537; *Evans v. George*, 80 Ill. 51; *Pittsburgh, C. & St. L. R. Co. v. Dahlin*, 67 Ill. App. 99.

Michigan. *Banner v. Schlessinger*, 109 Mich. 262; *People v. Murray*, 72 Mich. 10.

Mississippi. *Prine v. State*, 73 Miss. 838.

Pennsylvania. *Hayes v. Pennsylvania, R. Co.* 195 Pa. St. 184; *Reber v. Herring*, 115 Pa. St. 599; *Minick v. Gring*, 1 Pa. Super. Ct. 484.

It is not reversible error for the court to recite the evidence for the plaintiff more fully than the evidence for the defendant, where the substance of both is fairly and impartially stated. *Jamison v. Hawkins*, 13 Pa. Super. Ct. 372.

It is the duty of the jury to consider all the testimony in the case, as well that which makes for one party as for the other. *Moore v. Wright*, 90 Ill. 470.

14—*Keyes v. Fuller*, 9 Ill. App. 528. See also, *Love v. Gregg*, 117 N. C. 467, where it was held that an instruction that if the jury believe a single uncontradicted witness the case is made out, was not erroneous.

properly call the attention of the jury to evidence which is obscure, and which might escape their attention.¹⁵

Though it is not ordinarily competent for a party to select a part of the facts which his adversary claims to have proved, and require a charge upon them, yet an instruction may be based on facts so selected, if their effect cannot be varied by others which may have been proved.¹⁶

A party may ask an instruction that certain facts in the case present a certain question of law, and has a right to the opinion of the court as to what principle is applicable to the facts, though other facts, not embraced in the hypothesis assumed, may justify an application for other and different instructions.¹⁷

Whether or not the charge gives undue prominence to a portion of the evidence depends upon the nature of the evidence, and if the substance of the evidence for both parties is fairly and impartially stated, one party cannot complain that the evidence of his adversary is more fully or prominently stated than his own.¹⁸

It has been said that the court will not, as a general rule, reverse for the giving of instructions singling out and giving undue prominence to evidence, if there are no other errors,¹⁹ and an instruction is not objectionable on the ground that it gives undue prominence to certain facts, if such facts are immaterial to the issues involved,²⁰ but if it

15—*West v. Chicago & N. W. Ry. Co.*, 77 Iowa 657.

16—*Beers v. Housatonic R. Co.*, 19 Conn. 570.

17—*Birney v. New York & W. Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607n.

18—*Irvin v. Kutruuff*, 152 Pa. St. 609; *Jamison v. Hawkins*, 13 Pa. Super. Ct. 372.

19—*McCartney v. McMullen*, 38 Ill. 237. See also, *Medlin v. Wilkins*, 60 Tex. 409, where it was said that a disregard of the rule against em-

phasizing "any particular portion of the evidence * * * will only afford ground for reversal when it is calculated to mislead the jury." And see *Bertram v. People's Ry. Co.*, 154 Mo. 639; *Gulf, C. & S. F. Ry. Co. v. Gordon*, 70 Tex. 80; *Houston & T. C. Ry. Co. v. Larkin*, 64 Tex. 454; *Maes v. Texas & N. O. Ry. Co.* (Tex. Civ. App.), 23 S. W. 725.

20—*Bertram v. People's Ry. Co.*, 154 Mo. 639, wherein the instructions gave undue prominence to plaintiff's advanced age. See also *Conover v.*

is clear that the jury have been misled to the injury of the party complaining, the judgment will be reversed.²¹

Thus, if the case is a close one on the evidence, and the court singles out and lays special stress on the evidence in favor of one of the parties, and no special reference is made anywhere in the charge to any of the evidence favorable to the other side, the judgment will be reversed.²²

§ 148. Same—Instructions held erroneous as singling out and giving undue prominence to the evidence.

As illustrative of the rule against singling out and giving undue prominence to portions of the evidence, it has been held error to give instructions that the jury may look to certain facts in determining questions of fact before them,²³ that the jury cannot look to certain evidence in determining a disputed question of fact,²⁴ or that certain facts in evidence are not conclusive evidence of one of the ultimate facts in issue, irrespective of whether the proposition of law is correct or not.²⁵

“An instruction which selects conversations, testified to by the party asking it, and attempts to lay down certain conditions, upon which, alone, such conversations can be regarded as proved by a preponderance of the evidence” is erroneous,²⁶ and it has also been held error to give a charge that the declarations and admissions of a party to

Carpenter, 57 Wash. 146, 106 Pac. 620; Schubert v. Schubert, 168 Ill. App. 419.

21—Flowers v. Flowers, 92 Ga. 688; Holt v. State, 62 Ga. 314; Jacksonville & S. E. Ry. Co. v. Walsh, 106 Ill. 253; Pennsylvania Co. v. Stoelke, 104 Ill. 201; Brown v. Monson, 51 Ill. App. 490; Com. v. Delaney, 16 Ky. L. Rep. 509; Polly v. Com., 16 Ky. L. Rep. 203; Reber v. Herring, 115 Pa. St. 599; McCabe v. City of Philadelphia, 12 Pa. Super. Ct. 383.

22—Flowers v. Flowers, 92 Ga.

688; McCabe v. City of Philadelphia, 12 Pa. Super. Ct. 383.

23—Jackson v. Robinson, 93 Ala. 157; Alabama Great Southern R. Co. v. Sellers, 93 Ala. 9, 30 Am. St. Rep. 17; Hussey v. State, 86 Ala. 34; Huffman v. Graves, 245 Ill. 440.

24—Stone v. State, 105 Ala. 60. See also, Gash v. Home Ins. Co., 153 Ill. App. 31; Huffman v. Graves, 245 Ill. 440.

25—Merchants' Loan & Trust Co. v. Lamson, 90 Ill. App. 18.

26—Horne v. Walton, 117 Ill. 131.

the action can be considered by the jury as any other evidence.²⁷

So, "an instruction reciting certain acts and declarations of the plaintiff as testified to by the defendants, and informing the jury that if they believe the existence of such facts and circumstances as sworn to, then such facts, unless otherwise satisfactorily explained, have a tendency to prove that the defendants did not make the alleged contract," is erroneous.²⁸

An instruction to "look to the declarations of the plaintiff, C., to see whether she ever claimed the property in question as her homestead, and to her declarations about leaving it; and they will look to the evidence to see whether she did leave it or leave the state in accordance with her declarations, and, if so, then her declarations are evidence of her intention, and, if the evidence shows that she left the state in 1866, and refused to return when requested by her husband by letter, then the abandonment is complete, and the jury will find for defendant," is also erroneous.²⁹

It is erroneous to give an instruction calling the attention of the jury specially to certain portions, bearing upon the question of the scope of a party's agency, and omitting other facts in evidence bearing upon the same question,³⁰ as well as to give an instruction, where a photograph was admitted to show the location and appearance of buildings, that "it was for the jury to say how much stock they take in testimony of that kind," since the intimation was that the jury ought not to give any weight to such evidence.³¹

On the subject of adverse possession, it is not error for the court to refuse to single out and emphasize evidence that the giving of a deed or mortgage by one in possession of land is ordinarily evidence of assertion of title.³²

27—Dobbs v. Cates' Estate, 60 Mo. App. 658.

28—Brant v. Gallup, 5 Ill. App. 262.

29—Burcham v. Gann, 1 Posey Unrep. Cas. (Tex.) 333.

30—Pope v. Lowitz, 14 Ill. App. 96.

31—City of Chicago v. Spoor, 190 Ill. 340, rev'g 91 Ill. App. 472.

32—Carr v. Mouzon, 86 S. C. 461.

Except in cases where the law itself raises a particular presumption from a certain fact or set of facts, the judge should not give his opinion of the probative value of a particular fact, and comment upon any particular fact in evidence is equally vicious, whether its effect is to exaggerate or diminish the importance of such fact as evidence.³³

And it is also improper to call the attention of the jury to particular testimony in such a way as to throw discredit upon it, or to lead the jury to believe that the judge discredits the testimony of the witnesses.³⁴

In negligence cases the following instructions have been held erroneous: An instruction singling out an isolated fact, and telling the jury that, as matter of law, it amounts to negligence;³⁵ an instruction calling attention to a single omission of the defendant, and submitting to the jury the question whether such omission constituted negligence, without reference to the surroundings or attendant circumstances;³⁶ an instruction that the occurrence of a miscarriage did not tend to prove that the accident was the proximate cause of it, and not stating the other evidence;³⁷ an instruction singling out a particular act, and stating that it would not constitute proper care, the issue being contributory negligence;³⁸ an instruction as to contributory negligence which singles out and calls the attention of the jury to a particular point in the evidence that is indecisive and a mere circumstance bearing upon such fact, omitting reference, except by the words "in connection with the other facts and circumstances of the case," to all other important circumstances in proof, is erroneous and mis-

33—Leeser v. Boekhoff, 33 Mo. App. 223.

34—Wilson v. Hotchkiss' Estate, 81 Mich. 172. And see Wolf v. City of Venice, 152 Ill. App. 585, rev'd 242 Ill. 544.

35—Meyer v. Pacific R. Co., 40 Mo. 151.

36—Wabash R. Co. v. Stewart, 87

Ill. App. 446. See also, Krieger v. Aurora, E. & C. R. Co., 148 Ill. App. 613.

37—Strehmann v. City of Chicago, 93 Ill. App. 206.

38—International & G. N. R. Co. v. Newman (Tex. Civ. App.), 40 S. W. 854.

leading as giving undue prominence to such indecisive point.³⁹

A charge singling out circumstances which the jury might consider as tending to excuse a plaintiff's wife in jumping from the steps of a moving train and directing the jury that such circumstances would excuse her unless the danger was so apparent that no person of ordinary prudence would have undertaken it, is improper.⁴⁰

In an action for personal injuries, an instruction given for the plaintiff which calls special attention to the disfigurement of the plaintiff as a basis for estimating damages, is erroneous.⁴¹

Also, an instruction on damages calling particular attention to loss of masculine vigor is improper.⁴²

In criminal cases it is error to single out the question of motive for the commission of the crime or the absence of motive and tell the jury they may consider that as a circumstance in favor of the guilt or innocence of the accused,⁴³ or to give an instruction that if the jury believe the testimony of a particular witness with regard to a disputed fact, they must acquit.⁴⁴

A charge which singles out part of the evidence and instructs that an acquittal should be had upon a consideration of the evidence specially referred to, in connection with other evidence in the case, is improper,⁴⁵ and it is error to give an instruction singling out the conduct, demeanor or expressions of the defendant, when their weight and importance depend wholly on their combination with other inculpatory facts, and directing the jury that they may look to it alone, as tending to show the defendant's guilt.⁴⁶

39—*Bice v. Wheeling Electrical Co.*, 62 W. Va. 685.

40—*Ft. Worth & D. C. R. Co. v. Watkins*, 48 Tex. Civ. App. 568.

41—*Taylor v. Peoria, B. & C. Traction Co.*, 184 Ill. App. 188.

42—*Loftus v. Illinois Midland Coal Co.*, 181 Ill. App. 197.

43—*Scott v. State*, 109 Ark. 391.

44—*Frost v. State*, 124 Ala. 71.

45—*Watts v. State*, 8 Ala. App. 264.

46—*McAdory v. State*, 62 Ala. 154.

It is also error to give an instruction that "accused may offer evidence of his previous good character, not only where a doubt exists on the other proof, but even to generate a doubt as to his guilt."⁴⁷

An instruction which informs the jury that they may consider threats made by the deceased against the defendant in determining who brought on the difficulty, and thus generate a doubt of defendant's guilt, is erroneous.⁴⁸

An instruction that flight "is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is in some sense—feeble or strong, as the case may be—a confession," has also been held erroneous.⁴⁹

On a trial for homicide, where there is competent evidence that the defendant is guilty and that he committed the crime to gratify a desire for revenge rather than through fear of injury, it is improper to call attention to such evidence in an instruction.⁵⁰

An instruction that "a house of prostitution cannot be proven to be such by mere reputation, but other evidence must be offered," should not be given when it singles out such evidence of reputation and there is other evidence in the case.⁵¹

An instruction that if the jury find the defendant guilty they should consider certain enumerated facts in determining what punishment should be inflicted, where the facts enumerated are favorable to the defendant, and the instruction does not particularize other testimony having a contrary tendency, is erroneous.⁵²

47—*Miller v. State*, 107 Ala. 40.

48—*Crawford v. State*, 112 Ala. 1.

49—*Alberty v. United States*, 162 U. S. 499, 40 L. Ed. 1051, in which the reviewing court said that this instruction placed too much stress on the fact of flight, and permitted the inference that this fact alone might

be sufficient to raise a presumption of guilt.

50—*State v. Rogers*, 253 Mo. 399.

51—*Smith v. State*, — Tex. Cr. App. —, 164 S. W. 825.

52—*Gilmore v. State*, 126 Ala. 20, holding that such an instruction was properly refused.

§ 149. Same—Instructions held not erroneous as singling out and giving undue prominence to the evidence.

An instruction containing a mere statement of the plaintiff's claims is not erroneous,⁵³ and where contradictory testimony has been given, it is not error to instruct the jury to consider the probability or improbability of such testimony.⁵⁴

Also an instruction that if the jury shall find from the evidence that the facts involved in the issue are proven, reciting the facts, they shall find for the party whose case is established by such facts, is not erroneous. If the facts alleged in the declaration are sufficient to make out plaintiff's case, and the court recites all of such facts, the objection cannot be urged that the instruction did not state the facts going to establish the defense.⁵⁵

An instruction stating the law on the issue of negligence in not having proper appliances to prevent the emission of sparks, when such issue is not presented elsewhere, except in instructions requested by the defendant, is not erroneous.⁵⁶

In an action for death by wrongful act, it is not error to instruct the jury that if the mind and mental faculties of the deceased were impaired and, by reason of such condition of mind, he could not comprehend the danger in attempting to cross the tracks, they should consider such fact in determining the question of contributory negligence.⁵⁷

On a trial of two defendants for an affray, where the

53—McCann v. Ullman, 109 Wis. 574.

54—Bowsher v. Chicago, B. & Q. R. Co., 113 Iowa 16.

55—Chicago & N. W. Ry. Co. v. Snyder, 117 Ill. 376; Frame v. Badger, 79 Ill. 442.

56—International & G. N. R. Co. v. Newman (Tex. Civ. App.), 40 S. W. 854. See also, Engvall v. Des

Moines City R. Co., 145 Iowa 560, where an instruction in a negligence case was held not erroneous although portions of the evidence were presented to the jury for consideration in determining negligence.

57—Jackson v. Kansas City, Ft. S. & M. R. Co., 157 Mo. 621, 80 Am. St. Rep. 650.

testimony of each tended to excuse himself and to convict the other, an instruction to acquit one of the defendants if they believed his representation of the facts, and to convict both if they accepted the testimony of a named person, but that they should acquit such defendant unless they were satisfied of his guilt from all the testimony, has been held not to give undue emphasis to the testimony of the witness named.⁵⁸

On a prosecution for rape, where it was necessary for the court to require the commonwealth to select one certain time at which defendant was alleged to have committed the crime, an instruction referring to an occasion as to which the prosecutrix testified was proper, so that the jury might confine their verdict to the crime committed on that occasion.⁵⁹

An instruction that certain evidence, brought out on cross-examination of the defendant, could be considered only as affecting his credibility, and not as tending to show guilt of the crime charged, is not erroneous.⁶⁰

§ 150. Singling out particular witnesses.

It is improper to give an instruction which singles out the testimony of a particular witness or particular witnesses and gives undue prominence thereto.⁶¹

58—State v. Weathers, 98 N. C. 685.

59—McCreary v. Com., 158 Ky. 612.

60—Jasper v. State (Tex. Cr. App.), 61 S. W. 392.

61—Alabama. Central of Georgia R. Co. v. Dothan Mule Co., 159 Ala. 225; Southern Ry. Co. v. Reaves, 129 Ala. 457; Thompson v. State, 106 Ala. 67; Steed v. Knowles, 97 Ala. 573; Gibson v. Snow Hardware Co., 94 Ala. 346.

Illinois. People v. Mendelson, 264 Ill. 453, L. R. A. 1915 C 627n; Judy v. Judy, 261 Ill. 470; Wolf v. City of

Venice, 152 Ill. App. 585; People v. Whalen, 151 Ill. App. 16; Hughes v. Hughes, 133 Ill. App. 654; Donahue v. Egan, 85 Ill. App. 20.

Michigan. Fraser v. Haggerty, 86 Mich. 521; Chase v. Buhl Iron Works, 55 Mich. 139; People v. Simpson, 48 Mich. 474; Grand Rapids & I. R. Co. v. Judson, 34 Mich. 507; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

Minnesota. State v. Yates, 99 Minn. 461.

Mississippi. Pigott v. State, — Miss. —, 65 So. 583.

North Carolina. State v. Rogers,

An instruction on the credibility of witnesses should be in general terms,⁶² and the practice of singling out a particular witness and charging specifically as to his interest in the case has often been disapproved on the ground that it gives undue prominence to his testimony and tends to discredit it.⁶³

When an instruction as to the impeachment of witnesses is in general terms, it is not special because it is applicable to only one witness.⁶⁴

While it has been held improper to single out a witness by name,⁶⁵ it has also been held that where "there is but one witness who testifies to a certain fact, and a party is entitled to have the existence of the fact so testified to sub-

93 N. C. 523; *Jackson v. Greene County Com'rs*, 76 N. C. 282; *Willey v. Gatling*, 70 N. C. 410; *Brem v. Allison*, 68 N. C. 412.

Texas. *Bell v. Hutchings* (Tex. Civ. App.), 41 S. W. 200.

The court should not place a particular witness in undue prominence by charging the jury to find according to their belief or disbelief in his evidence. *Thompson v. State*, 106 Ala. 67; *Fraser v. Haggerty*, 86 Mich. 521; *Chase v. Buhl Iron Works*, 55 Mich. 139; *People v. Simpson*, 48 Mich. 474; *Dolan v. Delaware & H. Canal Co.*, 71 N. Y. 285; *McGrath v. Metropolitan Life Ins. Co.*, 6 N. Y. St. 376; *Jackson v. Greene County Com'rs*, 76 N. C. 282; *Willey v. Gatling*, 70 N. C. 410; *Brem v. Allison*, 68 N. C. 412.

62—*North Chicago St. R. Co. v. Wellner*, 206 Ill. 272, aff'g 105 Ill. App. 652.

63—*Krahn v. J. L. Owens Co.*, 125 Minn. 33, 51 L. R. A. (N. S.) 650.

Instruction construed as not singling out a particular witness. *Chicago & A. R. Co. v. Winters*, 175 Ill. 293, aff'g 65 Ill. App. 435.

Instruction calling attention to the plaintiff's interest in the suit held proper. *Helbig v. Citizens' Ins. Co.*, 234 Ill. 251, aff'g 138 Ill. App. 115.

64—An instruction as to impeachment of witnesses held not special by being applicable to only one witness. *Penney v. Johnston*, 142 Ill. App. 634.

An instruction on the credibility of witnesses is not improper because singling out a particular witness, where he was the only one sought to be impeached. *Stevens v. People*, 215 Ill. 593.

65—It is improper to single out a witness by name and instruct the jury that they are judges of his credibility, though they are further instructed that they are also judges of the credibility of all the other witnesses. This instruction is calculated to make the jury believe that there is more question as to the credibility of the witness thus singled out than as to that of the other witnesses. *Davidson v. Wallingford*, 88 Tex. 619. See also, *Goodhue Farmers' Warehouse Co. v. Davis*, 81 Minn. 210.

mitted to the jury by instruction, the mere reference, in such an instruction, to the name of the witness, as a method of identifying his evidence, does not render the instruction erroneous, so as to justify the refusal of it.”⁶⁶

It may also be stated that a charge may be based on the evidence of a single witness in the cause, without noticing other testimony, if the testimony of the single witness is of such character that, if believed by the jury, it is decisive of the merits of the cause.⁶⁷

§ 151. Same—Illustrations.

“It is not customary or good practice to select the testimony of one witness, and tell the jury that they cannot render a verdict upon that testimony alone. While this may be true, the jury have a right to consider the testimony * * * in connection with all the other testimony in the case.”⁶⁸

An instruction which dwells repeatedly on the cases, where one witness is contradicted by more than one, and yet is to be believed, in a case where plaintiff's side of the case is supported by one witness and that of defendant by several witnesses, is erroneous,⁶⁹ and it is proper to refuse an instruction “that, if they [the jury] believe the testimony of certain witnesses as to the whereabouts of the

66—Hartmann v. Louisville & N. R. Co., 39 Mo. App. 88.

67—Hart v. Bray, 50 Ala. 446.

The judge can declare the law upon certain facts, which the testimony of a single witness tends to prove, without noticing other evidence pertaining to other phases of the case. Garrett's Adm'rs v. Garrett, 27 Ala. 687.

An instruction as to one witness is not objectionable where such matter was substantially the whole theory of the defense. Lecklieder v.

Chicago City Ry. Co., 172 Ill. App. 557.

68—Dawson v. Falls City Coat Club, 125 Mich. 433.

It is proper to refuse an instruction which puts a case to the jury upon the testimony of a single witness, and which directs them that if they believe such witness their verdict should be for a designated party. Grand Rapids & I. R. Co. v. Judson, 34 Mich. 507.

69—Lendberg v. Brotherton Iron Min. Co., 75 Mich. 84.

defendant at the time of the * * * alleged offense," they should acquit him.⁷⁰

In instructing as to the credibility of witnesses, it may be proper to enumerate elements which the jury may consider, but an instruction that the jury "must" or "should" consider such elements is liable to be misleading.⁷¹

An instruction that the plaintiff was a witness in his own behalf, that the jury are the sole judges of his credibility, that all statements made by him, if any, which are against his own interest must be taken as true, but his statements in his own favor are only to be given such credit as the jury under all the facts and circumstances in evidence deem them entitled to, is erroneous.⁷²

An instruction that in passing on the testimony of all the witnesses the jury might consider any interest which such witnesses might feel, is not objectionable as calling special attention to their credibility.⁷³

An instruction that in considering the testimony of witnesses, including that of the defendant, the jury will take into consideration the interest, if any, that the witness has in the result of the trial, is not such a reference to the testimony of the defendant as to pointedly aim at the credibility of the defendant as a witness for himself, or to impress the jury with the idea that the judge questioned his credibility.⁷⁴

An instruction as to ratification of alteration of a note which particularly refers to one defendant because he was the only solvent signer to the note, and the only real defendant to the action, is not objectionable.⁷⁵

70—Thompson v. State, 106 Ala. 67.

71—Lyons v. Chicago City Ry. Co., 258 Ill. 75.

72—Meyers v. Chicago, B. & Q. R. Co., 171 Mo. App. 283.

This instruction has been repeatedly condemned by the Missouri Supreme Court as singling out the

plaintiff and commenting on his testimony, and because it erroneously declares the law. See the cases cited in the Meyers case.

73—Chicago & A. R. Co. v. Anderson, 166 Ill. 572.

74—Fuentes v. State, 64 Fla. 64.

75—Waugh v. Cook, — Ark. —, 167 S. W. 103.

An instruction in an action of tort, that if the jury should give plaintiff's statements credit after considering the defendant's denial and all other testimony, the verdict should be for plaintiff, the court having also charged that the jury should take into consideration the whole of the testimony of plaintiff, and determine whether it was reasonable or not, and give it such weight as they should deem it entitled to, is not error.⁷⁶

So, an instruction that if the jury believe the evidence of a designated witness they will find for plaintiffs has been held not erroneous, as giving undue prominence to the testimony of the witness, where there were only two witnesses for the plaintiffs and one of them was called solely to corroborate the testimony of the witness mentioned.⁷⁷

§ 152. Repetition.

It is improper for the court to place too prominently before the jury any principle of law involved in the case, as by frequent repetition.⁷⁸

Where a number of instructions announce in varying language a single rule of law, the effect is to unduly impress the single principle announced upon the jury's minds to the exclusion, perhaps, of other equally important principles.⁷⁹

Repeated reference to the conditions upon which the plaintiff in a given case may recover, or what defense by the

76—Schenk v. Dunkelw, 70 Mich. 89.

77—Gregg v. Mallett, 111 N. C. 74.

78—Cincinnati Traction Co. v. Nellis, 81 Ohio St. 535; Traylor v. Townsend, 61 Tex. 144; Powell v. Messer's Adm'r, 18 Tex. 401; Sizemore v. St. Louis & S. F. Ry. Co., — Tex. Civ. App. —, 130 S. W. 1024; Brady v. Georgia Home Ins. Co., 24 Tex. Civ. App. 464. See also, Gallagher v. Neilon, — Tex. Civ. App. —, 121 S. W. 564.

Contra, Murray v. New York, L. & W. R. Co., 103 Pa. St. 37.

79—People v. Harrison, 261 Ill. 517.

Repeating the same propositions in different instructions and emphasizing points by repetition tends to prejudice the rights of litigants and has frequently been condemned. Bacon v. Walsh, 184 Ill. App. 377.

The giving of a number of instructions concluding with a direction to return a verdict of "not guilty," and unduly emphasizing by frequent repetition certain principles of law, held prejudicial. Wood v. Illinois Cent. R. Co., 185 Ill. App. 180.

defendant will defeat a recovery, is improper and sometimes erroneous.⁸⁰

Repetitions are not reversible error when necessary in order to apply any given rule of law to the various phases of the case raised by the evidence,⁸¹ or when such repetitions are not given such prominence as is calculated to mislead the jury into believing that the issue referred to was the controlling one.⁸²

It is also the rule that instructions should not be so drawn as to direct and repeatedly call attention to particular facts or features not in themselves conclusive;⁸³ but a violation of this rule is not necessarily a ground for reversal, and it seems that the judgment should not be reversed unless it is apparent that injury has resulted.⁸⁴

§ 153. Same—Illustrations.

In an action for injuries to a servant caused by a ladder being caught in machinery when he was carrying it, where

80—Carter v. Missouri, K. & T. Ry. Co. of Texas, — Tex. Civ. App. —, 160 S. W. 987.

81—Carter v. Missouri, K. & T. Ry. Co. of Texas, — Tex. Civ. App. —, 160 S. W. 987.

Where an instruction requiring the plaintiff to prove his case by a preponderance of evidence is given in connection with each issue of negligence submitted to the jury, there is not such a repetition of the rule of law as to give undue prominence to it. Martin v. St. Louis & S. W. Ry. Co. (Tex. Civ. App.), 56 S. W. 1011. See also, Gran v. Houston, 45 Neb. 813.

82—Carter v. Missouri, K. & T. Ry. Co. of Texas, — Tex. Civ. App. —, 160 S. W. 987.

83—Meachem v. Hahn, 46 Ill. App. 149.

It is error to refer repeatedly to

a fact or facts in evidence, as this is calculated to give undue prominence to such testimony. Meachem v. Hahn, 46 Ill. App. 149; Mendes v. Kyle, 16 Nev. 369; Gulf, C. & S. F. Ry. Co. v. Harriett, 80 Tex. 73; Stringfellow v. Braselton, 54 Tex. Civ. App. 1.

84—Gulf, C. & S. F. Ry. Co. v. Gordon, 70 Tex. 80; Houston & T. C. Ry. Co. v. Larkin, 64 Tex. 454; Maes v. Texas & N. O. Ry. Co. (Tex. Civ. App.), 23 S. W. 725. In Houston & T. C. Ry. Co. v. Larkin, *ante*, it was held that the mere repetition, in a charge, of the abstract principle that the jury might consider the physical and mental suffering the plaintiff had endured in estimating damages, cannot be regarded as calculated to affect a jury of ordinary intelligence, and will afford no ground for reversal.

the court fully and fairly instructed on the care to be exercised by the plaintiff in handling the ladder, the repetition of the proposition in a different language was calculated to give undue prominence and importance to such issue, and an instruction repeating such proposition was erroneous.⁸⁵

In an action for injuries sustained in a collision at a crossing, the submission of the issue of contributory negligence in several variant forms was unnecessary and tended to unduly impress the jury.⁸⁶

In an action for injuries to a passenger thrown against a seat by a jerk of the train, where the issues as to whether or not the plaintiff's wife was guilty of contributory negligence or whether she died from the injuries or from natural disease were sharply contested, the repetition in the charges of the law as to such issues in such a manner as to impress the jury that the plaintiff was not entitled to recover was error.⁸⁷

In an action for injuries sustained by a passenger while alighting from a train, due to a stool being placed on an uneven box, repeated charges laying stress upon the fact that the box was possibly an unsafe appliance or was improperly constructed, gave too much prominence to such question.⁸⁸

§ 154. Singling out issues and theories.

A defendant has the right to demand the giving of a charge based upon any specified group of facts which, if found to be true, would constitute a good defense,⁸⁹ but this rule cannot be held to authorize or require the giving of numerous charges upon a single fact or group of facts con-

85—Redmond v. Sherman Cotton Mills, — Tex. Civ. App. —, 100 S. W. 186.

86—Buchanan v. Missouri, K. & T. R. Co. of Texas, 48 Tex. Civ. App. 299.

87—Sizemore v. St. Louis & S. F. Ry. Co., — Tex. Civ. App. —, 130 S. W. 1024.

88—Missouri, K. & T. R. Co. of Texas v. Dunbar, 49 Tex. Civ. App. 12.

89—Mayfield v. Gause, — Tex. Civ. App. —, 164 S. W. 927. See also, ch. XIII, §§ 138 *et seq.*, *ante*, "Summing up the Evidence."

stituting a single defense, merely because such charges are differently phrased,⁹⁰ and the practice of singling out one among several important issues, and submitting it to the jury as the controlling issue, is improper.⁹¹

90—*Mayfield v. Gause*, — Tex. Civ. App. —, 164 S. W. 927; *Sizemore v. St. Louis & S. F. Ry. Co.*, — Tex. Civ. App. —, 130 S. W. 1024; *Hamm v. Briant*, 57 Tex. Civ. App. 614, 124 S. W. 112.

91—*Bowden v. Achor*, 95 Ga. 243; *Dallas & O. C. El. Ry. Co. v. Harvey* (Tex. Civ. App.), 27 S. W. 423; *Trinkle v. State*, 60 Tex. Cr. App. 187.

It is error to emphasize a particular issue. *Zoeller v. Court of Honor*, 168 Ill. App. 562.

On a trial for homicide, an instruction which singles out facts surrounding a prior difficulty and places that issue with undue prominence before the jury is erroneous. *Roquemore v. State*, 59 Tex. Cr. App. 568.

CHAPTER XV.

REQUESTS FOR INSTRUCTIONS.

- § 155. Introduction.
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- § 173. Time of making request.
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- § 183. Effect of noncompliance with statute.
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- § 190. Modification of requested instructions.
- § 191. Particular modifications considered.
- § 192. Modification as harmless or reversible error.
- § 193. Manner of making modification.

§ 155. Introduction.

It has already been noted that at common law and unless prohibited by statute, the court has a right to give the jury correct instructions applicable to the law and facts of the case, irrespective of whether any instructions have been requested by the parties or not.¹

But as already indicated this is a matter which is governed largely if not entirely by the statutory provisions of the various states and accordingly there is some conflict as to the necessity of requesting instructions as well as the duty and right to give a charge.

In the succeeding sections the questions as to the necessity of requesting instructions where no instructions are given,² or where the instructions given are insufficient³ or erroneous⁴ will be considered.

§ 156. Rule that instructions must be requested.

But in a number of states the rule is well established that, if the parties desire to have instructions given to the jury, they must make a proper request for instructions, and, in the absence of such a request, it is not error for the court to totally omit giving any instructions.⁵

1—See § 5, *ante*.

2—See § 157, *post*.

3—See § 161, *post*.

4—See § 172, *post*.

5—**Arizona.** *Chung Sing v. United States* (Ariz.), 36 Pac. 205.

Florida. *Carter v. Bennett*, 4 Fla. 283.

Georgia. *Louisville & N. R. Co. v. Barnwell*, 131 Ga. 791. An apparent exception exists to the general rule is recognized in *Central of Ga. R. Co. v. Madden*, 135 Ga. 205, 31 L. R. A. (N. S.) 813n, 21 Ann. Cas. 1077, where it was held not good practice to entirely omit instructions.

Kentucky. *West Kentucky Coal*

Co. v. Davis, 138 Ky. 667; *Clarke v. Baker*, 7 J. J. Marsh. (Ky.), 197.

Maryland. *Coates v. Sangston*, 5 Md. 121.

Missouri. *Powell v. Union Pac. R. Co.*, 255 Mo. 420; *Farmer v. Farmer*, 129 Mo. 530; *Nolan v. Johns*, 126 Mo. 166; *Clark v. Hammerle*, 27 Mo. 55; *Simonds v. Oliver*, 23 Mo. 32; *Drury v. White*, 10 Mo. 354; *National Stamping & Electric Works v. Wicks*, 144 Mo. App. 249, 128 S. W. 775; *Lathrop v. Quincy, O. & K. C. R. Co.*, 135 Mo. App. 16.

New York. *Rooney v. Brogan Const. Co.*, 194 N. Y. 32; *Haupt v. Pohlmann*, 1 Rob. 121, 16 Abb. Pr. 301.

North Carolina. *Bynum v. By*

The court is not bound to instruct on its own motion ⁶ and the failure to request an instruction is a waiver of the right.⁷ It has also been said that while it is not good practice to submit cases without an instruction on the facts relied upon, lawyers have such right in civil cases.⁸

Where the only instructions requested are erroneous, and therefore properly refused, the court need not instruct generally on the law of the case.⁹

A statute requiring the court to charge the jury in writing has been held not to make it the duty of the trial judge to charge the jury in every case, but to merely require the charge to be in writing, if a charge is given, and, where no instructions are requested, none need be given.¹⁰

Where the action is triable by the court, and only specific questions of fact are submitted to the jury, the answers to which may be accepted or rejected by the court, no instructions are necessary.¹¹

§ 157. Rule that court must instruct whether requested or not.

In some states it is held that it is the duty of the court

num, 33 N. C. 632; *State v. Morris*, 10 N. C. 388.

Ohio. *Taft v. Wildman*, 15 Ohio 129.

Texas. *Berry v. Texas & N. O. Ry. Co.*, 72 Tex. 620; *Farquhar v. Dallas*, 20 Tex. 200; *Linn v. Wright*, 18 Tex. 317, 70 Am. Dec. 282; *Deweese v. Hudgeons*, 1 Tex. 192.

Virginia. *Womack v. Circle*, 29 Gratt. (Va.) 208.

Wisconsin. *Stuckey v. Fritsche*, 77 Wis. 329; *Hepler v. State*, 58 Wis. 46.

6—*People v. Lucas*, 244 Ill. 603; *Illinois Cent. R. Co. v. Atwell*, 198 Ill. 200, aff'g 100 Ill. App. 513.

7—*City of Chicago v. Keefe*, 114 Ill. 222.

Error cannot be predicated on the failure to give an instruction not requested. *Central Ry. Co. v. Ankie-*

wicz, 213 Ill. 631, aff'g 115 Ill. App. 380.

8—*Williams v. Kansas City*, — Mo. App. —, 177 S. W. 783; *Rickards v. Kansas City*, 181 Mo. App. 336; *Wilson v. Kansas City So. Ry. Co.*, 122 Mo. App. 667. But see, *Central of Ga. R. Co. v. Madden*, 135 Ga. 205, 31 L. R. A. (N. S.) 813n, 21 Ann. Cas. 1077.

9—*Womack v. Circle*, 29 Gratt. (Va.) 192. A party cannot, by asking for an erroneous instruction, or by asking for a general instruction, devolve upon the court the duty of charging the jury on the law of the case. *Id.*

10—*Wisconsin Rev. St.*, § 2853; *Stuckey v. Fritsche*, 77 Wis. 329; *Hepler v. State*, 58 Wis. 46.

11—*Saint v. Guerrerio*, 17 Colo.

to give instructions substantially covering the material issues in the case, whether requested or not,¹² though the rule is sometimes confined to criminal cases.¹³ The theory of

448, 31 Am. St. Rep. 320, 30 Pac. 335. See also, ch. 23, *post*, "Issues out of Chancery."

12—**California.** *People v. Byrnes*, 30 Cal. 206.

Connecticut. *New London Water Com'rs v. Robbins*, 82 Conn. 623.

Georgia. *Central R. R. v. Harris*, 76 Ga. 502; *Wall v. Wall*, 15 Ga. App. 156.

Iowa. *Tretter v. Chicago G. W. R. Co.*, 147 Iowa 375, 140 Am. St. Rep. 304n; *State v. Phipps*, 95 Iowa 487; *State v. Brainard*, 25 Iowa 572.

Kansas. *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406.

Kentucky. *Heilman v. Com.*, 84 Ky. 457, 4 Am. St. Rep. 207.

Massachusetts. *Maxwell v. Massachusetts Title Ins. Co.*, 206 Mass. 197.

Michigan. *People v. Murray*, 72 Mich. 10.

Missouri. *State v. Stonum*, 62 Mo. 596; *State v. Matthews*, 20 Mo. 55.

Nebraska. *Housh v. State*, 43 Neb. 163.

North Carolina. *Penny v. Atlantic Coast Line R. Co.*, 153 N. C. 296, 32 L. R. A. (N. S.) 1209n; *Phifer v. Alexander*, 97 N. C. 335.

Vermont. *Donahue v. Windsor County M. Fire Ins. Co.*, 56 Vt. 374.

13—In criminal cases it is the duty of the court, whether properly requested or not, to instruct the jury fully upon all questions of law arising in the case, and a failure to do so is ground for a new trial and reversible error.

Arkansas. *Brooks v. State*, 91 Ark. 505.

California. *People v. Byrnes*, 30 Cal. 206.

Georgia. *Porter v. State*, 6 Ga. App. 770.

Iowa. *State v. O'Hagan*, 38 Iowa 504; *State v. Brainard*, 25 Iowa 572.

Kentucky. *Gordon v. Commonwealth*, 136 Ky. 508; *Heilman v. Com.*, 84 Ky. 457, 4 Am. St. Rep. 207.

Michigan. *People v. Murray*, 72 Mich. 10.

Missouri. *State v. Bidstrup*, 237 Mo. 273; *State v. Palmer*, 88 Mo. 572; *State v. Banks*, 73 Mo. 592; *State v. Kilgore*, 70 Mo. 546; *State v. Branstetter*, 65 Mo. 155; *State v. Stonum*, 62 Mo. 596; *State v. Matthews*, 20 Mo. 55; *State v. Banks*, 10 Mo. App. 111.

Oklahoma. *Reed v. State*, 3 Okla. Cr. Rep. 16, 103 Pac. 1070.

Tennessee. *Potter v. State*, 85 Tenn. 88; *Williams v. State*, 3 Heisk. 379; *Lang v. State*, 16 Lea 433; *Nelson v. State*, 2 Swan 237.

Texas. *Bishop v. State*, 43 Tex. 390; *Sanders v. State*, 41 Tex. 306; *Fulcher v. State*, 41 Tex. 233; *Maria v. State*, 28 Tex. 698; *Villareal v. State*, 26 Tex. 107; *Robinson v. State*, 5 Tex. App. 519; *Curry v. State*, 4 Tex. App. 574; *Wasson v. State*, 3 Tex. App. 474; *Lister v. State*, 3 Tex. App. 18; *Jenkins v. State*, 1 Tex. App. 346; *Steiner v. Anderson*, — Tex. Civ. App. —, 130 S. W. 261; *Epperson v. International & G. N. R. Co.*, — Tex. Civ. App. —, 125 S. W. 117; *Gibson & Cunningham v. Purifoy*, 56 Tex. Civ. App. 379; *Miers v. State*, 34 Tex. Cr. App. 161, 53 Am. St. Rep. 705.

each side should be fully and fairly given,¹⁴ and it is the duty of the court to explain the law arising upon the facts,¹⁵ or to cover the substantial issues made by the evidence.¹⁶

When it appears that the trial court was unwilling or thought it unnecessary to give any charge upon a certain point, a party is not called upon to ask instructions upon such point,¹⁷ and the failure to make a request is not a waiver of the right to have the case fully presented to the

Washington. *State v. Myers*, 8 Wash. 177, 35 Pac. 580, 756.

Under Mo. Rev. St. 1909, § 5231, the court must instruct in writing on all questions of law arising in a criminal case, whether requested or not. *State v. Bidstrup*, 237 Mo. 273.

14—*Freeman v. Hamilton*, 74 Ga. 318.

15—In North Carolina, Code, § 413 (now Pell's Rev. of 1908, § 535), expressly requires the court to explain the law arising upon the facts. Some charge is necessary. *State v. Boyle*, 104 N. C. 820; *Phifer v. Alexander*, 97 N. C. 335.

Where the cause of action is based upon an illegal or immoral consideration, it is the duty of the court, of its own motion, to instruct the jury that the plaintiff cannot recover, and a failure to do so is ground for a new trial, because the court will not enforce such claims, even if the parties do not object. *Viser v. Bertrand*, 14 Ark. 267.

In an action of criminal conversation, where it appeared that the husband had connived at the intercourse, a failure of the court to apply the rule that such connivance is a bar to the action is ground for reversal, even in the absence of a request, because in such case the real question in issue has not been determined. *Bunnell v. Greathead*, 49 Barb. (N. Y.) 106.

16—"The law of the case must be given to the jury to the extent of covering the substantial issues made by the evidence," *Central R. Co. v. Harris*, 76 Ga. 502, and fairly presenting the case to the jury. *Phinney v. Bronson*, 43 Kan. 451, 23 Pac. 624.

"In a trial by a jury, it is the duty of the court to instruct the jury on questions of law which he deems applicable to the case as made by the pleadings and evidence." *Douglass v. Geiler*, 32 Kan. 499, 4 Pac. 1039.

"It is the duty of the trial court to submit to the jury all questions of fact arising under the pleadings upon which evidence is introduced on the trial." *Upton v. Paxton*, 72 Iowa 299. And see *Emerson v. State*, 83 Neb. 663; *Reed v. State*, 3 Okla. Cr. Rep. 16, 103 Pac. 1070.

Where issue of self-defense is raised the court should instruct on it, and failure to do so is error, even though no request for such charge was made. *Moran v. Martinson*, 164 Iowa 712.

Failure to request instruction on measure of damages does not relieve trial court of duty of correctly stating measure. *Lexington & E. R. Co. v. Crawford*, 155 Ky. 723.

17—*International & G. N. R. Co. v. Underwood*, 64 Tex. 463.

jury by instructions as to all ultimate questions necessarily inherent in it.¹⁸

But an entire failure to state the law to the jury is to be distinguished from an omission to instruct on some particular phase of the case, and such entire failure has been held to have the effect of submitting to the jury the determination not only of the facts but also of the law.¹⁹

It is also to be noted that the court is not required to instruct as to a rule of law not necessary for the correct determination of the case,²⁰ and, if the instructions given fairly and substantially cover the issues, a failure to give a particular instruction is not error, in the absence of a request. If a party desires further and more specific in-

18—*Soderburg v. Chicago, St. P., M. & O. Ry. Co.*, — Iowa —, 149 N. W. 82.

19—*York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834.

“In *Manufacturing Co. v. Shiley*, 15 Neb. 109, it was said: ‘It is undoubtedly the duty of the judge presiding at a trial to instruct the jury upon the law of the case which is to be observed by them; and should a case arise in which it shall appear from the record that the jury has taken a wrong view of the law applicable to the case, and where the judge has failed to instruct them, whether requested by the counsel or not, this court would not hesitate to grant a new trial.’

“The same principle was substantially announced in *C. Aultman & Co. v. Martin*, 37 Neb. 826. An entire failure to instruct the jury in regard to the law of the case is very different from an omission to instruct in regard to some particular phase of the case, or some particular question arising upon the trial. In the latter case a proper instruction upon the subject must be requested before

error can be predicated upon a failure to instruct; but the law imposes upon the court the duty of stating to the jury the law applicable to the case, and an entire failure to state the law to the jury has the effect of submitting to the jury the determination, not only of facts, but of the law. In this case there was a total failure to instruct the jury upon the law of the case. This would not be prejudicially erroneous if it were apparent that the jury had come to a correct conclusion (*Manufacturing Co. v. Shiley, ante*); but the error is prejudicial if it is apparent that the jury has taken a wrong view of the law. We must therefore examine the record in order to determine that question.” *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834.

20—Where an instruction as to a certain rule of law was not asked for, the failure of the court to give such instruction cannot be complained of if an instruction upon such rule was not necessary for the correct determination of the case. *Deere v. Wolf*, 77 Iowa 115. See also, *State v. Dean*, 148 Iowa 566.

structions, he must request them, or he will not be heard to complain.²¹

Accordingly, under a statute requiring the court to instruct whether requested or not, it has been held not reversible error to fail to instruct on collateral questions in the absence of a request.²²

As to the effect of the general rule it may be said that, a failure to instruct the jury will be deemed to be harmless error where, upon a general view of the whole case, the verdict seems to be right, but it will be reversible error if the verdict appears to be wrong.²³

"A judge is not bound to charge upon all the points in a case,—he may be silent, unless called on by one of the parties to give his opinion on a question of law; but where he passes over one point, which is preliminary, to get at another, which could not fairly arise until the first is disposed of, it is error." *McNeill v. Massey*, 10 N. C. 91.

21—California. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *People v. Byrnes*, 30 Cal. 206.

Connecticut. *State v. Campbell*, 82 Conn. 671, 135 Am. St. Rep. 293, 18 Ann. Cas. 236.

Georgia. *Brooks v. State*, 134 Ga. 784; *Fortson v. Mikell*, 97 Ga. 336.

Iowa. *State v. Helvin*, 65 Iowa 289.

Kansas. *State v. Miller*, 83 Kan. 410, 111 Pac. 437; *State v. Pfefferle*, 36 Kan. 90; *Douglass v. Geiler*, 32 Kan. 499, 4 Pac. 1039.

Michigan. *People v. Dumas*, 161 Mich. 45.

Missouri. *State v. Nickens*, 122 Mo. 607; *State v. Brooks*, 92 Mo. 542; *State v. Leeper*, 78 Mo. 470; *State v. Kilgore*, 70 Mo. 546; *State v. Baldwin*, 56 Mo. App. 423.

Nebraska. *Carleton v. State*, 43 Neb. 402; *Housh v. State*, 43 Neb.

163; *Hill v. State*, 42 Neb. 503; *German Nat. Bank of Hastings v. Leonard*, 40 Neb. 676; *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724n.

North Dakota. *State v. Fleming*, 20 N. D. 105.

South Dakota. *State v. Colvin*, 24 S. D. 567.

Texas. *Bramlette v. State*, 21 Tex. App. 611, 57 Am. Rep. 622; *Austin v. State*, 57 Tex. Cr. App. 611; *Crane v. State*, 57 Tex. Cr. App. 476; *Marshall v. State*, 37 Tex. Cr. App. 450.

Vermont. *Howland v. Day*, 56 Vt. 324, 48 Am. Rep. 791; *Walker v. Wait*, 50 Vt. 668.

See also, § 161, *post*, "Where insufficient instructions are given."

22—Missouri Rev. St. 1909, § 5231. *State v. Harris*, 232 Mo. 317.

23—State v. Helvin, 65 Iowa 289; *State v. Brainard*, 25 Iowa 572; *Owen v. Owen*, 22 Iowa 270; *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834; *Sandwich Mfg. Co. v. Shiley*, 15 Neb. 109; *Honeycutt v. State*, 8 Baxt. (Tenn.) 372; *Good v. State*, 1 Lea (Tenn.) 293; *Gentry v. State*, 25 Tex. App. 614; *Pitts v. State* (Tex. Cr. App.), 24 S. W. 896.

§ 158. Same—Criminal cases.

Under the rules referred to in the preceding section the instructions in criminal cases must go to the extent of fairly presenting the case to the jury.²⁴

The judge must submit such principles of law as may be applicable to the case,²⁵ and it has been held the duty of

24—*State v. Winters*, 81 Kan. 414, 105 Pac. 516; *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406; *State v. Shenkle*, 36 Kan. 43, 12 Pac. 309.

25—*Westbrook v. State*, 133 Ga. 578, 26 L. R. A. (N. S.) 591, 18 Ann. Cas. 295; *Pace v. State*, 58 Tex. Cr. App. 90. "It is the duty of the judge [in criminal cases] to declare to the jury what the law is, with its exceptions and qualifications, and then to state, hypothetically, that if certain facts, which constitute the offense, are proved to their satisfaction, they will find the defendant guilty; otherwise, they will acquit him." *Keener v. State*, 18 Ga. 194.

"It is the duty of the trial court to submit to the jury, by way of proper instructions, such principles of law as may be applicable to the case on trial as it appears from the evidence, and also such principles as should be applied to witnesses who are interested in the result, or whose testimony should be weighed with special care and caution as accomplices. But it is not proper to discuss the policy of using such witnesses. This should be left to the counsel in the argument." *Long v. State*, 23 Neb. 33.

"It is the duty of the court to explain to the jury the offense with which the defendant is charged, what acts constitute it, and explain or define the words used in the statute prescribing the offense." More than this is not necessary by way of defi-

nition. *State v. Clark*, 78 Iowa 492. And see *State v. Dean*, 148 Iowa 566, as to necessity of instructing concerning included offenses.

In a trial for forgery, a failure by the court to give instructions respecting the law applicable to the offense, and to a certain line of defense, of which there was sufficient evidence to require it to be considered by the jury, though no instructions were asked by the counsel for defendant, was sufficient to warrant a reversal, the court saying that, although the court below is not bound to give instructions on its own motion where those asked by counsel are sufficient, yet, when they are defective or insufficient, the law complicated, and the offense of a highly criminal character, the court should point out the controverted questions of fact, and state the law applicable thereto. *State v. Brainard*, 25 Iowa 572.

North Carolina. As to the construction and application of N. C. Code, § 413 (now Pell's Rev. of 1908, § 535), requiring the court to "state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon," see the following cases: *State v. Brady*, 107 N. C. 822; *State v. Pritchett*, 106 N. C. 667; *State v. Boyle*, 104 N. C. 820; *Phifer v. Alexander*, 97 N. C. 335; *Holly v. Holly*, 94 N. C. 100; *State v. Rogers*, 93 N. C. 523; *State*

the judge to instruct that the jury are the judges of the facts,²⁶ to instruct as to the different degrees of crime,²⁷

v. Jones, 87 N. C. 547; State v. Matthews, 78 N. C. 523; State v. Dunlop, 65 N. C. 292; Bailey v. Poole, 35 N. C. 404; State v. Moses, 13 N. C. 452; State v. Morris, 10 N. C. 391.

"A charge to the jury, in which the judge deals in generalities and abstract propositions of law (merely reading 'headnotes' of reported cases), without making any application of them to the facts of the case, does not meet the requirements of the statute, and furnishes sufficient grounds for a new trial. He should not recapitulate the evidence in detail, but eliminate the material facts, array the state of facts on both sides, and apply the principles of law to each, that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence." State v. Jones, 87 N. C. 547.

26—A conviction of felony will be reversed for failure to instruct the jury that they are the exclusive judges of the facts proved, and of the weight to be given to the testimony. Barbee v. State, 23 Tex. App. 199.

27—Murder.

The court must instruct as to all the different degrees of murder to which the evidence is applicable. State v. Palmer, 88 Mo. 572; State v. Banks, 73 Mo. 592; State v. Branstetter, 65 Mo. 155. But see Williams v. State, 3 Heisk. (Tenn.) 379.

"Failure to define murder in the second degree, in a case where the jury, upon the evidence, might have found the defendant guilty of the lesser offense, will be cause for reversal, whether the instructions were

asked or not." Sanders v. State, 41 Tex. 306.

"Where, upon a trial for murder, there was conflicting evidence as to the circumstances immediately antecedent to the commission, which, in connection with the other evidence, was important with reference to the degree of offense of which the accused was guilty, it was the duty of the judge to have instructed the jury distinctly as to the degrees of murder, and to have defined what the law means by express malice and implied malice; in such manner that a jury of ordinary intelligence would be enabled to comprehend the distinction between the two kinds of malice." Villareal v. State, 26 Tex. 107.

Rape.

"In Ray v. State (1871) cited in 3 Heisk. 379, note, the indictment contained two counts,—one for rape, and the other for an assault with intent to commit rape,—and the verdict was that the defendant was guilty of rape, which was sustained by proof. The court held that the failure of the judge to charge the law relating to the offense in the second count was not reversible error." Parham v. State, 10 Lea (Tenn.) 502.

Mayhem.

On an indictment for mayhem, where the evidence tends to show a simple assault and battery, it is error for the court to neglect to instruct as to the latter offense, and the error is not waived by the defendant's failing to request such an instruction, or to except to its omission. State v. Cody, 18 Ore. 506, 23 Pac. 891.

or as to defenses, such as alibi,²⁸ insanity,²⁹ or self-defense.³⁰

Also, it has been held the duty of the court to instruct as to various presumptions, such as the presumption of innocence,³¹ the presumptions as to capacity to commit a

28—Under a statute making it the duty of the court to instruct the jury on all questions of law arising in the case, where there is evidence in a criminal case tending to prove an alibi, an instruction on that subject must be given, whether requested by defendant or not. *State v. Taylor*, 118 Mo. 153.

In a prosecution for a misdemeanor, before defendant can be heard to complain of an omission to charge an alibi, he must have prepared and presented a charge to the court on alibi, and, on the refusal of the court to give such charge, he must have saved his bill of exceptions thereto. *Lyon v. State* (Tex. Cr. App.), 34 S. W. 947.

"It is settled by repeated decisions in this state that the defense of alibi is sufficiently embraced in a general charge to the effect that a defendant is presumed by law to be innocent until his guilt is established by competent evidence beyond a reasonable doubt, where no additional instruction is requested, more explicitly amplifying the law upon that subject." *Oxford v. State*, 32 Tex. Cr. App. 272.

29—Where there is evidence tending to establish the defense of insanity, the court should give a direct, positive and affirmative instruction upon insanity as a defense, and should tell the jury what the statute declares, —that "no act done in a state of insanity can be punished as an offense." *Smith v. State*, 19 Tex. App. 96.

30—Where the evidence tends to

show that defendant charged with murder acted in self-defense, the jury should be fully charged in reference to that subject. *State v. Donahoe*, 78 Iowa 486; *Ashworth v. State*, 19 Tex. App. 182; *Sterling v. State*, 15 Tex. App. 249; *Jackson v. State*, 15 Tex. App. 84; *King v. State*, 13 Tex. App. 277; *North v. State*, 12 Tex. App. 111; *Kemp v. State*, 11 Tex. App. 174; *Guffee v. State*, 8 Tex. App. 277; *Foster v. State*, 8 Tex. App. 248; *Edwards v. State*, 5 Tex. App. 593.

"Where, on trial for murder, there is proof that deceased made threats against defendant, some of which were communicated to him, and there is proof also tending to show that deceased was a dangerous man, and brought about the difficulty, and was in fault at time of killing, the failure of the court to charge the law applicable to such threats is an error equivalent to the affirmative injury of an erroneous charge, and this court will reverse for such omission in the charge, though no further instructions were asked." *Potter v. State*, 85 Tenn. 88.

31—"The court should have charged the jury that the respondent was presumed to be innocent until proved guilty. It is claimed that the court charged that the jury must find that all the material facts were proved beyond a reasonable doubt, and that should be held sufficient. There is a difference between innocence and doubtful innocence. Neither, it is true, will allow a conviction, but the presumption abides

crime,³² or the presumption arising from refusal to testify.³³

Usually an instruction limiting the effect of evidence should be given,³⁴ but the court is not bound to instruct as to collateral matters, such as the effect of impeaching testimony,³⁵ and it has been held unnecessary to instruct as to the good character of a defendant.³⁶

If additional instructions as to reasonable doubt are desired, they should be requested.³⁷

with the accused from the beginning, and is alone a sufficient defense until overthrown by proof. This is not the impression with many who are called to act as jurors, as I presume has been found to be the experience of most trial lawyers; but the fact that a person has been brought to the bar of the court charged with crime, and asked to answer, causes him not unfrequently to be regarded by the average juror from the first with suspicion amounting almost to a presumption of guilt, and hence the necessity for the charge omitted in this case. It should have been given by the court, although no request therefor was made by counsel." *People v. Macard*, 73 Mich. 25.

32—The court must instruct as to the presumptions of legal capacity of children to commit a crime, where the evidence raises the question. *Heilman v. Com.*, 84 Ky. 461.

33—Where the statute provides that "it shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if he fail or refuse to testify as a witness in his own behalf," the omission to so instruct is reversible error, though counsel asks for specific instruction, and fails to ask for an instruction on the effect of failure to testify. In case of such a statute, the general rule that, where the law requires the court to

instruct the jury upon the law, the failure of the court to do so, in the absence of a request, is not error, does not apply. *State v. Myers*, 8 Wash. 177, 35 Pac. 580, 756.

34—Where testimony as to other and different offenses is admitted, the judge, whether requested or not, should, in his charge, limit the evidence to the purpose for which it was admitted, viz.: the impeachment of the credibility of defendant. *Warren v. State*, 33 Tex. Cr. App. 502; *Sexton v. State*, 33 Tex. Cr. App. 416. But this rule does not apply to proof of a former indictment of a witness who is not a defendant. *Matkins v. State*, 33 Tex. Cr. App. 605.

35—The court is not bound to instruct as to the effect of impeaching testimony, in the absence of a request, this being a collateral matter. *State v. Kilgore*, 70 Mo. 546, distinguishing *State v. Branstetter*, 65 Mo. 149.

36—The trial court is not bound, unless requested, to instruct the jury as to the legal effect of evidence offered by defendant to establish his general reputation as a peaceable and quiet citizen. *State v. Nickens*, 122 Mo. 607; *State v. Nugent*, 71 Mo. 136.

37—"The court instructed the jury that, before they convicted defendant, they ought to be satisfied of his guilt beyond a reasonable

§ 159. Rule in Texas.

In Texas, although the earlier cases hold in effect that it would be reversible error to fail to give a distinct and affirmative presentation of the issues arising upon the evidence in a criminal case, even though special charges are not requested, the holding under the later statutes is that such would not be the case unless special charges are requested.³⁸

A party is entitled, when he requests it, to have the facts establishing his cause of action or ground of defense and the law applicable to them affirmatively stated to the jury.³⁹

In felony cases it is the duty of the court whether properly requested or not to instruct the jury fully on all questions of law arising in the case,⁴⁰ but in misdemeanor cases the

doubt. Held, that it was not for the defendant to complain that the court failed to add that such doubt ought to be substantial doubt touching his guilt, and not a mere possibility of his innocence. If defendant desired this addition to the instruction, he should have asked for it." *State v. Leeper*, 78 Mo. 470.

Where no special charge was asked applying the doctrine of reasonable doubt to any particular fact, and the circumstances do not call for any special charge relating thereto, a correct general charge on reasonable doubt is sufficient. *Carson v. State*, 34 Tex. Cr. App. 342.

38—*Davis v. State*, 63 Tex. Cr. App. 484. See also, cases cited in note 13, § 157, *ante*.

39—*Lyon v. Bedgood*, 54 Tex. Civ. App. 19.

40—*Bishop v. State*, 43 Tex. 390; *Sanders v. State*, 41 Tex. 306; *Fulcher v. State*, 41 Tex. 233; *Maria v. State*, 28 Tex. 698; *Villareal v. State*, 26 Tex. 107; *Barbee v. State*, 23 Tex. App. 199; *Bell v. State*, 21 Tex. App. 270; *White v. State*, 18

Tex. App. 57; *Jackson v. State*, 15 Tex. App. 84; *Greta v. State*, 9 Tex. App. 434; *Reynolds v. State*, 8 Tex. App. 412; *Smith v. State*, 7 Tex. App. 414; *Robinson v. State*, 5 Tex. App. 519; *Curry v. State*, 4 Tex. App. 574; *Wasson v. State*, 3 Tex. App. 474; *Lister v. State*, 3 Tex. App. 18; *Jenkins v. State*, 1 Tex. App. 346; *Jobe v. State*, 1 Tex. App. 186; *Miers v. State*, 34 Tex. Cr. App. 161, 53 Am. St. Rep. 705; *Warren v. State*, 33 Tex. Cr. App. 502; *Sexton v. State*, 33 Tex. Cr. App. 416; *Moore v. State* (Tex. Cr. App.), 33 S. W. 980. *Contra*, *Greenwood v. State*, 35 Tex. 587. Though in every case of felony the court is required by statute to give a written charge, whether asked by the parties or not, yet it is only necessary for the court to give such instructions as are applicable to every legitimate deduction which the jury may draw from the evidence. *Bishop v. State*, 43 Tex. 391; *Dawson v. State*, 33 Tex. 491; *Johnson v. State*, 27 Tex. 758; *Curry v. State*, 4 Tex. App. 574; *Noland v. State*, 3

court will not reverse for the failure to instruct unless a charge is requested.⁴¹

§ 160. Rule in Mississippi.

Under the system of judicial procedure in Mississippi it is not in the province of the judge to give instructions to the jury unless one of the parties request him to do so and present him in writing the desired instruction. He is not permitted to instruct the jury at his own instance.⁴²

Accordingly, the giving of even a correct instruction, in the absence of a request, is reversible error,⁴³ but where the court is requested to charge upon a certain point, the court is not confined to merely giving or refusing the identical charge asked, but may modify it, or may refuse it, and give another instruction materially different.⁴⁴

Tex. App. 598; Thrasher v. State, 3 Tex. App. 281; Lister v. State, 3 Tex. App. 18; Bronson v. State, 2 Tex. App. 46; Holden v. State, 1 Tex. App. 226; Jobe v. State, 1 Tex. App. 186.

41—Under Texas Code Cr. Proc., art. 719. Robey v. State, — Tex. Cr. App. —, 163 S. W. 713; Willingham v. State, 62 Tex. Cr. App. 55.

In misdemeanor cases where no request is made, the court is not required to give a charge to the jury. (White's Ann. Code Cr. Proc., art. 719.) Sloan v. State, — Tex. Cr. App. —, 170 S. W. 156; Brunk v. State, 60 Tex. Cr. App. 263; Hilcher v. State, 60 Tex. Cr. App. 180. See also, Davidson v. State, 27 Tex. App. 262; Sparks v. State, 23 Tex. App. 447; Porter v. State, 1 Tex. App. 477; Lyon v. State (Tex. Cr. App.), 34 S. W. 947; Garrison v. State, 54 Tex. Cr. App. 600; Hurley v. State, 36 Tex. Cr. App. 73; Lucio v. State, 35 Tex. Cr. App. 320; Waechter v. State, 34 Tex. Cr. App. 297.

42—Johnson v. State, — Miss. —, 63 So. 338.

By statute the giving of instructions is prohibited, in the absence of a request for instructions. Dixon v. State, — Miss. —, 64 So. 468; James v. State, — Miss. —, 63 So. 669; Bangs v. State, 61 Miss. 363; Stewart v. State, 50 Miss. 587; Archer v. Sinclair, 49 Miss. 343; Edwards v. State, 47 Miss. 581; Williams v. State, 32 Miss. 389, 66 Am. Dec. 615; Davis v. Tiernan, 2 How. (Miss.) 786; Montgomery v. Griffin, Walk. (Miss.) 453. The circuit judge has no power to originate independent instructions not called for nor rendered necessary by those requested by counsel, "and he cannot evade this in a criminal case by handing the charge to the district attorney, who returns it requesting that it be given, which the judge does." Watkins v. State, 60 Miss. 323.

43—Williams v. State, 32 Miss. 389, 66 Am. Dec. 615.

44—Watkins v. State, 60 Miss. 323. The statute forbidding judges to charge the jury, except when requested, should receive a liberal con-

§ 161. Necessity of request where insufficient instructions are given.

As a general rule, if there is no error in the instructions given, it is necessary for a party to request a charge on points omitted.⁴⁵

struction in favor of the judge's power, and he is not bound by it to give the identical charge asked, or refuse it, but, when asked to charge on a certain point, may give an instruction differing materially from the one asked. *Carpew v. Canavan*, 4 How. (Miss.) 370. "If the charges as asked are correct and pertinent, the safe practice is to give them as propounded. Upon the judge rests the responsibility of a correct statement of the law. He should not permit the jury to be confounded or misled by the language in which instructions are couched." *Archer v. Sinclair*, 49 Miss. 343.

45—California. *O'Connor v. United Rds. of San Francisco*, 168 Cal. 43, 141 Pac. 809; *Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12; *People v. Hoosier*, 24 Cal. App. 746, 142 Pac. 514.

Georgia. *Banks v. Bradwell*, 140 Ga. 640.

Illinois. *People v. Lucas*, 244 Ill. 603.

Minnesota. *Krulic v. Petcoff*, 122 Minn. 517, Ann. Cas. 1914 D 1056n; *Hanson v. Hellie*, 107 Minn. 375.

Missouri. *Lampe v. United Rys. Co. of St. Louis*, 177 Mo. App. 652; *Knight v. Kansas City*, 138 Mo. App. 153.

Nebraska. *Edwards & Bradford Lumber Co. v. Lamb*, 95 Neb. 263.

North Carolina. *State v. Powell*, 168 N. C. 134.

South Carolina. *Brown v. South-*

ern Ry., 83 S. C. 30; *Berley v. Western U. Tel. Co.*, 82 S. C. 360.

South Dakota. *Grant v. Powers Dry Goods Co.*, 23 S. D. 195.

Texas. *Good v. Texas & P. Ry. Co.*, — Tex. Civ. App. —, 166 S. W. 670; *Park v. Pyle*, — Tex. Civ. App. —, 157 S. W. 445; *Goldstein v. State*, — Tex. Cr. App. —, 166 S. W. 149.

The court need not instruct on particular points unless requested. *People v. Lucas*, 244 Ill. 603.

"It is no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, where it was not requested by either party at the trial. It is sufficient that the court has given no erroneous directions. * * * The court cannot be presumed to do more in ordinary cases than to express its opinion upon questions which the parties themselves have raised on the trial." *Pennock v. Dialogue*, 2 Pet. (U. S.) 1, 7 L. Ed. 327. "When counsel want every detail of the law applicable to the facts gone over by the court, they should call attention to such minute matters. Unless they do so, the court may instruct, in general terms, on broad and controlling principles, and then stop." *Moore v. Brown*, 81 Ga. 10. "Good faith requires that a litigant who claims to be prejudiced by a ruling of the court shall at once call attention to the fact by apt language, to the end that, if an error has been committed,

An instruction must be requested if a more specific submission of the issues is desired,⁴⁶ or if it is contended that the instructions should be more full,⁴⁷ or that the issues were not all covered,⁴⁸ and a party who does not request additional instructions cannot complain when the charge given was correct as far as it went.⁴⁹

it may be corrected or put in shape for review on the spot." Smith v. Matthews, 9 Misc. Rep. (N. Y.) 431.

46—**Arkansas.** C. H. Smith Tie & Timber Co. v. Weatherford, 92 Ark. 6.

California. People v. Stirgios, 23 Cal. App. 48, 136 Pac. 957.

Colorado. Burnside v. Peterson, 43 Colo. 382, 17 L. R. A. (N. S.) 76n, 96 Pac. 256.

Indiana. Indianapolis & Northwestern Traction Co. v. Newby, 45 Ind. App. 540.

Montana. Kirk v. Smith, 48 Mont. 489, 138 Pac. 1088.

North Carolina. Monds v. Town of Dunn, 163 N. C. 108; Todd v. Mackie, 160 N. C. 352.

North Dakota. Landis v. Fyles, 18 N. D. 587.

South Carolina. Gossett v. Western U. Tel. Co., 95 S. C. 397.

Texas. Guerra v. San Antonio Sewer Pipe Co., — Tex. Civ. App. —, 163 S. W. 669; Guinn v. Pecos & N. T. Ry. Co., — Tex. Civ. App. —, 142 S. W. 63; Galveston Electric Co. v. Dickey, 56 Tex. Civ. App. 490.

Washington. O'Connor v. Slatter, 48 Wash. 493, 93 Pac. 1078.

47—**California.** Townsend v. Butterfield, 168 Cal. 564, 143 Pac. 760.

Florida. Johnson v. State, 55 Fla. 41.

Indiana. Plummer v. Indianapolis Union R. Co., 56 Ind. App. 615.

Iowa. State v. Brandenberger, 151 Iowa 197.

North Carolina. State v. Robertson, 166 N. C. 356; Brown v. Southern R. Co., 165 N. C. 392.

Pennsylvania. Fedorawicz v. Citizens' Electric Illuminating Co., 246 Pa. 141.

Texas. Missouri, K. & T. Ry. Co. of Texas v. Beasley, — Tex. Civ. App. —, 162 S. W. 950; Girtman v. State, — Tex. Cr. App. —, 164 S. W. 1008; Tyler v. State, — Tex. Cr. App. —, 150 S. W. 782.

Wisconsin. Robinson v. City of Oconto, 154 Wis. 64.

Where the defect in an instruction results from the absence of fullness in the charge, and it is not otherwise misleading, it is the duty of the complaining party to present and request a special charge covering the defect and the failure to do so deprives him of the right to a reversal on appeal because of the defect. Missouri, K. & T. Ry. Co. of Texas v. Beasley, — Tex. Civ. App. —, 162 S. W. 950.

48—Schramm v. P. J. Owens Lumber Co., — Tex. Civ. App. —, 163 S. W. 1016. See also, Savage v. Chicago & J. E. R. Co., 238 Ill. 392.

49—McMullen v. Harris, — Iowa —, 147 N. W. 164.

A party cannot complain of the failure to give a certain instruction when he did not request the same. People v. Darr, 179 Ill. App. 130.

When the charge of the court is correct and fairly submits the issue, so far as it goes, and one of the

An omission to instruct on any point, however material, is not assignable as error if there was no request to instruct upon it,⁵⁰ and ordinarily the court will not reverse for the failure to give instructions not asked unless it is satisfied that such failure has deprived defendant of a fair trial.⁵¹

It is sufficient to sustain the verdict that no erroneous instructions were given.⁵²

In order to raise the question for review, the party must ask the particular instructions desired, and assign their refusal as error.⁵³

parties desires to have other aspects of the case presented to the jury for determination, special charges must be asked covering such points, and in the absence of such special request, it must be assumed that the general charge was satisfactory. *Bee Candy Mfg. Co. v. Maibaum*, — Tex. Civ. App. —, 158 S. W. 575.

50—*Frick v. Wilson*, 36 S. C. 65; *Texas & P. R. Co. v. Volk*, 151 U. S. 73, 38 L. Ed. 78; *Mutual Life Ins. Co. v. Snyder*, 93 U. S. (3 Otto) 393, 23 L. Ed. 887; *Pennock v. Dialogue*, 2 Pet. (U. S.) 1, 1 L. Ed. 327; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258, 6 L. Ed. 468. This rule is not affected by the statute, which declares that the error alleged need not be put in writing, and may be taken advantage of at any time, even on appeal. *Ferry v. Danville, M. & S. W. R. Co.*, 91 N. C. 236.

51—*State v. Brandenberger*, 151 Iowa 197.

Omissions are not reversible error in the absence of requested correct charges. *Selden-Breck Const. Co. v. Kelley*, — Tex. Civ. App. —, 168 S. W. 985.

52—*Pennock v. Dialogue*, 2 Pet. (U. S.) 1, 7 L. Ed. 327, affirming 4 Wash. C. C. 538, Fed. Cas. No. 10941; *Seabury v. Field*, 1 McAll. (U. S.)

60, Fed. Cas. No. 12575; *United States v. Fourteen Packages of Pins*, Gilp. (U. S.) 235, Fed. Cas. No. 15151.

53—**Georgia.** *White v. Hand*, 76 Ga. 3.

Indiana. *Du Souchet v. Dutcher*, 113 Ind. 249; *Carver v. Carver*, 97 Ind. 497; *Ireland v. Emmerson*, 93 Ind. 1, 47 Am. Rep. 364.

Massachusetts. *Reed v. Call*, 5 Cush. 14.

Nebraska. *Barr v. City of Omaha*, 42 Neb. 341.

New York. *Hogan v. Cregan*, 6 Rob. 138.

North Carolina. *Arey v. Stephenson*, 34 N. C. 34; *Torrence v. Graham*, 18 N. C. 284.

Oregon. *Kearney v. Snodgrass*, 12 Ore. 311, 7 Pac. 309.

Texas. *Freiberg v. Johnson*, 71 Tex. 558; *O'Neil v. Wills Point Bank*, 67 Tex. 36; *Powell v. Haley*, 28 Tex. 52; *Bowden v. Crow*, 2 Tex. Civ. App. 591.

A request for proper instructions is necessary to raise the point that the instructions given were insufficient.

Alabama. *Scully v. State*, 39 Ala. 240.

Arkansas. *Brooks Medicine Co. v.*

The rule is well settled that it is not sufficient to merely

Jeffries, 94 Ark. 575; **White v. McCracken**, 60 Ark. 613.

California. **People v. Fice**, 97 Cal. 459, 32 Pac. 531.

Colorado. **Sandberg v. Borstadt**, 48 Colo. 96, 109 Pac. 419; **Saint v. Guerrero**, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335.

Florida. **Lungren v. Brownlie**, 22 Fla. 491.

Georgia. **Fortson v. Mikell**, 97 Ga. 336.

Illinois. **Louisville, E. & St. L. Consol. R. Co. v. Spencer**, 149 Ill. 97; **Village of Hyde Park v. Washington Ice Co.**, 117 Ill. 233; **Sloan v. Lingafelter**, 56 Ill. App. 320.

Indiana. **Cincinnati, I., St. L. & C. Ry. Co. v. Smock**, 133 Ind. 411; **Marshall v. State**, 123 Ind. 128; **Island Coal Co. v. Neal**, 15 Ind. App. 15.

Iowa. **Rockwell v. Ketchum**, 149 Iowa, 507; **State v. Phipps**, 95 Iowa 487; **Dimmick v. Babcock**, 92 Iowa 692; **Mackie v. Central Railroad of Iowa**, 54 Iowa 540.

Kansas. **Hoyt v. Dengler**, 54 Kan. 309, 38 Pac. 260.

Louisiana. **State v. Scott**, 12 La. Ann. 386.

Maine. **Hearn v. Shaw**, 72 Me. 187.

Massachusetts. **Corrigan v. Connecticut Ins. Co.**, 122 Mass. 298.

Michigan. **MacDonald v. Freeman Mfg. Co.**, 160 Mich. 380; **Little v. Williams**, 107 Mich. 652.

Minnesota. **Bowe v. Hyland**, 44 Minn. 88.

Mississippi. **Edwards v. State**, 47 Miss. 589.

Missouri. **Farmer v. Farmer**, 129

Mo. 530; **Coleman v. Drane**, 116 Mo. 387; **Booker v. Southwest Missouri R. Co.**, 144 Mo. App. 273.

Montana. **Kelley v. Cable Co.**, 7 Mont. 70, 14 Pac. 633.

Nebraska. **Carter White Lead Co. v. Kinlin**, 47 Neb. 409.

Nevada. **State v. Hing**, 16 Nev. 307.

New Hampshire. **Moore v. Ross**, 11 N. H. 547.

New Jersey. **Hetfield v. Dow**, 27 N. J. Law 440.

New Mexico. **United States v. Chaves**, 6 N. M. 180, 27 Pac. 489.

New York. **Sudlow v. Warshing**, 108 N. Y. 520.

Ohio. **Rolling Mill Co. v. Corrigan**, 46 Ohio St. 283, 3 L. R. A. 385n, 15 Am. St. Rep. 596; **Doll v. State**, 45 Ohio St. 445.

Oregon. **Schoellhamer v. Rometsch**, 26 Ore. 394, 38 Pac. 344.

Pennsylvania. **Brinser v. Longenecker**, 169 Pa. St. 51.

South Carolina. **Jones v. Spartanburg Herald Co.**, 44 S. C. 526.

South Dakota. **Lunschen v. Ulom**, 25 S. D. 454.

Tennessee. **Bridges v. Vick**, 2 Humph. 516; **Butler v. State**, 7 Baxt. 35.

Texas. **Gulf, C. & S. F. Ry. Co. v. Box**, 81 Tex. 670; **Hays v. Hays**, 66 Tex. 606; **Stephens v. Anderson** (Tex. Civ. App.), 36 S. W. 1000.

Vermont. **State v. Hanlon**, 62 Vt. 334.

Virginia. **Crawford v. Morris**, 5 Gratt. 90.

Washington. **McQuillan v. City of Seattle**, 13 Wash. 600, 43 Pac. 893.

West Virginia. **State v. Donohoo**,

except to the charge of the court as given,—the additional instructions desired must be requested.⁵⁴

But the failure or refusal of the court, when asked, to give proper instructions to supply such omissions, is an error of law, and, if excepted to, constitutes a good cause for a new trial,⁵⁵ and where there is an omission in an

22 W. Va. 761; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

Wisconsin. *Lueck v. Heisler*, 87 Wis. 644.

Wyoming. *Bunce v. McMahon*, 6 Wyo. 24, 42 Pac. 23.

United States. *Carter v. Carusi*, 112 U. S. 478, 28 L. Ed. 820; *Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487.

54—**Arizona.** *Lenord v. State*, 15 Ariz. 137, 137 Pac. 412.

Georgia. *Poullain v. Poullain*, 79 Ga. 11.

Indiana. *Du Souchet v. Dutcher*, 113 Ind. 249; *Fitzgerald v. Goff*, 99 Ind. 28, 40; *Hodges v. State*, 85 Ind. 561; *Adams v. Stringer*, 78 Ind. 175.

Kansas. *Ryan v. Madden*, 46 Kan. 245, 26 Pac. 245.

Maine. *Emery v. Vinall*, 26 Me. 295.

Nevada. *State v. Hing*, 16 Nev. 307.

New York. *People v. McLaughlin*, 2 App. Div. 419, 37 N. Y. Supp. 1005; *Hotchkins v. Hodge*, 38 Barb. 117; *Dows v. Rush*, 28 Barb. 157.

North Carolina. *Gwaltney v. Scottish Carolina Timber Co.*, 115 N. C. 579.

Ohio. *Schryver v. Hawkes*, 22 Ohio St. 308; *Jones v. State*, 20 Ohio 34; *Wright v. Cincinnati St. Ry. Co.*, 9 Ohio Cir. Ct. R. 503, 2 Ohio Dec. 308.

South Carolina. *Caveny v. Neely*, 43 S. C. 70.

Texas. *Davidson v. State*, 27 Tex. App. 262; *Work v. State*, 3 Tex. App. 234; *Forrest v. State*, 3 Tex. App. 232; *Schell v. State*, 2 Tex. App. 31; *Goode v. State*, 2 Tex. App. 520; *Porter v. State*, 1 Tex. App. 479; *Foster v. State*, 1 Tex. App. 363; *Browning v. State*, 1 Tex. App. 96; *Garner v. Butcher*, 1 Posey, Unrep. Cas. 431; *Freeman v. Nickels*, — Tex. Civ. App. —, 125 S. W. 941; *Missouri, K. & T. Ry. Co. v. Kirschoffer* (Tex. Civ. App.) 24 S. W. 577.

Wisconsin. *Newton v. Whitney*, 77 Wis. 515; *Lela v. Domaske*, 48 Wis. 623; *Tomlinson v. Wallace*, 16 Wis. 224.

Contra, *Donahue v. Windsor County M. Fire Ins. Co.*, 56 Vt. 374. Where an instruction is manifestly erroneous, and is excepted to, it is not necessary for a party to ask to have it corrected by a proper charge; but “when a charge is not positively erroneous, but merely defective in not stating the law fully, as applicable to the case, then it is the duty of the party who is not satisfied with the charge to request an instruction curing the defect; otherwise, the objection will be considered waived.” *Lenord v. State*, 15 Ariz. 137, 137 Pac. 412; *Missouri, K. & T. Ry. Co. v. Kirschoffer* (Tex. Civ. App.), 24 S. W. 577.

55—*Blacketer v. House*, 67 Ind. 414; *Durant v. Fish*, 40 Iowa 559; *Pennock v. Dialogue*, 2 Pet. (U. S.) 1,

instruction and two charges are asked to supply such omission, one of them should be given.⁵⁶

An objection for failure to instruct cannot be raised for the first time on motion for a new trial,⁵⁷ or on appeal.⁵⁸

A mere promise of the judge to give an instruction upon a certain point will not excuse a party from requesting such instruction at the proper time, if he wishes it given.⁵⁹

§ 162. Same—Illustrations.

In accordance with the rules laid down in the preceding section, it is held that a party cannot complain that the instructions did not properly present his theory of the case, where he did not request an instruction covering the omission complained of;⁶⁰ and when the instructions given are abstractly correct, but it is claimed that there are exceptions, qualifications or limitations to the general rule laid down, which should be given, a failure to state such excep-

7 L. Ed. 327. See also, § 184, *post*, "Necessity of giving requested instructions."

56—*Ft. Worth & R. G. Ry. Co. v. Jonas*, — Tex. Civ. App. —, 166 S. W. 415.

57—*Lary v. Young* (Tex. Civ. App.), 27 S. W. 908. It is too late, after verdict, to object to the failure to charge upon a particular matter. *Boon v. Murphy*, 108 N. C. 187.

58—*Goldhammer v. Dyer*, 7 Colo. App. 29, 42 Pac. 177; *Hall v. Incorporated Town of Manson*, 90 Iowa 585; *Burkitt v. Twyman* (Tex. Civ. App.), 35 S. W. 421.

59—*Carleton v. State*, 43 Neb. 373; *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834; *Avery v. New York Cent. & H. R. R. Co.*, 17 N. Y. St. Rep. 417, 2 N. Y. Supp. 101; *International & G. N. R. Co. v. Smith*

(Tex. Sup.), 1 S. W. 565. See also, *Louisville, N. A. & C. Ry. v. Hubbard*, 116 Ind. 193.

60—*Village of Hyde Park v. Washington Ice Co.*, 117 Ill. 233; *Hitecock v. Supreme Tent, K. M. W.*, 107 Mich. 391; *Advertiser & Tribune Co. v. City of Detroit*, 43 Mich. 120; *Ward v. Ward*, 37 Mich. 259; *Howry v. Eppinger*, 34 Mich. 35; *Turner v. People*, 33 Mich. 382, and cases cited; *Texas & Pacific Coal Co. v. McWain*, — Tex. Civ. App. —, 124 S. W. 202; *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632.

"It is the duty of counsel to ask instructions embodying their theory of the case, and, if they fail to do so, the court is not bound to embody the whole case in one instruction." *State v. Haase*, 6 Mo. App. 586.

tions, qualifications or limitations is not error in the absence of a request to do so.⁶¹

The failure of the court to inform the jury that they are the exclusive judges of the law and facts is not such error as will justify a judgment of reversal, unless defendant asks an instruction upon this point,⁶² and the failure to give instructions requested, but overlooked, has been held not to be a good ground of exception.⁶³

61—**Alabama.** Ivey's Adm'r v. Owens, 28 Ala. 648.

Georgia. Malone v. State, 77 Ga. 767.

Illinois. Bartlett v. Board of Education of Freeport School Dist., 59 Ill. 364.

Indiana. Wells v. Morrison, 91 Ind. 52; Reissner v. Oxley, 80 Ind. 580.

Iowa. Gwinn v. Crawford, 42 Iowa 67; State v. Tweedy, 11 Iowa 350.

Maine. Eaton v. New England Telegraph Co., 68 Me. 63.

Michigan. Belmer v. Boyne City Tanning Co., 160 Mich. 669.

Minnesota. McKnight v. Chicago, M. & St. P. Ry. Co., 44 Minn. 141.

Missouri. Johnston v. St. Louis & S. F. R. Co., 150 Mo. App. 304; Haymaker v. Adams, 1 Mo. App. 409.

New York. Fasshender v. Western Transit Co., 26 N. Y. St. 112.

Texas. Texas & N. O. Ry. Co. v. Crowder, 70 Tex. 222; Gallagher v. Bowie, 66 Tex. 265.

"If a party desires that the exceptions to a general rule of law be stated in an instruction to a jury, he should, in general, ask the court so to do; but where the court states a legal proposition, and that the same is the rule 'except in cases I shall hereafter enumerate,' if the

court afterwards undertakes to enumerate the exceptions, he must state them all, and for a failure so to do the judgment will be reversed." Wells v. Morrison, 91 Ind. 52.

The failure to state an exception to the general rule as to the burden of proof in actions against carriers for injury to goods is not reversible error, where the charge was not excepted to, and no request for a further charge was made. Fasshender v. Western Transit Co., 26 N. Y. St. 112.

The court charged as follows: "If the jury believe from the evidence that M. was justly and honestly indebted to B. the sum for which the judgment was rendered, * * * he had a right to prefer B. by confessing said judgment." Held that, if appellants desired that these instructions should be qualified by adding, "if there are no distinctive badges of fraud to vitiate the transaction," they should have asked it. Stockwell v. Byrne, 22 Ind. 6.

62—Keyes v. State, 122 Ind. 527.

Merely omitting to charge, when not requested, that the jury are the judges of the facts and of the application of the law, is not reversible error. Butler v. State, 7 Baxt. (Tenn.) 35.

63—Where a point on "which the court had been requested to charge

Other illustrations of the necessity of requesting instructions may be found in cases where it has been held not error to fail to instruct as to the existence of a contract,⁶⁴ its performance,⁶⁵ or construction,⁶⁶ or where the omission to charge as to false representations,⁶⁷ mental capacity of a

was forgotten, but at the end of his charge the court asked the counsel on both sides if there was any other matter on which they wished instructions, who both answered in the negative, the omission was held not to be a good ground of exception." *Gillespie v. Shuliberrier*, 50 N. C. 157.

Where a party requests a series of instructions, and the court fails to respond to all seriatim, but the attention of the court is not, at the close of the charge, called to any one or more of such series, although the counsel of the party are invited by the court to do so, if desired, the failure of the court in this respect is not regarded, in an appellate court, as error, even if some of such instructions ought to be given. *Hudson v. Charleston, C. & C. R. Co.* (C. C.) 55 Fed. 252.

64—"Where the question raised by the pleadings was whether there had been an express contract by a mother-in-law to pay her son-in-law, with whom she lived, for her board, and the court had charged the jury that she would not be liable to pay for such board, in the absence of an agreement, but had failed to instruct the jury that they should consider all the circumstances, for the purpose of determining whether or not an agreement should be implied or inferred therefrom," the failure to give additional and more explicit instructions is not error, in the ab-

sence of a request therefor. *Austin v. Moe*, 68 Wis. 458.

65—"It was proper for the trial court to submit to the jury the question whether or not the plaintiff, by reason of her temporary disability, failed to perform the contract of employment on her part in any substantial manner; but inasmuch as defendant's counsel failed to make a specific request that the court so charge, his omission to submit that question to the jury cannot, for the purpose of this appeal, be assigned as error." *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Winchell v. Hicks*, 18 N. Y. 559; *Fisher v. Monroe*, 16 Daly (N. Y.) 467.

66—"If a party desires the court to place a construction upon a contract, he should ask for it. *Barnett v. State*, 100 Ind. 171; *State Nat. Bank of Springfield v. Bennett*, 8 Ind. App. 679.

"If the presiding judge is not requested to give any instructions in reference to the nature and effect of a written instrument introduced in evidence at the trial, the omission to do so is no valid ground of exceptions unless the liability of the party is to be determined solely by the legal construction to be put upon it." *Badger v. Bank of Cumberland*, 26 Me. 428.

67—"In an action on a promissory note given upon an exchange of horses, the jury were instructed that, if the plaintiffs, at the time of the

person,⁶⁸ payment,⁶⁹ notice,⁷⁰ limitations⁷¹ or adverse

exchange, made false representations as to the soundness of their horse, upon which the defendant relied as true, and the horse received by the defendant was worth the most, the difference between the actual value of that horse and what would have been its value if the representations had been true should be deducted from the amount of the note. It was held that the plaintiffs, if they requested no instructions upon the hypothesis that the defects in that horse might have been ascertained by the defendant by the exercise of ordinary care and vigilance, had no ground of exception." *Davis v. Elliott*, 15 Gray (Mass.) 90.

68—Where the evidence, in an action to set aside a conveyance, is such as to require a charge upon the nature and degree of mental capacity to make a valid conveyance, a request for a special instruction upon the mental capacity of the grantor must be made to render the failure to charge on the point error. *Berryman v. Schumaker*, 67 Tex. 312.

69—Where, in an action to recover for services rendered, payment of part of the account is admitted, the court's failure to mention the subject of payment in its charge is not error, where its attention is not called to the matter, and where no request is made. *Crowell v. Truax*, 94 Mich. 585, wherein the court said: "We think that error could not be predicated upon this, as the jury could hardly overlook so plain a proposition as that payments should be deducted, when it was conceded upon the trial." The failure to charge as to the presumption of payment from lapse of time is not error,

in the absence of a request to charge upon that point. *Abrahams v. Kelly*, 2 S. C. 237.

70—Where the issue is whether or not the defendant purchased with notice of plaintiff's claim, a failure to instruct as to the law of constructive notice is not error, in the absence of a request. *Brotherton v. Weathersby*, 73 Tex. 471.

Where the court instructed that notice to a clerk would not be notice to his employer of certain facts, a failure to charge as to the effect of notice to a business manager is not error, in the absence of a request to charge upon that point. *Brown v. Foster*, 41 S. C. 118.

Where the court charged that the case turned mainly upon the question of notice, but did not explain what amounted to notice, as applied to the facts in evidence, nor as to the legal effect of rumors as notice, such failure is not ground for a new trial, in the absence of a request. *Street v. Lynch*, 38 Ga. 631.

71—The general rule that, when the court fails to charge on an issue raised by the pleadings and evidence, the omission cannot be alleged as error unless a special charge covering the point is asked, applies to the issue of the application of the statute of limitations. *Rackley v. Fowlkes* (Tex. Civ. App.), 36 S. W. 75.

"The defendant pleaded the statute of limitations, and the testimony was such as to raise the issue. The court charged the jury that 'the defendant had pleaded the statute of limitations in bar of plaintiff's action, among other defenses,' and did not further instruct upon that subject. No instruction was asked.

possession⁷² has been held not to constitute error.

§ 163. Same—Instructions defective in form.

In the absence of a request for proper instructions it is not ground for reversal that the instructions given are general, indefinite, vague or uncertain,⁷³ or that they are

Held, that it was the duty of plaintiff to ask further instructions, if he desired, and, having failed to do so, he cannot complain on appeal of the defective charge." *Hocker v. Day*, 80 Tex. 529.

72—Where adverse possession is an issue, the failure of the court to define "adverse possession," and to state that the running of the statute of limitations would be interrupted by the filing of the suit, is not error, in the absence of a request to charge upon these points. *Robinson v. McIver* (Tex. Civ. App.), 23 S. W. 915.

Where adverse possession of uncultivated and unclosed land is relied upon, a failure to instruct that the extent of possession should be denoted by natural or artificial boundaries has been held not error, in the absence of a request for such an instruction. In this case, however, no injury could have resulted from the omission. *Wood v. Figard*, 28 Pa. St. 403.

73—*Alabama*. *Pulliam v. Newberry's Adm'r*, 41 Ala. 168; *Jones v. Fort*, 36 Ala. 449; *State v. Brinyea*, 5 Ala. 241.

California. *People v. Olsen*, 80 Cal. 122, 22 Pac. 125.

Georgia. *Johnson v. State*, 14 Ga. 55.

Illinois. *Savage v. Chicago & J. E. R. Co.*, 238 Ill. 392.

Indiana. *Hallock v. Iglehart*, 30 Ind. 327; *Stockwell v. Byrne*, 22 Ind. 6; *Morningstar v. Hardwick*,

3 Ind. App. 431; *Gastlin v. Weeks*, 2 Ind. App. 222; *Eichel v. Senhenn*, 2 Ind. App. 208.

Iowa. *State v. Jelinek*, 95 Iowa 420.

Kansas. *State v. Falk*, 46 Kan. 498, 26 Pac. 1023.

Minnesota. *Clapp v. Minneapolis & St. L. Ry. Co.*, 36 Minn. 6, 1 Am. St. Rep. 629; *Warner v. Myrick*, 16 Minn. 91.

Missouri. *State v. Reynolds*, — Mo. —, 165 S. W. 729; *Murphy v. Wabash R. Co.*, 228 Mo. 56.

Nebraska. *Sheridan Coal Co. v. C. W. Hull Co.*, 87 Neb. 117; *Sioux City, etc., R. Co. v. Brown*, 13 Neb. 317.

Pennsylvania. *Fife v. Com.*, 29 Pa. St. 429; *Weiss v. Swift & Co.*, 36 Pa. Super. Ct. 376.

Texas. *Northern Texas Traction Co. v. Hunt*, 54 Tex. Civ. App. 415; *Rousel v. Stanger*, 73 Tex. 670.

Wisconsin. *Page v. Town of Sumpster*, 53 Wis. 652; *Lela v. Domaske*, 48 Wis. 623.

The mere fact that an instruction is obscure is not ground for reversal. The party complaining must ask an explanatory or qualifying charge. *Pulliam v. Newberry's Adm'r*, 41 Ala. 168; *Jones v. Fort*, 36 Ala. 449; *State v. Brinyea*, 5 Ala. 241; *Johnson v. State*, 14 Ga. 55; *Stockwell v. Byrne*, 22 Ind. 6; *Fife v. Com.*, 29 Pa. St. 429.

Where an instruction is too gen-

ambiguous.⁷⁴ So, also, a request for instructions is necessary where the instructions given are verbally inaccurate,⁷⁵ or contain unnecessary verbiage,⁷⁶ or where the charge given contains words or terms which should be explained.⁷⁷

eral, a requested instruction limiting the effect of the charge so as not to be misunderstood is necessary. *State v. Reynolds*, — Mo. —, 165 S. W. 729.

74—A merely ambiguous instruction is not ground for reversal, in the absence of a request for proper instructions correcting the defect:

Alabama. *Sharp v. Burns*, 35 Ala. 663.

Maine. *Stratton v. Staples*, 59 Me. 94.

Minnesota. *McCormick v. Loudon*, 64 Minn. 509; *Boyle v. Loudon*, 64 Minn. 509.

Oregon. *Schoellhamer v. Rometsch*, 26 Ore. 394, 38 Pac. 344; *Kearney v. Snodgrass*, 12 Ore. 311, 7 Pac. 309.

Washington. *McQuillan v. City of Seattle*, 13 Wash. 600, 43 Pac. 893; *Box v. Kelso*, 5 Wash. 360.

United States. *Schuykill & Dauphin Imp. & R. Co. v. Munson*, 14 Wall. 442, 20 L. Ed. 867. "Where a charge is merely ambiguous, a party dissatisfied with it ought, before the jury leave the bar, to ask the court to make it clear. He should not acquiesce in the correctness of the instruction, take his chance with a jury, and, after the verdict is against him, claim the benefit of the ambiguity on error." *Schuykill & Dauphin Imp. & R. Co. v. Munson*, 14 Wall. (U. S.) 442, 20 L. Ed. 867.

75—If a charge is verbally inaccurate plaintiff should request a correct charge on the point in issue and when he does not do so, he cannot

complain on appeal. *McKee v. Garner*, — Tex. Civ. App. —, 168 S. W. 1031.

76—If a party desires to have defects in instructions cured, as where they contain unnecessary verbiage, he should seek to accomplish that result by asking properly prepared special charges correcting such defects. *La Grange & Lockhart Compress Co. v. Hart*, — Tex. Civ. App. —, 169 S. W. 373.

77—"A mere defect in the charge, in failing to explain an expression used in it, cannot avail an appellant who did not ask an appropriate instruction at the trial." *Texas & P. Ry. Co. v. O'Donnell*, 58 Tex. 27.

Where a charge on the issue of adverse possession was not erroneous, but only defective, in not defining "adverse possession," plaintiff cannot assign error, in the absence of a request for an instruction curing the omission. *Robinson v. McIver* (Tex. Civ. App.), 23 S. W. 915.

If an explanation of what constitutes a legal tenancy is desired, it must be requested. *Crail v. Crail*, 6 Pa. 480.

An instruction defining "legal services" should be requested. In *re Lutz's Estate*, 175 Mo. App. 427.

A failure to charge specially as to the meaning of "probable cause" in an action for malicious prosecution cannot be assigned as error in the absence of a request. *Peterson v. Toner*, 80 Mich. 350; *Lueck v. Heisler*, 87 Wis. 644.

But under some statutes when an instruction is defective in form or phraseology it becomes the duty of the court to give a proper instruction covering the point.⁷⁸

§ 164. Misleading instructions.

The mere fact that the charge, though correct, might mislead the jury or has a tendency to mislead is not reversible error in the absence of a request for a proper instruction,⁷⁹ but where the almost necessary effect of the charge is to mislead the jury, or where the result shows that the jury were probably misled, it seems that the judgment should be reversed.⁸⁰

In many cases the general rule that a request is necessary is stated with the proviso that the instructions given were not misleading.⁸¹

78—Under Mo. Rev. St. 1909, § 5231, requiring the court to instruct whether requested or not, if an instruction is refused because defective in form or phraseology, it becomes the duty of the court to give a proper instruction covering the point. *State v. Harris*, 232 Mo. 317.

79—**Alabama.** *Green v. Southern States Lumber Co.*, 163 Ala. 511; *Towns v. State*, 111 Ala. 1; *Durrett v. State*, 62 Ala. 434; *Abraham v. Nunn*, 42 Ala. 57; *Fitzpatrick v. Hays*, 36 Ala. 684; *Birmingham Railway, Light & Power Co. v. Cockrell*, 10 Ala. App. 578, and see cases in this note, *post*.

Indiana. *Jones v. State*, 49 Ind. 549.

Iowa. *Churchill v. Gronewig*, 81 Iowa 449; *Deere v. Wolf*, 77 Iowa 115; *Gwinn v. Crawford*, 42 Iowa 63.

Louisiana. *Milne v. Pontchartrain R. Co.*, 9 La. 257.

Michigan. *Chapman v. Strong*, 162 Mich. 623.

Missouri. *Hyde v. St. Louis Book & News Co.*, 32 Mo. App. 298.

If an instruction is capable of misleading interpretation, an explanatory charge should be requested. *Gilley v. Denman*, 185 Ala. 561; *Hamrick v. Shipp*, 169 Ala. 171; *Birmingham Railway, Light & Power Co. v. Friedman*, — Ala. —, 65 So. 939; *Louisville & N. R. Co. v. Mason*, 10 Ala. App. 263.

A charge to the jury, asserting that an equal distribution of the testator's property among his children "is no legal reason why it should be considered an irrational act," is not erroneous, though it may be calculated to mislead the jury. Explanatory charges should have been asked. *Hughes v. Hughes' Ex'r*, 31 Ala. 519.

80—*Towns v. State*, 111 Ala. 1; *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162; *Towns v. Riddle*, 2 Ala. 694; *Toulmin v. Lesesne*, 2 Ala. 359; *Peirson v. Duncan*, 162 Pa. St. 187; *International & G. N. Ry. Co. v. Philips*, 63 Tex. 590.

81—*Jones v. State*, 49 Ind. 549; *Hill v. Newman*, 47 Ind. 187; *Dris-*

If the instructions given are correct, are applicable to the facts, and are not fairly open to misconstruction, there can be no reversal for their want of greater fullness.⁸²

§ 165. Same—Pleadings and issues.

A requested instruction explaining the paragraphs of a pleading is necessary,⁸³ and it is also usually held that the failure to submit an issue made by the pleadings and evidence will not be ground for reversal where no request was made that such issue be submitted.⁸⁴

coll v. People, 47 Mich. 413; Schryver v. Hawkes, 22 Ohio St. 308; Ott v. Oyer's Ex'x, 106 Pa. St. 7.

82—Hyde v. St. Louis Book & News Co., 32 Mo. App. 298.

83—"An objection to an instruction to the jury that it fails to state the difference between the various paragraphs of defendant's answer is unavailable. An instruction covering the point should have been asked." Conrad v. Kinzie, 105 Ind. 281.

84—**Arkansas.** Jones v. Seymour, 95 Ark. 593.

Georgia. Ronsheim v. Brimberry, 89 Ga. 97.

Maine. Barrett v. Delano (Me.), 14 Atl. 288.

Michigan. Lynch v. Johnson, 109 Mich. 640; Copas v. Anglo-American Provision Co., 73 Mich. 541.

Minnesota. McCarvel v. Phenix Ins. Co., 64 Minn. 193.

Nebraska. Barr v. City of Omaha, 42 Neb. 341.

New York. Carnes v. Platt, 6 Rob. 271.

Pennsylvania. Brinser v. Longenecker, 169 Pa. St. 51.

South Carolina. Hume v. Providence Washington Ins. Co., 23 S. C. 199.

South Dakota. Chrystal v. Gerlach, 25 S. D. 128.

Texas. Texas & P. Ry. Co. v. Gay, 86 Tex. 571, 25 L. R. A. 52; Wilkin-son v. Johnson, 83 Tex. 392; Milmo v. Adams, 79 Tex. 526; Blackwell v. Hunnicutt, 69 Tex. 273; Gibson & Cunningham v. Purifoy, 56 Tex. Civ. App. 379; Jesse French Piano & Organ Co. v. Garza & Co., 53 Tex. Civ. App. 346; Texas Land & Loan Co. v. Watkins, 12 Tex. Civ. App. 603; Missouri, K. & T. Ry. Co. v. Thompson, 11 Tex. Civ. App. 658; Missouri, K. & T. Ry. Co. v. Kirkl-land, 11 Tex. Civ. App. 528; Missouri Pac. Ry. Co. v. Peay, 7 Tex. Civ. App. 400; Texas & P. Ry. Co. v. Robinson, 4 Tex. Civ. App. 121; Voorheis v. Waller (Tex. Civ. App.) 35 S. W. 807; Shilling v. Shilling (Tex. Civ. App.) 35 S. W. 420; Mills v. Haas (Tex. Civ. App.) 27 S. W. 263; Sigal v. Miller (Tex. Civ. App.) 25 S. W. 1012; Bernheim v. Shannon (Tex. Civ. App.) 21 S. W. 386; Myer v. Fruin (Tex.) 16 S. W. 868.

Wisconsin. Newton v. Whitney, 77 Wis. 515.

"Where the evidence is barely sufficient, if at all, to raise the issue of fraud, failure of the court to charge on such issue is error of

But in Iowa, it is held to be "the duty of the trial court to submit to the jury all questions of fact arising under the pleadings upon which evidence is introduced on the trial." ⁸⁵

§ 166. Same—Evidence.

Unless requested, the court need not charge upon all the points of the case, nor recapitulate all the evidence, nor charge upon a particular part of the testimony,⁸⁶ and if in recapitulating testimony the court overlooks evidence important to a defendant, it is the duty of counsel to call the attention of the trial judge to the omission, or error cannot

omission, and can be taken advantage of only where appellant asked correct instruction below covering the omission." *Kidwell v. Carson*, 3 Tex. Civ. App. 327.

The court below does not err in failing to instruct the jury upon defendant's plea of privilege of being sued in another county, where no such instruction is requested by them, and the error is therefore one of omission, of which they cannot complain. *Sigal v. Miller* (Tex. Civ. App.) 25 S. W. 1012.

Where, in an action to recover for goods furnished to one alleging himself to be an infant, the only evidence as to defendant's age is the testimony of his father, it cannot be contended that the court erred in submitting the question of his age to the jury, where defendant did not request an instruction that his age was conclusively proven. *Lynch v. Johnson*, 109 Mich. 640.

"On a trial before a jury, where the court directs a verdict for the defendant, if there is any question for the jury, the party should request the court to submit the same. If no such request is made, the question cannot be considered on re-

view." *Seymour v. Cowing*, 1 Keyes (N. Y.) 532.

A failure to instruct as to a separate defense of one of several joint defendants is not error, in the absence of a request. *Edwards v. Smith*, 71 Tex. 156; *Shilling v. Shilling* (Tex. Civ. App.) 35 S. W. 420.

85—*Upton & Co. v. Paxton*, 72 Iowa 295.

86—*Boykin v. Perry*, 49 N. C. 315, 69 Am. Dec. 751n.

The court need not bring to the notice of the jury all the evidence in relation to a subject on which they charge. *State v. Morris*, 10 N. C. 388.

"The trial judge is not required, in the absence of a prayer for special instructions, to present the evidence in his charge in every possible aspect." *Morgan v. Lewis*, 95 N. C. 296.

It is not reversible error to omit to direct the specific attention of the jury to isolated portions of the testimony which may bear with peculiar force in favor of one party rather than of the other. *Wall v. Wall*, 15 Ga. App. 156.

There is no rule of law which re-

be predicated upon the refusal of the trial judge to grant a new trial because of such omission.⁸⁷

A party may entitle himself to the opinion of the court on the legal effect of any portion of the evidence only by specifically referring to it in his prayer for instructions,⁸⁸ and the failure of the court to instruct that certain evidence was admitted only for a certain purpose, and can be considered only for that purpose, is not error in the absence of a request to so instruct.⁸⁹

quires that any particular part of the evidence shall be charged upon, whether requests for instructions are made or not, and the failure of the court to notice admissions introduced in evidence by one of the parties is not error, in the absence of any request to charge upon such admissions. *Hawkins v. Kermod*, 85 Ga. 116.

The mere omission to refer in the charge to all the evidence is not a sufficient cause for reversing the judgment, in the absence of a request. *Payne v. Noon* (Pa.), 8 Atl. 428.

The omission to charge the jury, without special request, that mere possession by the husband of the wife's property will not subject it to his debts, and that conflicting testimony ought to be reconciled, if practicable, is not ground for a new trial. *Morgan v. Swann*, 81 Ga. 207.

87—*State v. Gould*, 90 N. C. 658; *Brown v. Calloway*, 90 N. C. 118; *State v. Reynolds*, 87 N. C. 545; *State v. Grady*, 83 N. C. 643.

88—*Dingee v. Jackson*, 23 Pa. 176; *Lancaster County Bank v. Albright*, 21 Pa. 228; *Garrett v. Jackson*, 20 Pa. 331.

It is not error to fail to charge on the effect of certain promises to pay money where such charge is not pre-

pared and offered. *Buchholz v. Feustel*, 179 Ill. App. 396.

On a rule to compel an attorney to pay over money collected for his client, it is not error to fail to instruct as to the effect of receipts in full, where no such instruction is requested. *Howland v. Bartlett*, 86 Ga. 669.

"A judge's omission, while calling attention to the conflict in testimony as to a disputed payment, to state what effect the truth of either statement would have in respect to the operation of the statute of limitations, was error warranting reversal if he had been properly requested to charge that the items of plaintiff's claim were barred unless renewed by the payment." *Hollywood v. Reed*, 55 Mich. 308.

"It is not always necessary for the court to tell the jury, when not requested to do so, what are the legal inferences from certain facts, if proved; but where the inference is clear, and the request is made, it is error to refuse to so instruct." *Howard v. Mutual Benefit Life Ins. Co.*, 6 Mo. App. 577.

89—*Alabama*. *Lamar v. King*, 168 Ala. 285; *Long Distance Telephone & Telegraph Co. v. Schmidt*, 157 Ala. 391.

California. *People v. Gray*, 66

When a defendant is entitled to an instruction limiting or modifying the effect of evidence legally introduced he must request such instruction. The court does not err in omitting instructions on such point, as it is of a collateral nature and not indispensable in arriving at a correct verdict;⁹⁰ and it has also been held as to any matter not referred to in the pleadings or the issues, but introduced into the case by competent and material testimony, failure to instruct with reference to this testimony in the absence of a request is not erroneous.⁹¹

An instruction correcting error in the admission of evidence,⁹² or to disregard evidence,⁹³ should be requested, and

Cal. 276; *People v. Ah Yute*, 53 Cal. 613; *People v. Collins*, 48 Cal. 277; *People v. Connelly*, 38 Pac. 42.

Illinois. *Foley v. Everett*, 142 Ill. App. 250; *City of Chicago v. Cohen*, 139 Ill. App. 244.

Iowa. *Greenlee v. Ealy*, 145 Iowa 394.

Maine. *Stone v. Redman*, 38 Me. 578.

Minnesota. *Nininger v. Knox*, 8 Minn. 140 (Gil. 116).

Missouri. *Kirby v. St. Louis & S. F. R. Co.*, 146 Mo. App. 304.

New Hampshire. *Dow v. Merrill*, 65 N. H. 107.

New York. *People v. McLaughlin*, 2 App. Div. 419, 37 N. Y. Supp. 1005.

North Carolina. *Hill v. Bean*, 150 N. C. 436.

Texas. *Mayer v. Walker*, 82 Tex. 222; *Walker v. Brown*, 66 Tex. 556; *Shumard v. Johnson*, 66 Tex. 70; *Posener v. Harvey*, — Tex. Civ. App. —, 125 S. W. 356; *Mutual Life Ins. Co. of New York v. Baker*, 10 Tex. Civ. App. 515; *Roos v. Lewyn*, 5 Tex. Civ. App. 593.

Wisconsin. *Roebke v. Andrews*, 26 Wis. 312.

Where the court instructs the jury

that certain admissions admitted in evidence are not binding upon the plaintiff, a failure to instruct the jury for what purpose they might consider the admissions is not error, in the absence of a request to so charge. *People v. Ah Yute*, 53 Cal. 613; *Mayer v. Walker*, 82 Tex. 222.

Failure to restrict the jury in its consideration of evidence, when no instruction to that effect has been requested, is not reversible error. *Mutual Life Ins. Co. of New York v. Baker*, 10 Tex. Civ. App. 515.

90—*People v. Carmean*, 23 Cal. App. 396, 138 Pac. 117; *State v. Douglas*, 258 Mo. 281.

91—*State v. SeEVERS*, 108 Iowa 738.

92—"Where a party fails to request that an instruction given by the court to correct an error in the admission of evidence be made more explicit, it will be deemed to have been satisfactory to him at the time, and he cannot afterwards be heard to complain." *Moore v. Shields*, 121 Ind. 267.

93—Where, on objection, the court excludes hearsay evidence, and the

the court need not instruct on its own motion to obviate the effect of evidence not objected to.⁹⁴

But, where material evidence tending to present a definite legal position or having legal value in reference to the issues or any of them is introduced and a specific prayer for instructions concerning it is properly preferred, stating correctly the law applicable, the failure to give such instruction substantially is reversible error.⁹⁵

A party who does not ask for specific instructions as to the amount of evidence required to overturn the presumption arising from a settlement cannot complain if none are given.⁹⁶

Where the court charges, on a plaintiff's request, that an affirmative defense must be established by a preponderance of the evidence, a failure to charge that the evidence on this point must be clear and positive is not error.⁹⁷

§ 167. Same—Witnesses.

In the absence of a timely written request to instruct the jury as to the law with reference to impeachment of witnesses, it is not error for the judge in his charge to omit all reference to this subject.⁹⁸

Where a party desires the court to charge specially on the testimony of a witness, attention should be called to the testimony by a proper request.⁹⁹

party objecting fears the effect of such testimony notwithstanding its exclusion, he should request an instruction to the jury to disregard it, and cannot complain of a failure to give such instruction unless he does so request. *Russell v. Nall*, 79 Tex. 664. See also, *Fass v. Western U. Tel. Co.*, 82 S. C. 461.

94—*Illinois Cent. R. Co. v. Atwell*, 198 Ill. 200, aff'g 100 Ill. App. 513.

95—*Marcom v. Durham & S. R. Co.*, 165 N. C. 259.

96—*Gheen v. Heyburn*, 1 Walk. (Pa.) 148.

97—*Gottstein v. Seattle Lumber & Commercial Co.*, 7 Wash. 424, 35 Pac. 133.

98—*Hart v. State*, 14 Ga. App. 714.

99—*Kurtz v. Haines*, 2 Monag. (Pa.) 328.

The omission of the court to comment upon the alleged extraordinary character of the testimony of a witness cannot be alleged as error if the court was not requested to make such comment. *Warden v. City of Philadelphia*, 167 Pa. St. 523.

§ 168. Same—Verdict.

A failure to direct a verdict for a party is not error in the absence of a request to do so,¹ and a party who desires the jury to be advised as to the form of a verdict should request an instruction embodying such form.²

A failure to instruct that the jury might find one joint defendant guilty and disagree as to the other is not erroneous, in the absence of a request to so instruct.³

§ 169. Same—Criminal cases.

While it is the duty of the court in a criminal case to fairly present the issues in its charge to the jury in order that they may have a clear and intelligent notion as to what they are to decide, yet it is not necessary that the court on its own motion instruct upon every matter arising in the case.⁴

Where the statutory definition of an offense is given, if the defendant desires a more specific statement as to the elements necessary to constitute such offense he should make a request therefor,⁵ and where no instruction is re-

1—Reading v. Metcalf, Hardin (Ky.) 544; Wiggins v. Guthrie, 101 N. C. 661; Lawrence v. Hester, 93 N. C. 79; Carr v. H. C. Frick Coke Co., 170 Pa. St. 62; Wray v. Spence, 145 Pa. St. 399; Cannell v. Smith, 142 Pa. St. 25, 12 L. R. A. 395n; Readdy v. Borough of Shamokin, 137 Pa. St. 98; Pennsylvania R. Co. v. Page, 21 Wkly. Notes Cas. (Pa.) 52.

2—Triggs v. McIntyre, 215 Ill. 369, aff'g 115 Ill. App. 257.

Where the court instructed as to the form of a verdict of guilty of petit or grand larceny, a failure to instruct as to the form of a verdict of not guilty is not error, in absence of a request. Hodge v. State, 85 Ind. 561.

3—Morgan v. State, 117 Ind. 569.

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4—State v. Brandenberger, 151 Iowa 197.

5—State v. O'Hagan, 124 Minn. 58.

If the court in its instructions gives, in general terms, the elements of the crime charged, and it is not asked by defendant to enlarge upon and explain further and particular elements or features thereof, failure to give fuller and more explicit instructions is not error which will justify a reversal. State v. Potter, 15 Kan. 302.

Omission of word "actually" in instructing as to burglary of house, occupied and used at time of offense as place of residence, held not reversible error in absence of request on subject. Payne v. State, — Tex. Cr. App. —, 148 S. W. 694.

quested, it is not erroneous for the court to fail to instruct as to an alibi,⁶ as to self-defense,⁷ or as to drunkenness.⁸

The failure to charge as to effect of evidence is not error where no instruction is requested.⁹

Thus, the failure to instruct as to evidence of good character does not constitute reversible error,¹⁰ and a like rule applies to circumstantial evidence.¹¹

In the absence of a timely written request, the court is not required to charge a theory wholly dependent upon the statement of the accused,¹² and it is not error to fail to instruct that the defendant's failure to testify does not create any presumption of guilt against him when such instruction is not requested.¹³

If a defendant in a misdemeanor case desires fuller in-

6—State v. Lightfoot, 107 Iowa 344.

It was not reversible error to fail to instruct as to the defense of alibi where the defendant makes no request for such instruction. Bloom v. State, 95 Neb. 710.

7—State v. Woodward, 84 Iowa 172.

"Where a prisoner prayed for instructions only on the ground that the deceased did not intend to kill him, and not on the ground of a reasonable belief on his part that the deceased did so intend, the judge did not err in omitting to instruct the jury on the latter point." State v. Scott, 26 N. C. 409, 42 Am. Dec. 148.

8—A failure to charge in respect to a statute providing that drunkenness shall be no excuse for crime is not error, in the absence of a request. So held on indictment for assault with intent to kill. Thomas v. State, 91 Ga. 204.

9—On an indictment for embezzlement, where evidence of other sim-

ilar embezzlements by defendant was admitted, but the court charges that the defendant is not on trial for such other embezzlements, a failure to charge that the evidence of such other embezzlements is admissible only to show a criminal intent is not error, in the absence of a request. People v. Connelly (Cal.), 38 Pac. 42.

10—State v. Brandenberger, 151 Iowa 197; Heard v. State, 9 Tex. App. 1.

Contra, see State v. Anslinger, 171 Mo. 600. It will be noted that this decision is bottomed upon a statute which requires the court to instruct whenever necessary upon the subject of good character, whether requested or not.

11—On a prosecution for a misdemeanor, failure to charge on circumstantial evidence is not ground for reversal, in the absence of a request. Lucio v. State, 35 Tex. Cr. App. 320.

12—Pitts v. State, 14 Ga. App. 283.

13—State v. Lesh, 27 N. D. 165.

instructions in regard to certain matters he should request such charges,¹⁴ and the failure to caution the jury as to the evidence of an accomplice in a misdemeanor case is not reversible error, in the absence of a special request.¹⁵

A failure to instruct the jury as to the law with respect to a "reasonable doubt" is not error, in the absence of a request.¹⁶

Also the failure of the court to instruct the jury to acquit if the venue was not proven is not error, in the absence of a request.¹⁷

The failure to charge on the right of the jury to convict of a lesser offense is not reversible error, unless such instruction is requested,¹⁸ and it has been held not erroneous, in the absence of a request, to fail to instruct that an accused

14—*Noodleman v. State*, — Tex. Cr. App. —, 170 S. W. 710.

15—*Goemann v. State*, 94 Neb. 582.

16—*Mead v. State*, 53 N. J. L. 601; *Butler v. State*, 7 Baxt. (Tenn.) 35.

Where the court instructs the jury that, "if they believe from the evidence, etc.," and omits to add "beyond a reasonable doubt," because, when such instruction is given, it is intended and understood that before the jury can convict they must believe the material facts, "beyond a reasonable doubt," there is no available error, and if the defendant wants the very words inserted in the instruction, he must ask to have it done, or ask for a general instruction on the subject. *State v. Robinson*, 20 W. Va. 714.

17—*People v. Marks*, 72 Cal. 46, 13 Pac. 149.

18—*State v. Horn*, 21 S. D. 237.

Manslaughter. It cannot be urged as error in a case of homicide that the court failed to submit instructions to the jury as to the law of

manslaughter applicable to the case, defendant not having asked it. *Edwards v. State*, 47 Miss. 589. Compare *Sanders v. State*, 41 Tex. 306. Failure to instruct as to involuntary manslaughter in a trial for murder is not error, in the absence of request. *Adams v. State*, 65 Ind. 565. Where an accused requests a correct instruction as to involuntary manslaughter but does not present what he considers a correct instruction, he cannot complain of the refusal to grant his request. *Carlton v. State*, 109 Ark. 516.

Assault. On indictment for assault with intent to commit rape, it is not error to fail to charge that the jury may find the defendant guilty of a simple assault in case they find him not guilty of assault with intent to commit rape, as the defendant could not have been prejudiced by a charge which allowed the defendant to be acquitted unless the jury, on the evidence, found him guilty of the higher crime charged. *State v. Hanlon*, 62 Vt. 334.

might be recommended to mercy,¹⁹ or to instruct as to the right of the jury to relieve from the death penalty.²⁰

§ 170. Negligence cases.

In an action for negligence, a failure to define the terms "negligence," "ordinary care," "reasonable care and diligence," "gross negligence," "carelessness" or "unfitness," as used in the instructions, is not error in the absence of a request to do so.²¹ Similarly, in the absence of a request the

19—In the absence of a request, it is not a ground for a new trial that the judge failed to instruct the jury, in an arson case, that the prisoners might be recommended to mercy, and their punishment mitigated. *State v. Dodson*, 16 S. C. 463.

20—"The language used is: 'It is within your discretion to pronounce such a sentence as will relieve such defendant from the extreme penalty of the law.' The instruction is certainly open to criticism in this respect. In the trial of cases of this kind, the court should carefully instruct the jury, not only that they have the discretion to relieve a defendant from the extreme penalty of the law, but they should be told in specific terms what verdict they are authorized to return, and the forms of the different kinds of verdicts should be stated, and such forms of verdicts prepared and sent out with the jury, allowing them to select the one agreed upon by them. But the jury were apprised of the fact here that they were not bound to return such a verdict as would result in the infliction of the death penalty. There was nothing in the instruction to mislead. If the counsel for defendant desired a more specific charge upon the point, they should have asked it, and, if they did not do so,

the responsibility must rest with them. *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *People v. Ah Wee*, 48 Cal. 237; *People v. Haun*, 44 Cal. 96; *People v. Collins*, Id. 227. We do not wish to be understood as holding that an entire failure to instruct on this subject, in this class of cases, would not be error; but where the court does instruct and call to the attention of the jury that it is within their province to determine whether or not the extreme penalty shall be inflicted, and the instruction is not such as to mislead the jury, a defendant cannot be allowed to complain that the instruction was not sufficiently certain and specific, when the attention of the court below has not been called to it, and no more specific instruction has been asked for." *People v. Olsen*, 80 Cal. 122, 22 Pac. 125.

21—*Atlantic Coast Line R. Co. v. Jones*, 132 Ga. 189; *Blue Grass Traction Co. v. Ingles*, 140 Ky. 488; *Quirk v. St. Louis United Elevator Co.*, 126 Mo. 279; *Johnson v. Missouri Pac. Ry. Co.*, 96 Mo. 340, 9 Am. St. Rep. 351; *Campbell v. Hoosier Stave & Lumber Co.*, 146 Mo. App. 681; *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633; *Galveston, H. & S. A. Ry. Co. v. Arispe*, 81 Tex. 517; *Galveston, H. & S. A. Ry. Co. v. Waldo* (Tex. Civ. App.) 26 S. W. 1004.

court need not define such a term as "sufficient and secure."²²

Also, it cannot be contended that a definition is insufficient unless a further charge relative to such subject is requested.²³

If plaintiff desires the court to differentiate between "gross negligence" and a conscious failure to observe "due care," he should make a request as to such subject.²⁴

Instructions as to contributory negligence will not be given by the court of its own motion but must as a general rule be requested,²⁵ and the same rule applies to instructions as to the doctrine of proximate and remote cause.²⁶

Where the court gives a correct definition of negligence, and an attempted definition of ordinary care is meaningless, the defendant should request a proper definition of ordinary care. *San Antonio & A. P. Ry. Co. v. Batte*, — Tex. Civ. App. —, 163 S. W. 630.

22—In an action for injuries to a servant caused by a defective handhold, the failure to define "sufficient and secure" was an error of omission, and the defendant should have requested a special charge to remedy the omission. *Galveston, H. & S. A. Ry. Co. v. Enderle*, — Tex. Civ. App. —, 170 S. W. 276.

23—*Donati v. Righetti*, 9 Cal. App. 45, 97 Pac. 1128; *Texas & N. O. R. Co. v. Reed*, 54 Tex. Civ. App. 26.

Where the court charged that, "by the term 'negligence,' when used in this charge, is meant the omission or failure to do something which an ordinarily prudent and careful person would have done under like circumstances," it cannot be contended that this definition of negligence did not include the doing of any affirmative act, unless a further charge upon this phase of the case is requested. *Campbell v. Warner* (Tex. Civ. App.), 24 S. W. 703.

24—*Carolina Rice Co. v. West Point Mill Co.*, 98 S. C. 476.

25—*Orr v. Garabold*, 85 Ga. 373; *Livingston v. Chicago, R. I. & P. R. Co.*, 41 Okla. 505, 139 Pac. 260; *Western U. Tel. Co. v. Buchanan*, — Tex. Civ. App. —, 129 S. W. 850; *Western U. Tel. Co. v. Mack*, — Tex. Civ. App. —, 128 S. W. 921; *Houston & T. C. R. Co. v. Lentz*, 56 Tex. Civ. App. 498.

26—*Wickham v. Chicago, St. P., M. & O. R. Co.*, 110 Minn. 74; *Stumm v. Western U. Tel. Co.*, 140 Wis. 528.

A charge is not erroneous merely upon the ground that it does not enter sufficiently into the particulars which distinguish proximate from remote causes. *International & G. N. R. Co. v. Smith* (Tex. Sup.) 1 S. W. 565.

In an action against a master by a servant to recover for injuries caused by the alleged negligence of another servant, an instruction cannot be objected to as authorizing the jury to find for plaintiff if defendant was negligent in employing the other servant, regardless of the remoteness of the negligent act of employment, unless defendant requests a charge reciting the facts which tend to establish such remoteness. *Mexi-*

the doctrines of fellow-servants,²⁷ or scope of employment.²⁸

Where the court is not requested to charge upon the subject of assumption of risk and no exception is taken to the court's failure to so charge, the appellate court is not required to consider such question,²⁹ and if an instruction as to assumed risk is too restrictive, the complaining party should prepare and request a special charge as to such defense.³⁰

In an action for injuries to a passenger, where the plaintiff's counsel argued that the failure of defendant's servants to appear and testify raised a presumption that they were negligent, in the absence of a request, there was no duty on the court to charge that defendant was not bound to produce all the agents and employees who were connected with the running of the train.³¹

§ 171. Same—Damages—Costs.

A party will not be heard to complain that the instructions as to the measure of damages in a particular case are insufficient in the absence of a request for a further instruction.

can Nat. R. Co. v. Musette, 7 Tex. Civ. App. 169.

27—Where, in an action by a servant against a master, the court has correctly stated who are fellow-servants, if the defendant desires specific instructions on the point of the relation between the plaintiff and another employee whose negligence is alleged to have caused the injury sued for, the defendant should request such instruction. Philadelphia & R. R. Co. v. Trainor, 137 Pa. St. 148, 26 Wkly. Notes Cas. (Pa.) 441.

28—Where the court has charged the jury that the defendant is not liable for the acts of his servant beyond the scope of his employment, a failure to state what constitutes an

act within the scope of a servant's employment is not reversible error, in the absence of a request for such an explanation. Vernon v. Cornwell, 104 Mich. 62.

29—Myers v. Pittsburgh Coal Co., 233 U. S. 184, 58 L. Ed. 906.

The failure of the court to charge that a servant assumes the risk incident to the employment does not furnish ground for reversal, where no special charge is requested. International & G. N. R. Co. v. Beasley, 9 Tex. Civ. App. 569.

30—St. Louis Southwestern R. Co. of Texas v. Pope, 43 Tex. Civ. App. 616.

31—Chattanooga, R. & C. R. Co. v. Huggins, 89 Ga. 494.

The failure to state a definite rule for assessing damages is not error.³²

The better practice in suits for damages for personal injuries is for a party who is disappointed with the terms in which the district judge has stated to the jury the rule to be followed in estimating damages to at once ask him to give to the jury, in addition, a carefully drawn instruction, embracing the rule to be followed in estimating the damages, as he believes it to be.³³

The omission of the court to charge for interest on damages recovered cannot be assigned as error where no special instruction is asked,³⁴ and in the absence of a request, a failure to instruct as to what matters may be considered in mitigation of damages is not error.³⁵

An instruction on the measure of damages in an action, "I suppose you all understand what the present worth of a given sum means. It is arrived at by dividing a given sum by one dollar, plus the legal rate of interest, or usual rate of interest, for the given time," where no other instruction was requested or suggested, is sufficient.³⁶

Where a set-off is involved, and a general verdict is

32—**Massachusetts.** Buzzell v. Emerton, 161 Mass. 176.

Minnesota. Clapp v. Minneapolis & St. L. Ry. Co., 36 Minn. 6, 1 Am. St. Rep. 629.

Missouri. Browning v. Wabash Western Ry. Co., 124 Mo. 55; Taylor v. City of Springfield, 61 Mo. App. 263.

New York. Harris v. Northern Indiana R. Co., 20 N. Y. 232.

North Carolina. Willey v. Norfolk Southern R. Co., 96 N. C. 408.

Oregon. Page v. Finley, 8 Ore. 45.

Texas. Maverick v. Maury, 79 Tex. 435; Freiberg v. Elliott (Tex.), 8 S. W. 322; Galveston, H. & S. A. Ry. Co. v. Worthy (Tex. Civ. App.), 27 S. W. 426; Gulf, C. & S. F. Ry. Co.

v. Harmonson (Tex. Civ. App.), 22 S. W. 764.

Wisconsin. Stewart v. City of Ripon, 38 Wis. 584.

United States. Texas & P. Ry. Co. v. Cody, 14 C. C. A. 310, 67 Fed. 71. 33—Galveston Oil Co. v. Malin, 60 Tex. 645.

34—Gulf, C. & S. F. Ry. Co. v. Fink, 4 Tex. Civ. App. 269.

35—East Tennessee, V. & G. Ry. Co. v. Fleetwood, 90 Ga. 24; Kelley v. Kelley, 8 Ind. App. 606; Tetherow v. St. Joseph & D. M. R. Co., 98 Mo. 74, 14 Am. St. Rep. 617; San Antonio & A. P. Ry. Co. v. Kniffen, 4 Tex. Civ. App. 484.

36—Kinney v. Folkerts, 84 Mich. 616.

rendered for the defendant, without showing whether the plaintiff has failed to establish any claim, or whether his demand is balanced by the set-off, the plaintiff cannot complain that the judge did not instruct the jury in relation to the costs, unless such instruction was requested.³⁷

§ 172. Necessity of request where erroneous instructions are given.

“One who has not asked a proper instruction on a subject cannot complain of the refusal of the court to give an improper one,”³⁸ and the giving of an erroneous instruction is error, whether any requests to charge were made or not. A request to modify or correct the instruction given is not necessary to enable a party to assign error;³⁹ but, as a

37—*Osgood v. Tansil*, 33 Me. 360.

38—*Russell v. State*, 112 Ark. 282.

39—*Colorado*. *Melcher v. Beeler*, 48 Colo. 233, 139 Am. St. Rep. 273, 110 Pac. 181.

Iowa. *State v. Pennell*, 56 Iowa 29; *State v. Glynden*, 51 Iowa 463; *State v. Walters*, 45 Iowa 390.

Kentucky. *West Kentucky Coal Co. v. Davis*, 138 Ky. 667.

Maine. *Stephenson v. Thayer*, 63 Me. 143.

Michigan. *Rouse v. Michigan United Rys. Co.*, 158 Mich. 109.

Missouri. *Shinn v. United Rys. Co.*, 146 Mo. App. 718; *Warrington v. Kallaner*, 135 Mo. App. 5.

New York. *Low v. Hall*, 47 N. Y. 104; *Gowdey v. Robbins*, 3 App. Div. 353; *Parsons v. Brown*, 15 Barb. 590; *Carnes v. Platt*, 6 Rob. 270.

North Carolina. *Mitchell v. Welborn*, 149 N. C. 347; *Pierce v. Alsbaugh*, 83 N. C. 258; *Hice v. Woodard*, 34 N. C. 293; *Bynum v. Bynum*, 33 N. C. 632; *McRae's Adm'r v. Evans*, 18 N. C. 243.

Ohio. *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50; *Jones v. State*, 20 Ohio 46.

Pennsylvania. *Seigle v. Loudersbaugh*, 5 Pa. St. 490.

South Carolina. *Carter v. Columbia & G. R. Co.*, 19 S. C. 26.

Texas. *Ford v. McBryde*, 45 Tex. 499; *Stude v. Saunders*, 2 Posey, Unrep. Cas. (Tex.) 122; *Settle v. San Antonio Traction Co.*, — Tex. Civ. App. —, 126 S. W. 15.

“If a judge omits to charge upon a point presented by the evidence, it is no error, unless he has been requested to give the charge; but if he make a charge against law, it is error, unless it be upon a mere abstract proposition, and it is apparent upon the whole case that it could not have misled the jury.” *Hice v. Woodard*, 34 N. C. 293.

“Where the charge of the court in effect excluded material conclusions to be deduced from the evidence, it is error, without counter instructions having been presented” *Stude v.*

general rule, an objection must be made and an exception saved, or the error will be deemed waived.⁴⁰

§ 173. Time of making request.

The time of presenting instructions is frequently governed by statute, as where statutory provisions require the requests to be handed up at or before the close of the evidence.⁴¹

The court may also prescribe reasonable rules as to the time of making requests,⁴² as when a rule requires the instructions to be presented before argument,⁴³ and such a rule is usually considered reasonable.⁴⁴

Saunders, 2 Posey, Unrep. Cas. (Tex.) 122.

Where the judge charged that defendants were liable even if the jury should find the facts precisely as defendant's witnesses testified, and thereupon directed verdict for plaintiffs, to which defendants excepted, it was held that defendants might, on appeal, raise the question of the correctness of the charge and direction, though they had not requested the court to submit any question of fact. *Low v. Hall*, 47 N. Y. 104.

"Where the jury has been misdirected in reference to a controlling question in the case, the judgment should be reversed and a new trial granted, although the weight of evidence may seem to support the verdict." *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

40—See *Abrahams v. Kelly*, 2 S. C. 237, wherein it is said that a misstatement of the law is not error unless the attention of the trial court is called to it, and he neglects or refuses to correct it.

41—N. C. Rev., §§ 536, 538; *Barringer v. Deal*, 164 N. C. 246.

42—*Prindeville v. People*, 42 Ill. 217; *McMahon v. O'Connor*, 137 Mass. 216; *Carney v. Barrett*, 4 Ore. 171; *Atchison, T. & S. F. R. Co. v. Hamble*, 101 C. C. A. 270, 177 Fed. 644.

43—Requested instructions may be required by rule of court to be presented before argument. *Pittsburg, C., C. & St. L. R. Co. v. Hewitt*, 202 Ill. 28, aff'g 102 Ill. App. 428; *Rauch v. Bankers' Nat. Bank of Chicago*, 143 Ill. App. 625.

Requested instructions must be presented before beginning of closing argument. *Chicago & A. R. Co. v. Louderback*, 125 Ill. App. 323.

The rule of court requires requests to be presented in writing before the argument begins. *Salley v. Cox*, 94 S. C. 216, 46 L. R. A. (N. S.) 53n, Ann. Cas. 1915 A 1002n; *State v. Glenn*, 88 S. C. 162.

Courts have the right to make a rule in criminal cases that written instructions must be handed to the court before the argument commences. *People v. Sears*, 18 Cal. 635.

44—Rule requiring instructions to be presented in writing before argument is reasonable. *Manhattan Life*

In most jurisdictions the rule prevailing requires the request to be made at or before the close of the evidence, and before the beginning of the argument,⁴⁵ though in some

Ins. Co. v. Francisco, 17 Wall. (U. S.) 672, 21 L. Ed. 698.

Rule requiring requests to be submitted before conclusion of argument is reasonable. *Sterling Organ Co. v. House*, 25 W. Va. 64.

The court cannot lay down an unbending rule that all requests to charge shall be submitted before the argument is begun. *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162n. "A rule of court prohibiting a party from obtaining the instruction of the court to the jury on any matter of law relevant in the case, at any time before the jury retire from the bar, ought not be made, and, if made, ought not to be adhered to." *Bell v. North*, 4 Litt. (Ky.) 133.

45—*Arizona*. *Territory v. Harper*, 1 Ariz. 399, 25 Pac. 528.

California. *People v. Demasters*, 105 Cal. 669, 39 Pac. 35; *People v. Sears*, 18 Cal. 635; *Anderson v. Parker*, 6 Cal. 197.

Illinois. *Rauch v. Bankers Nat. Bank of Chicago*, 143 Ill. App. 625; *McMahon v. Sankey*, 35 Ill. App. 345.

Indiana. *Ransbottom v. State*, 144 Ind. 250; *Benson v. State*, 119 Ind. 488; *Grubb v. State*, 117 Ind. 277; *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 2 L. R. A. 450, 9 Am. St. Rep. 865; *Louisville, N. A. & C. Ry. Co. v. Wood*, 113 Ind. 544; *Kopelke v. Kopelke*, 112 Ind. 435; *Phillips v. Thorne*, 103 Ind. 275; *Surber v. State*, 99 Ind. 71; *Hege v. Newsum*, 96 Ind. 426; *Terry v. Shively*, 93 Ind. 413; *Foxwell v. State*, 63 Ind. 539; *Glasgow v. Hobbs*, 52 Ind. 239; *Ollam v. Shaw*, 27 Ind. 388; *Supreme*

Tent, Knights of Maccabees of World v. Ethridge, 43 Ind. App. 475; *Anderson v. Lake Shore & M. S. Ry. Co.*, 26 Ind. App. 196; *Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 655; *German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623.

Kansas. *Atchison, T. & S. F. R. Co. v. Franklin*, 23 Kan. 74.

Massachusetts. *Brick v. Bosworth*, 162 Mass. 334; *Ela v. Cockshott*, 119 Mass. 416.

Michigan. *Kelso v. Woodruff*, 88 Mich. 299. And see cases cited *post* this note.

Missouri. *Buck v. People's St. Ry. & Elec. L. & P. Co.*, 108 Mo. 179; *Payne v. Payne*, 57 Mo. App. 130; *State v. Bickel*, 7 Mo. App. 572.

North Carolina. *Biggs v. Gurganus*, 152 N. C. 173; *Luttrell v. Martin*, 112 N. C. 593; *Ward v. Albemarle & R. R. Co.*, 112 N. C. 168; *State v. Whitmire*, 110 N. C. 367; *Posey v. Patton*, 109 N. C. 455; *Grubbs v. North Carolina House Ins. Co.*, 108 N. C. 472, 23 Am. St. Rep. 62; *Taylor v. Plummer*, 105 N. C. 56; *Powell v. Wilmington & W. R. Co.*, 68 N. C. 395; *State v. Rowe*, 98 N. C. 629.

Ohio. *Caldwell v. Brown*, 9 Ohio Cir. Ct. R. 691; *Lutterbeck v. Toledo Consolidated St. R. Co.*, 5 Ohio Cir. Dec. 141.

Pennsylvania. *Kinley v. Hill*, 4 Watts & S. 426.

South Dakota. *White v. Amrhien*, 14 S. D. 270.

Vermont. *Wilmot v. Howard*, 39 Vt. 455.

Virginia. *Richmond & M. R. Co. v. Humphreys*, 90 Va. 425.

states it is the practice to request instructions after the argument.⁴⁶

In some jurisdictions the request must be made before the giving of the general charge or it will be too late, and may—

Wisconsin. *Carey v. Chicago, M. & St. P. Ry. Co.*, 61 Wis. 76.

United States. *United States v. Gilbert*, 2 Sumn. 22, Fed. Cas. No. 15204; *Manhattan Life Ins. Co. v. Francisco*, 17 Wall. 672, 21 L. Ed. 698; *Atchison, T. & S. F. R. Co. v. Hamble*, 101 C. C. A. 270, 177 Fed. 644.

See *People v. Demasters*, 105 Cal. 669, 39 Pac. 35; *People v. Sears*, 18 Cal. 635; *Brick v. Bosworth*, 162 Mass. 338; *Carey v. Chicago, M. & St. P. Ry. Co.*, 61 Wis. 71. See also, *Buck v. People's St. Ry. & Elec. Light & Power Co.*, 108 Mo. 179.

A request for written instructions, made during the concluding argument, is too late. *Atchison, T. & S. F. R. Co. v. Franklin*, 23 Kan. 74.

Any special requests to charge should be presented to the court by the opening of the argument for the party making the requests. *Wilmot v. Howard*, 39 Vt. 455; *Cady v. Owen*, 34 Vt. 598; *Vaughan v. Porter*, 16 Vt. 266.

It is clear that the court does not err in this respect. A request of counsel that the court shall arrest and thereby disarrange the argument of counsel, in order to instruct the jury on the law of the case, is premature, and opposes the well-settled rules of practice. *Richmond & M. R. Co. v. Humphreys*, 90 Va. 425.

Until defendant has announced that he rests his case he cannot insist upon the court's instructing the jury. *Kelso v. Woodruff*, 88 Mich. 299; *Clow v. Plummer*, 85 Mich. 550;

Hinchman v. Weeks, 85 Mich. 535; *Denman v. Johnston*, 85 Mich. 387; *Morley v. Liverpool & L. & G. Ins. Co.*, 85 Mich. 210.

Where counsel, at the "conclusion" of the trial, handed to the court fifty-eight written instructions, occupying twenty pages, it was not incumbent upon the judge to stop the progress of the trial for their examination, and they were properly refused." *Anderson v. Parker*, 6 Cal. 197.

46—In Iowa, under a statute providing that when the argument is concluded either party may request instructions, instructions which are submitted during the opening and only argument made at the trial cannot be refused as being presented too late. *McCaleb v. Smith*, 22 Iowa 242. In Oregon, requests should be presented before conclusion of the argument. *Carney v. Barrett*, 4 Ore. 171. And in West Virginia a rule to that effect was held reasonable. *Sterling Organ Co. v. House*, 25 W. Va. 65. In South Carolina, under rule of court, requests should be presented before the argument, but at the close of the argument either counsel may present such "additional requests as may be suggested by the course of the argument." *State v. Hutchings*, 24 S. C. 145. "A rule of court requiring counsel to file and submit to the court any instructions they may offer, before the argument is closed, to the jury, does not operate where the cause is submitted without argument." *Tinney*

be refused;⁴⁷ while in other jurisdictions requests for additional instructions may be made after the general charge, and before the retirement of the jury,⁴⁸ and requests made

v. Endicott, 5 Cal. 102. Where no request for instructions is made in writing before the closing argument, as required by a rule of court, a special leave to present requests later cannot be implied from "a postponement of discussion of a question raised on evidence to the arguments." In re Keohane, 179 Mass. 69.

"The court may, after argument begun by counsel for the defendant, give additional instructions, or modify those already given, at the request of the district attorney." Wood v. State, 64 Miss. 761.

47—**Connecticut.** Fitch v. Belding, 49 Conn. 469; Donahue v. Coleman, 49 Conn. 464.

Minnesota. Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284).

New York. Schuhle v. Cunningham, 14 Daly 404, 13 N. Y. St. 81.

North Carolina. Posey v. Patton, 109 N. C. 455; Marsh v. Richardson, 106 N. C. 539; Powell v. Wilmington & W. R. Co., 68 N. C. 395.

Utah. Flint v. Nelson, 10 Utah 261, 37 Pac. 479.

United States. United States v. Gilbert, 2 Sumn. 21, Fed. Cas. No. 15204. See Billings v. McCoy, 5 Neb. 187. Compare Winne v. Brundage, 40 N. Y. Supp. 225.

48—**Georgia.** Brooks v. State, 96 Ga. 353; Yeldell v. Shinholster, 15 Ga. 189.

Massachusetts. Brick v. Bosworth, 162 Mass. 334; McMahon v. O'Connor, 137 Mass. 216.

Michigan. People v. Garbutt, 17 Mich. 25.

New York. Pfeffele v. Second Ave. R. Co., 34 Hun 499.

Ohio. Venable v. State, 1 Ohio Cir. Dec. 165.

Tennessee. Williams v. Miller, 2 Lea 406.

Texas. Boone v. Miller, 73 Tex. 557. See also, Freeman v. Puckett, 56 Tex. Civ. App. 126.

The request should be made immediately after the close of the charge. Boone v. Miller, 73 Tex. 557.

"The proper time to present requests for instructions is before the charge, and not after, unless there are circumstances making it necessary to call attention to some matter of detail or some phase of the case which has been overlooked or inaccurately dealt with." Leydecker v. Brintnall, 158 Mass. 298.

"While the practice referred to may be, and undoubtedly is, an excellent one, yet it must be apparent to any one that the charge of the court may itself develop the necessity of counsel's calling the attention of the court to some point that has been overlooked, and asking a direct charge thereon. Counsel need not, in the first instance, make any requests, or they may request the court to charge upon some particular part of the case. In either event, they are justified in assuming that the court will fully, in the charge, cover all the essential parts of the case, and if, after the charge has been given, they see that some essential has been overlooked, no practice or rule of that court adopted for mere convenience will deprive them

before the general charge have been held to be premature, and therefore properly refused.⁴⁹

It is practically a universal rule that requests, to be in time, must be presented before the case has been finally submitted to the jury.⁵⁰

of their right to present a request covering the omission." *Crippen v. Hope*, 38 Mich. 344.

"It would be better if requests to charge could be submitted in writing before the court proceeds to charge; but if, in the pressure of business, this is impracticable, in such event, after the charge has closed, the attention of the court may be called to the point omitted." *Yeldell v. Shinholster*, 15 Ga. 189.

It is obviously reasonable that it should be settled as far as possible, before the arguments begin, what facts must be found by the jury to entitle one side or the other to prevail; and it is still more obvious that if the right to present requests for rulings is to be an aid in the administration of justice, the court must have an opportunity to consider the requests which are made. We do not see sufficient reason for disturbing the now settled practice, which leaves it within the discretion of the court, when a multitude of requests are presented after the arguments have begun, to throw the burden on counsel of calling attention to points not dealt with, at the end of the charge, with the right, of course, to except to such portions of the charge as they deem erroneous. It is not to be supposed that this discretion would be used in such a way as to avoid dealing with an important point that arises or is first thought of at a late stage. *McMahon v. O'Connor*, 137 Mass. 216.

49—*Chicago Guaranty Fund Life Society v. Ford*, 104 Tenn. 533; *Chesapeake, O. & S. W. R. Co. v. Hendricks*, 88 Tenn. 710; *Chesapeake, O. & S. W. R. Co. v. Foster*, 88 Tenn. 671; *Roller v. Bachman*, 5 Lea (Tenn.) 158.

50—*Maine*. *Bradstreet v. Rich*, 74 Me. 303; *Smart v. White*, 73 Me. 332, 40 Am. Rep. 356.

Massachusetts. *Garrity v. Higgins*, 177 Mass. 414; *Phillips' Case*, 132 Mass. 233.

Missouri. *Watson v. Race*, 46 Mo. App. 546.

New Jersey. *State v. Engeman* (N. J. L.), 23 Atl. 676.

North Carolina. *State v. Barbee*, 92 N. C. 820; *Davis v. Council*, 92 N. C. 725. See also cases cited *post* this note.

Texas. *Freeman v. Puckett*, 56 Tex. Civ. App. 126.

Vermont. *Wetherby v. Foster*, 5 Vt. 136; *Stanton v. Bannister*, 2 Vt. 464.

Virginia. *Williams v. Com.*, 85 Va. 607.

West Virginia. *Jarrett v. Stevens*, 36 W. Va. 445; *Tully v. Despard*, 31 W. Va. 370.

"An instruction asked after the rendition of the verdict is not in apt time, and may be disregarded." *Davis v. Council*, 92 N. C. 725.

The defendant has a right to ask for special instructions only before the case is given to the jury. He is not entitled to them as of right, although, after asking for them, the

After the jury have been charged, and are leaving the jury box, it is too late for counsel to request the court to make any specific charge in the case.⁵¹

In some cases it has been stated that it is never too late to present requests until the jury have retired,⁵² and sometimes it is proper for the court to give additional instructions to the jury after they have retired. This subject is considered in a separate chapter.⁵³

§ 174. Necessity of requesting instructions in proper time.

It is necessary, in order that a party may be entitled to instructions requested by him, that such request be presented to the court in apt and proper time, and as a general rule requests not made at the proper time may be refused.⁵⁴

jury are given additional instructions by the judge. *State v. Rowe*, 98 N. C. 629; *State v. Barbee*, 92 N. C. 820.

51—*Tinkham v. Thomas*, 34 N. Y. Super. Ct. 236; *Tully v. Despard*, 31 W. Va. 370. "A case on appeal stated in substance that, after the court had charged the jury, and they had risen from their seats and were about to retire, defendant's counsel requested that they should wait a moment. The court stated he would not add to his charge, and directed the jury to go on. Said counsel then stated that he desired 'to ask the court to make some charge * * *, —to charge the jury in certain respects.' The court refused to hear the requests." It was held "that it was the right of the counsel to present his requests; that, while these rights might be forfeited by the omission of counsel to speak in time, and the court had large discretion in this respect, here it was not exercised; but the court, anticipating the object of counsel, decided to deny him, and the refusal of the court to

listen to the request was error." *Chapman v. McCormick*, 86 N. Y. 479.

52—*Brooks v. State*, 96 Ga. 353; *Crippen v. Hope*, 38 Mich. 344. See also, *Billings v. McCoy*, 5 Neb. 187.

53—See ch. XIX, *post*.

54—*Arizona. Territory v. Harper*, 1 Ariz. 399, 25 Pac. 528.

California. Waldie v. Doll, 29 Cal. 555; *Anderson v. Parker*, 6 Cal. 197.

Illinois. Chicago Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573; *Pittsburgh, C. & St. L. R. Co. v. Hewitt*, 102 Ill. App. 428, *aff'd* 202 Ill. 28; *Pennsylvania Co. v. Greso*, 102 Ill. App. 252.

Indiana. Benson v. State, 119 Ind. 488; *Town of Noblesville v. Vestal*, 118 Ind. 80; *Grubb v. State*, 117 Ind. 277; *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 2 L. R. A. 450, 9 Am. St. Rep. 865; *Hege v. Newsom*, 96 Ind. 426; *Terry v. Shively*, 93 Ind. 413; *Fitzgerald v. Jerolaman*, 10 Ind. 336; *Kackley v. Evansville & T. H. R. Co.*, 7 Ind. App. 169.

Missouri. Payne v. Payne, 57 Mo.

It is proper to refuse requests made prematurely as well as requests made too late.⁵⁵

Thus it is proper to refuse an instruction which is presented too late when the giving of it would operate to bring undue prominence to its provisions.⁵⁶

However, the court is not bound to refuse a requested instruction merely because it is presented at an improper time. In such case, the court, in the exercise of a sound discretion, may either give or refuse the requested instructions, and in either case no error is committed.⁵⁷

App. 130; *Watson v. Race*, 46 Mo. App. 546.

New York. *Schuhle v. Cunningham*, 13 N. Y. St. 81.

North Carolina. *Shober v. Wheeler*, 113 N. C. 370; *Luttrell v. Martin*, 112 N. C. 593; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 23 Am. St. Rep. 62; *Marsh v. Richardson*, 106 N. C. 539; *Davis v. Council*, 92 N. C. 725.

Pennsylvania. *Kinley v. Hill*, 4 Watts & S. 426.

Vermont. *Wilmot v. Howard*, 39 Vt. 447, 94 Am. Dec. 338; *Cady v. Owen*, 34 Vt. 598; *Vaughan v. Porter*, 16 Vt. 266.

Virginia. *Richmond & M. R. Co. v. Humphreys*, 90 Va. 425.

Wisconsin. *Allen v. Perry*, 56 Wis. 178.

United States. *Atchison, T. & S. F. R. Co. v. Hamble*, 101 C. C. A. 270, 177 Fed. 644.

Requested instructions must be presented in apt time. *Pittsburg, C., C. & St. L. R. Co. v. Hewitt*, 102 Ill. App. 428, aff'd 202 Ill. 28; *Pennsylvania Co. v. Greso*, 102 Ill. App. 252.

⁵⁵—*Chesapeake, O. & S. W. R. Co. v. Hendricks*, 88 Tenn. 710.

Requests made out of time may be refused. *State v. Turley*, 87 Vt. 163.

⁵⁶—A requested charge not made

until after the court has read his charge to the jury comes too late and is properly refused, since it would have brought undue prominence to its provisions. *James v. State*, — Tex. Cr. App. —, 167 S. W. 727.

⁵⁷—**Massachusetts.** *Phillips' Case*, 132 Mass. 233; *Ela v. Cockshott*, 119 Mass. 416.

Minnesota. *Shartle v. City of Minneapolis*, 17 Minn. 308; *Sanborn v. School Dist. No. 10*, 12 Minn. 17.

Mississippi. *Wood v. State*, 64 Miss. 761.

Missouri. *Buck v. People's St. Ry. & Elec. Light & Power Co.*, 108 Mo. 179; *Cluskey v. City of St. Louis*, 50 Mo. 89; *State v. Bickel*, 7 Mo. App. 572.

New Jersey. *Engeman v. State*, 54 N. J. L. 247.

New York. *Chapman v. McCormick*, 86 N. Y. 479.

North Carolina. *Shober v. Wheeler*, 113 N. C. 370; *Ward v. Albemarle & R. R. Co.*, 112 N. C. 168; *State v. Barbee*, 92 N. C. 820.

Texas. *Missouri, K. & T. R. Co. v. Harrison*, — Tex. Civ. App. —, 120 S. W. 254.

Vermont. *Fadden v. McKinney*, 87 Vt. 316.

West Virginia. *Jarrett v. Stevens*,

The rules of court as to presenting requests are permissive in their nature and may be waived.⁵⁸

While this is undoubtedly the general rule, it is not rigidly adhered to in all cases. Circumstances may exist, such as matters arising in the course of the argument, or errors or omissions in the general charge, making it error to refuse to give a requested instruction, although the request was not made at a certain time.⁵⁹

36 W. Va. 445; *Tully v. Despard*, 31 W. Va. 370.

United States. *Manhattan Life Ins. Co. v. Francisco*, 17 Wall. 678, 21 L. Ed. 700; *Atchison, T. & S. F. R. Co. v. Hamble*, 101 C. C. A. 270, 177 Fed. 644.

The court may in its discretion waive the rule and consider requests made out of time, but it is not required to do so. *Fadden v. McKinney*, 87 Vt. 316.

58—A rule of court as to the time of presenting requests for instructions is permissive only, and may be waived by the court. *Sanborn v. School Dist. No. 10*, 12 Minn. 17.

59—**California.** *People v. Demasters*, 105 Cal. 669, 39 Pac. 35; *People v. Williams*, 32 Cal. 280; *People v. Sears*, 18 Cal. 635.

Illinois. See *Bochat v. Knisely*, 144 Ill. App. 551.

Massachusetts. *Brick v. Bosworth*, 162 Mass. 338; *McMahon v. O'Connor*, 137 Mass. 216; *Ela v. Cockshott*, 119 Mass. 416.

Michigan. *Crippen v. Hope*, 38 Mich. 344; *People v. Garbutt*, 17 Mich. 25.

Minnesota. *Sanborn v. School Dist. No. 10*, 12 Minn. 17.

Nebraska. *Billings v. McCoy*, 5 Neb. 188.

New York. *Chapman v. McCormick*, 86 N. Y. 479; *Winne v. Brun-*

dage, 40 N. Y. Supp. 225. See also, *Walsh v. Carter-Crume Co.*, 126 App. Div. (N. Y.) 229.

Wisconsin. *Carey v. Chicago, M. & St. P. Ry. Co.*, 61 Wis. 76.

West Virginia. *Sterling Organ Co. v. House*, 25 W. Va. 65.

“A rule of a circuit court, ‘that instructions to a jury will not be entertained or considered unless submitted before the conclusion of the argument of the case,’ is a reasonable rule, and tends to the promotion of justice, and should be enforced, unless in a particular case there exist peculiar circumstances, which would render the enforcement of this rule unjust to one of the parties, and in such a case the court ought to disregard the rule, and grant or refuse instructions, though asked too late under the rule.” *Sterling Organ Co. v. House*, 25 W. Va. 65.

A rule of court requiring requests for instructions to be submitted to the opposite counsel before final argument will not justify a refusal to charge upon a material point in a criminal case. *People v. Williams*, 32 Cal. 280.

The court may refuse to entertain a request because not presented at the time fixed by rule of court, but, if the request is entertained, the rule is waived, and it becomes the duty

But where a full and fair opportunity has been afforded to counsel to submit their requests for instructions, a very clear case of abuse of discretion must be made out to call for any interference with the refusal of the trial judge to receive other requests, the presentation of which has been unnecessarily delayed.⁶⁰

At the close of the evidence, and before the argument, the granting of time to prepare special instructions is a matter resting in the sound discretion of the trial court.⁶¹

Where the refusal to give an instruction because not presented in time would work injustice, the court should either

of the court to charge as requested, if the request is otherwise proper. *Sanborn v. School Dist. No. 10*, 12 Minn. 17.

On a trial for assault with intent to commit mayhem, it was held error for the court to refuse to charge on simple assault, although the request was not made until after argument, and a rule of court required requests to be presented before argument. *People v. Demasters*, 105 Cal. 669, 39 Pac. 35.

Instructions which are reasonable and pertinent, and are submitted before the jury retire, should be given, notwithstanding there is a general rule of the court that requests for instructions must be submitted before the summing up. *Billings v. McCoy*, 5 Neb. 187.

"Where instructions are asked by either party before the jury retire, which are unobjectionable, pertinent to the issue, and necessary for the jury to consider in making up their verdict, they should be given by the court, notwithstanding a rule requiring all instructions to be submitted before the commencement of the argument." *Billings v. McCoy*, 5 Neb. 188.

"It is error in the court, at the

close of its charge to the jury, to refuse to listen to a written request, at the instance of counsel to further charge the jury, regardless of the character of the request." *Wood v. McGuire's Children*, 17 Ga. 303.

Where an instruction, proper and necessary to the trial, is inadvertently overlooked, the court should not refuse to give it, even after argument, unless giving it at that time will unduly prejudice the opposite party. *Wills v. Tanner*, 13 Ky. L. Rep. 741.

Where his attention is called to certain legal points involved in the case by instructions asked, the judge, although he refuses such instructions, because not presented within the time prescribed by the rules, is bound in his charge to the jury to submit the law applicable to the case as made by the evidence. *Allen v. Perry*, 56 Wis. 178.

60—*O'Neil v. Dry Dock, E. B. & B. R. Co.*, 129 N. Y. 130; *Schuhle v. Cunningham*, 14 Daly (N. Y.) 404; *Williams v. Com.*, 85 Va. 607; *Tully v. Despard*, 31 W. Va. 370.

61—*Phillips v. Thorne*, 103 Ind. 275; *Atehison, T. & S. F. R. Co. v. Frazier*, 27 Kan. 463.

waive its rule and give the instruction, or make such explanations of its own as would put the law correctly before the jury.⁶²

“The object of the law is to administer justice, and rules of court for conducting trials should not be so construed as to prevent a fair submission of a case to the jury.”⁶³

An instruction is improperly refused as not presented in time when the time is not fixed by a rule of court.⁶⁴

§ 175. General requisites and form of requested instructions.

Requested instructions should conform to the general rules as to the requisites and form of instructions which have been stated in preceding chapters of this work.⁶⁵

In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be cor-

62—*People v. Keefer*, 18 Cal. 636.

Held error to refuse instruction defining manslaughter because requested too late, since no rule of court or order of procedure should be technically followed to deprive a defendant on trial for a grave crime of any right. *State v. Bloom*, 91 Kan. 156, 136 Pac. 951.

63—*Billings v. McCoy*, 5 Neb. 191.
“To refuse an instruction asked for soon after the court had refused one deemed deficient in form, but containing the same legal principle, because tendered after the time fixed by the court for the presentation of instructions, is not a proper exercise of the discretion of the court, where the giving it could not injure the opposite party, and refusing to give it was to deprive the party of the application of a legal principle to which he was entitled by the facts of the case.” *Hill v. Wright*, 23 Ark. 530.

“Rules of court are but a means

to accomplish the ends of justice; and it is always in the power of the court to suspend its own rules, or except a particular case from their operation, whenever the purposes of justice require it.” *People v. Demasters*, 105 Cal. 669, 39 Pac. 35, quoting, with approval, *Pickett v. Wallace*, 54 Cal. 148. See also, *People v. Williams*, 32 Cal. 280.

64—*Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, aff’g 45 Ill. App. 317.

“A rule could only exist in writing of record, as, when thus adopted, it has the force of law. The rule could not exist in the breast of the judge alone, but must be announced as a rule made of record, and is then applicable to all cases without discretion, unless an exercise of discretion is reserved in the rule.” *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573.

65—See chs. IV, V, *ante*.

rect both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error.⁶⁶

66—Alabama. Sloss-Sheffield Steel & Iron Co. v. Sampson, 158 Ala. 590; Cochran v. Kimbrough, 157 Ala. 454; Miller v. State, 107 Ala. 40; Barnes v. State, 103 Ala. 44; Johnson v. King, 20 Ala. 270; Long v. Rodgers, 19 Ala. 321.

Arkansas. Randleman v. Taylor, 94 Ark. 511, 140 Am. St. Rep. 141.

California. People v. Harlan, 133 Cal. 16, 65 Pac. 9.

Colorado. Greeley Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. 985.

Georgia. Murphy v. Central of Georgia R. Co., 135 Ga. 194.

Illinois. Kenny v. Marquette Cement Mfg. Co., 243 Ill. 396, aff'd 149 Ill. App. 1173; Chicago, R. I. & P. Ry. Co. v. Clough, 134 Ill. 586; Castelano v. Chicago & J. E. Ry. Co., 149 Ill. App. 250.

Indiana. Ricketts v. Harvey, 106 Ind. 566; Goodwin v. State, 96 Ind. 566; Roots v. Tyner, 10 Ind. 87; Lawrenceburgh & U. M. R. Co. v. Montgomery, 7 Ind. 474; Kackley v. Evansville & T. H. R. Co., 7 Ind. App. 169.

Kansas. Condiff v. Kansas City, Ft. S. & G. R. Co., 45 Kan. 256, 25 Pac. 562; Dickson v. Randal, 19 Kan. 214; Douglas v. Wolf, 6 Kan. 88; Western U. Tel. Co. v. Getto-McClung Boot & Shoe Co., 9 Kan. App. 863, 61 Pac. 504.

Maine. Duley v. Kelley, 74 Me. 556.

Maryland. Baltimore & O. R. Co. v. Resley, 14 Md. 424.

Michigan. Clintsman v. Alfred J. Brown Seed Co., 127 Mich. 280.

Missouri. Kendrick v. Ryus, 225 Mo. 150, 135 Am. St. Rep. 585.

New York. Hodges v. Cooper, 43 N. Y. 216; Bagley v. Smith, 10 N. Y. 489, 61 Am. Dec. 756; Brignoli v. Chicago & G. E. Ry. Co., 4 Daly 182; Walker v. Gilbert, 2 Daly 80; Keller v. New York Cent. R. Co., 24 How. Pr. 172; Hayden v. Wheeler & Tappan Co., 66 Hun 629; Wright v. Paige, 3 Keyes 581; Hollywood v. People, 3 Keyes 55, 2 Abb. Dec. 376; People v. Holmes, 6 Park. Cr. R. 25.

Ohio. Baltimore & O. R. Co. v. Schultz, 43 Ohio St. 270, 54 Am. Rep. 805.

Oklahoma. Sanders v. Cline, 22 Okla. 154, 101 Pac. 267.

Texas. Ratcliff v. Baird, 14 Tex. 43; Texas & N. O. R. Co. v. Bean, 55 Tex. Civ. App. 341; Lyon v. Bedgood, 54 Tex. Civ. App. 19.

Utah. Evans v. Oregon Short Line R. Co., 37 Utah 431, Ann. Cas. 1912 C 259n, 108 Pac. 638.

Vermont. Underwood v. Hart, 23 Vt. 120; Vaughan v. Porter, 16 Vt. 266.

Wisconsin. Fenelon v. Butts, 53 Wis. 344.

United States. Violet v. Patton, 5 Cranch 142, 3 L. Ed. 61; Catts v. Phalen, 2 How. 376, 11 L. Ed. 306; United States v. Metropolis Bank, 15 Pet. 377, 10 L. Ed. 774; Winn v. Patterson, 9 Pet. 663, 9 L. Ed. 266; Scott's Lessee v. Ratliffe, 5 Pet. 81, 8 L. Ed. 54; Patterson v. Jenks, 2 Pet. 216, 7 L. Ed. 402; Columbian Ins. Co. v. Lawrence, 2 Pet. 25, 7 L. Ed. 335; Elliott v. Piersol's Lessee,

Accordingly, the court may refuse erroneous instructions,⁶⁷ and where a part only of a requested instruction is erroneous, the whole may be properly refused,⁶⁸ and where

1 Pet. 328, 7 L. Ed. 164; *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90; *Haffin v. Mason*, 15 Wall. 671, 21 L. Ed. 196; *Brooks v. Marbury*, 11 Wheat. 78, 6 L. Ed. 423.

"Prayers should be so framed as to instruct, not to embarrass, juries, and, where the court thinks they may have the latter effect, it is not its duty to place a construction on the language employed by counsel, but may reject the prayers as offered." *Baltimore & O. R. Co. v. Resley*, 14 Md. 424.

67—"The court may refuse an instruction if satisfied that it is erroneous, although it may have previously indicated that it would be given." *Louisville, N. A. & C. Ry. Co. v. Hubbard*, 116 Ind. 193, citing *City of Logansport v. Dykeman*, 116 Ind. 15.

A requested instruction that does not state correctly the facts which it assumes is properly refused. *Conely v. Wood*, 73 Mich. 203.

"To constitute error in the refusal of a court to charge a jury as requested, the proposition requested and refused must be absolutely true under all reasonably conceivable circumstances." *Cleveland & P. R. Co. v. Sargent*, 119 Ohio St. 438.

"Where a party relies upon an exception for refusing to charge as requested, the request must be perfectly proper as an entirety. If it embraces a single idea or view which ought not to be presented, it destroys the value of the exception, although a part of the legal proposition embraced, if detached and presented separately, might be entirely prop-

er." *People v. Holmes*, 6 Park. Cr. R. (N. Y.) 25.

A correct and pertinent statement of law, though abstract, should be given, if requested. *Cleveland, P. & E. R. Co. v. Nixon*, 21 Ohio Cir. Ct. 736, 12 Ohio Cir. Dec. 79.

68—**Alabama.** *Baker v. State*, 49 Ala. 350.

Arkansas. *American Fire Ins. Co. v. Haynie*, 91 Ark. 43; *Stanton v. State*, 13 Ark. 317.

California. *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Garlick v. Bowers*, 66 Cal. 122, 4 Pac. 1138.

Connecticut. *Charter v. Lane*, 62 Conn. 121; *State v. Stanton*, 37 Conn. 423.

Florida. *Wooten v. State*, 24 Fla. 355.

Georgia. *City of Atlanta v. Buchanan*, 76 Ga. 585; *Sims v. Scheussler*, 5 Ga. App. 850.

Illinois. *Kenny v. Marquette Cement Mfg. Co.*, 243 Ill. 396, aff'd 149 Ill. App. 173; *Denman v. Bloomer*, 11 Ill. 177.

Indiana. *Town of New Castle v. Grubbs*, 171 Ind. 482; *McCammon v. Cunningham*, 108 Ind. 545; *Christian v. State*, 7 Ind. App. 417.

Kansas. *State v. Cassady*, 12 Kan. 551; *Kansas Ins. Co. v. Berry*, 8 Kan. 159; *Douglas v. Wolf*, 6 Kan. 88; *City of Topeka v. Tuttle*, 5 Kan. 426; *Mayberry v. Kelly*, 1 Kan. 116.

Maine. *Tower v. Haslam*, 84 Me. 86; *Snow v. Penobscot River Ice Co.*, 77 Me. 55; *Grand Trunk Ry. Co. v. Latham*, 63 Me. 177; *State v. Cleaves*, 59 Me. 298, 8 Am. Rep. 422; *Bryant v. Crosby*, 40 Me. 9; *Tibbetts v. Baker*, 32 Me. 25; *Atkinson*

the charge requested is erroneous the court is not required to

v. Snow, 30 Me. 364; *Inhabitants of Thomaston v. Inhabitants of Warren*, 28 Me. 289.

Michigan. *Bedford v. Penny*, 58 Mich. 424.

Minnesota. *Bond v. Corbett*, 2 Minn. 248; *Castner v. The Dr. Franklin*, 1 Minn. 73 (Gil. 51).

Mississippi. *Doe d. Martin v. King's Heirs*, 3 How. 125; *Dickson v. Moody*, 2 Smedes & M. 17.

Missouri. *Voelker v. Hill-O'Meara Const. Co.*, — Mo. App. —, 131 S. W. 907; *Lail v. Pacific Exp. Co.*, 81 Mo. App. 232.

Nevada. *State v. Anderson*, 4 Nev. 265.

New York. *People v. Holmes*, 6 Park. Cr. R. 25.

Ohio. *Eckels v. State*, 20 Ohio St. 508; *Inglebright v. Hammond*, 19 Ohio 337; *Walker v. Devlin*, 2 Ohio 593.

South Carolina. *Ragsdale v. Southern Ry. Co.*, 60 S. C. 381; *State v. Tarrant*, 24 S. C. 593; *Carter v. Columbia & G. R. Co.*, 19 S. C. 20, 45 Am. Rep. 754; *Gunter v. Graniteville Mfg. Co.*, 15 S. C. 454.

Tennessee. *East Tennessee, V. & G. R. Co. v. Gurley*, 12 Lea 46; *East Tennessee, V. & G. R. Co. v. Fain*, 12 Lea 35; *Sommers v. Mississippi & T. R. Co.*, 7 Lea 205; *Hills v. Goodyear*, 4 Lea 233, 40 Am. Rep. 5.

Texas. *Brownson v. Scanlan*, 59 Tex. 222; *Hardy v. De Leon*, 5 Tex. 211; *Houston & T. C. Ry. Co. v. Kelley*, 13 Tex. Civ. App. 1; *Dallas Consolidated Traction Ry. Co. v. Hurley*, 10 Tex. Civ. App. 246; *Lanyon v. Edwards* (Tex. Civ. App.) 26 S. W. 524.

Vermont. *Underwood v. Hart*, 23

Vt. 120; *Vaughan v. Porter*, 16 Vt. 266.

Virginia. *Brooke v. Young*, 3 Rand. 106.

Wisconsin. *Stucke v. Milwaukee & M. R. Co.*, 9 Wis. 202; *Sterling v. Ripley*, 3 Chand. 166, 3 Pin. 155.

United States. *Catts v. Phalen*, 2 How. 376, 11 L. Ed. 306; *Monarch Cycle Mfg. Co. v. Royer Wheel Co.*, 44 C. C. A. 523, 105 Fed. 324.

"The court is not bound to select the good from bad law in an instruction asked, especially when it gives the law applicable to the case otherwise." *City of Topeka v. Tuttle*, 5 Kan. 426.

"Where an instruction is asked which, in a disjunctive statement, presents two conditions of acquittal, and there is error in one of these conditions, the court may properly refuse the whole instruction." *State v. Cassady*, 12 Kan. 551.

"A request to charge, which begins with a recital of facts as undisputed, and closes with several propositions which the court is expected to charge 'upon these undisputed facts,' must be considered a single request; and if any part of the statement of facts is incorrect, the whole request must fail, and the judge is right in refusing to give it." *Bedford v. Penny*, 58 Mich. 424.

A court is never bound to regard written requests to charge, "unless they are couched in such terms as to be sound to the full extent. The fact that some sound law might be extracted from the requests, or that, in general terms, they may be sound law, with certain qualifications, is not enough. They must be wholly

correct it and prepare a proper special charge,⁶⁹ especially in jurisdictions where the court is required to give instructions in the exact words in which they are requested.⁷⁰

Accordingly, requested charges containing improper propositions may be refused when the correct portions are not readily separable.⁷¹

sound law, and without any necessary qualification, or it is not error'' to refuse them. Redfield, J., in Vaughan v. Porter, 16 Vt. 266.

When an instruction is prayed for as an entirety, part of which is proper and part improper, it is generally better to give the good and refuse the bad only, but it is not error to decline doing so; for, being asked as an entire thing, it may be treated as an entirety, and refused if a portion of it is inadmissible. Walker v. Devlin's Lessee, 2 Ohio 593; French v. Millard, 2 Ohio 45; Mayberry v. Kelly, 1 Kan. 116.

69—When the court has rejected a prayer incorrectly defining malice, it is not bound *ex mero motu* to give any definition of it. Garvey v. Wayson, 42 Md. 178.

Where a special charge is incorrect as drawn, it is not the duty of the court to prepare and give a proper special charge, and if the charge is incorrect it is not the duty of the court to give it. Missouri, K. & T. Ry. Co. of Texas v. Dunn, — Tex. Civ. App. —, 157 S. W. 434.

70—United States Life Ins. Co. v. Lesser, 126 Ala. 568; Stanton v. State, 13 Ark. 317; Lyle v. McCormick Harvesting Mach. Co., 108 Wis. 81, 51 L. R. A. 906; Castello v. Landwehr, 28 Wis. 522.

"Counsel desiring additional instructions * * * should present them to the court in the very language in which he wants them giv-

en." Heilbron v. State, 2 Tex. App. 538.

Since Rev. St., art. 1321 (see Sayle's Ann. Civ. St. Texas art. 1974) provides that instructions given to the jury may be carried with them in their retirement, the court may refuse to give requested instructions on the ground that the good are written with the bad, on the same piece of paper, such ground of refusal being stated at the time of refusal. Missouri Pac. Ry. Co. v. King, 2 Tex. Civ. App. 122.

71—It is not error to refuse a special charge, correct in its application of law and fact, when presented with other charges which are objectionable, the whole being attached together, though on separate papers, and in such a manner as not to be readily separated. International & G. N. R. Co. v. Neff (Tex. Civ. App.), 26 S. W. 784.

In preparing instructions, attorneys must take the risk of putting them in proper form for the court to act upon separately, and, if two propositions be so united that the court must pass upon both at the same time, one being correct and the other not, the judge will not be required to reconstruct his charge so as to cull out that which ought to be given, but may refuse the entire charge as written. Burnham v. Logan, 88 Tex. 1; Missouri Pac. Ry. Co. v. Cullers, 81 Tex. 394; Hamburg v. Wood, 66 Tex. 168; Brownson v.

The specific instructions desired should be requested, and a mere general request for instructions may be disregarded.⁷²

When a party makes request for the giving of certain instructions to the jury he should separate such charges, so that each one will cover but a single matter, and give each a separate number, so that it may be considered by itself and referred to by number.⁷³

In some jurisdictions it is held that a request which is properly refused for defects in form or substance may be sufficient to call the attention of the court to the matter upon which an instruction is desired, and make a failure to give an appropriate instruction thereon error.⁷⁴

Scanlan, 59 Tex. 222; Wells v. Barnett, 7 Tex. 584.

All the special charges were presented together to the court, and constituted different paragraphs of the same paper. The first paragraph did not correctly present the law of the case, and therefore the court did not err in rejecting the entire paper offered. The court was under no obligation to separate the paragraphs, and give that which was correct, and refuse that which was error. Yarborough v. Weaver, 6 Tex. Civ. App. 215.

"Where a number of requested charges, which, in so far as they contained correct propositions, were embodied in the main charge, were written on the same sheets, and were refused by the judge, who indorsed thereon as the reasons for refusal that they were so written, and that the substance of those correct was given in his main charge, it was held that this amounted to a requirement by the court that such of the charges as were correct should be submitted separately from the others, that such action was within judicial discre-

tion, and that there was no error in refusing to give the charges for the reasons stated in the indorsement of refusal." Missouri Pac. Ry. Co. v. King, 2 Tex. Civ. App. 122.

72—Simonds v. Oliver, 23 Mo. 32. "A party asking instructions of the court to the jury as to the law should specify the points, and not ask instructions generally as to the law arising out of a complicated mass of evidence." Kitty v. Fitzhugh, 4 Rand. (Va.) 600.

73—Hackett v. Straw, 33 S. D. 17.

74—People v. Tapia, 131 Cal. 647, 63 Pac. 1001; Atchison, T. & S. F. R. Co. v. Woodson, 79 Kan. 567, 100 Pac. 633; Brown v. Patterson, 224 Mo. 639; State v. Moore, 160 Mo. 443; Cleveland v. Empire Mills, 6 Tex. Civ. App. 479; Gulf, C. & S. F. Ry. Co. v. Hill (Tex. Civ. App.), 58 S. W. 255; Carpenter v. Dowe (Tex. Civ. App.), 26 S. W. 1002.

In Virginia and West Virginia it is held that if an instruction asked is equivocal, but is open to a construction by the jury which would make it a correct rule of law to be applied to the case, a refusal to give

Where special requests to charge are asked as a series, if any one of such requests is bad or improper the court may refuse them all.⁷⁵

the instruction will be misleading, and, though the instruction is also open to a construction which would make it an incorrect rule, the court should give it with such an explanation as will insure its being understood by the jury in the proper sense. *Ward v. Churn*, 18 Grat. (Va.) 801, 98 Am. Dec. 749; *Peshine v. Shep-person*, 17 Grat. (Va.) 473; *Baltimore & O. R. Co. v. Polly*, 14 Grat. (Va.) 447; *Carrico v. West Virginia Cent. & P. Ry. Co.*, 35 W. Va. 389; *Gas Co. v. Wheeling*, 8 W. Va. 371.

75—Alabama. *Tennessee Coal, Iron & Railroad Co. v. Bonner*, 164 Ala. 57; *Stowers Furniture Co. v. Brake*, 158 Ala. 639; *Price v. State*, 107 Ala. 161; *Eagle & P. Mfg. Co. v. Gibson*, 62 Ala. 369; *Slater v. Carter*, 35 Ala. 679.

Arkansas. *Hicks v. Maness*, 19 Ark. 701.

California. *Williamson v. Tobey*, 86 Cal. 497, 25 Pac. 65; *Smith v. Richmond*, 19 Cal. 476.

Colorado. *Gill v. Schneider*, 48 Colo. 382, 110 Pac. 62.

Connecticut. *Marlborough v. Sis-son*, 23 Conn. 54.

Florida. *Baker v. Chatfield*, 23 Fla. 540.

Georgia. *Grace v. McKinney*, 112 Ga. 425; *Roberts v. State*, 83 Ga. 369; *Hunt v. Pond*, 67 Ga. 578; *Head v. Bridges*, 67 Ga. 228.

Maine. *Atkinson v. Snow*, 30 Me. 365.

Maryland. *Blumhardt v. Rohr*, 70 Md. 328; *Marshall v. Haney*, 4 Md. 498, 59 Am. Dec. 92; *Greenway v. Turner*, 4 Md. 296.

Michigan. *Bedford v. Penny*, 58

Mich. 424; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Sword v. Keith*, 31 Mich. 247.

Minnesota. *Simmons v. St. Paul & C. Ry. Co.*, 18 Minn. 184; *Village of Mankato v. Meagher*, 17 Minn. 265 (Gil. 243); *Bond v. Corbett*, 2 Minn. 248 (Gil. 209); *Castner v. The Dr. Franklin*, 1 Minn. 73 (Gil. 51).

New Jersey. *Consolidated Trac-tion Co. v. Chenowith*, 58 N. J. L. 416.

New York. *Palmer v. Holland*, 51 N. Y. 416, 10 Am. Rep. 616; *Magee v. Badger*, 34 N. Y. 247, 90 Am. Dec. 691n; *Gutwillig v. Zuberbieber*, 41 Hun 361.

North Carolina. *Johnston County Sav. Bank v. Chase*, 151 N. C. 108.

Ohio. *Inglebright v. Hammond*, 19 Ohio 337; *Fuller v. Coats*, 18 Ohio 343; *Holmes v. Ashtabula Rapid Transit Co.*, 10 Ohio Cir. Dec. 638.

Texas. *Burnham v. Logan*, 88 Tex. 1; *Hamburg v. Wood*, 66 Tex. 168; *Wall v. Lubbock*, 52 Tex. Civ. App. 405; *Yarborough v. Weaver*, 6 Tex. Civ. App. 215; *McWhirter v. Allen*, 1 Tex. Civ. App. 649; *Sabine & E. T. Ry. Co. v. Ewing*, 1 Tex. Civ. App. 531; *Fordyce v. Yarborough*, 1 Tex. Civ. App. 260.

Utah. *People v. Thiede*, 11 Utah 241, 39 Pac. 837.

United States. *United States v. Hough*, 103 U. S. (13 Otto) 71, 26 L. Ed. 305; *Springer v. United States*, 102 U. S. (12 Otto) 586, 26 L. Ed. 253; *Worthington v. Mason*, 101 U. S. (11 Otto) 149, 25 L. Ed. 848; *Eastern Transp. Line v. Hope*, 95 U. S. (5 Otto) 297, 24 L. Ed. 477; *Indianapolis & St. L. R. R. v. Horst*,

A request containing several alternative propositions of law, one of which is incorrect, may be refused entirely.⁷⁶

It has been held, however, that where a request to charge, though in form one instruction, contains in fact several distinct and separable propositions, some of which are correct and should be given, and others are incorrect, the court should not reject the whole but should separate them, giving the correct and refusing the incorrect propositions.⁷⁷

A requested instruction which, although correct as a proposition of law, is not pertinent to the issues, may be refused.⁷⁸

The same is true as to requests for instructions which, under the circumstances, would be uncertain, ambiguous or misleading unless qualified or explained,⁷⁹ or which are in-

93 U. S. (3 Otto) 291, 23 L. Ed. 898; *Beaver v. Taylor*, 93 U. S. (3 Otto) 46, 23 L. Ed. 797; *Johnston v. Jones*, 1 Black. (U. S.) 210, 17 L. Ed. 117; *Lincoln v. Clafin*, 7 Wall. 132, 19 L. Ed. 106; *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871; *Mann Boudoir Car Co. v. Dupre*, 4 C. C. A. 540, 54 Fed. 646.

"When a party requests charges which, though separately numbered, were not separately asked, and any of the charges thus requested are erroneous, the court is not required to distinguish between the good and the bad, but may refuse them all." *Eagle & P. Mfg. Co. v. Gibson*, 62 Ala. 369.

76—*Richard v. State*, 42 Fla. 528; *Boyden v. Fitchburg R. Co.*, 72 Vt. 89.

77—*Sword v. Keith*, 31 Mich. 247; *Lawrence v. Hudson*, 12 Heisk. (Tenn.) 671; *Burnham v. Logan*, 88 Tex. 1; *Peshine v. Shepperson*, 17 Grat. (Va.) 472, 94 Am. Dec. 468.

Contra, *Slater v. Carter*, 35 Ala. 679.

"If a defendant, in his prayer for

instructions, sets up a broader right than he is entitled to, the judge should not deny it altogether, but should explain to the jury the true extent of his right." *Amer v. Longstreth*, 10 Pa. St. 145. But compare *Hodges v. Cooper*, 43 N. Y. 216.

78—*Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656, 62 Pac. 308; *Lamkin v. Palmer*, 164 N. Y. 201, *aff'g* 24 App. Div. (N. Y.) 255.

79—**Alabama.** *Southern Ry. Co. v. Lynn*, 128 Ala. 297; *Lafayette Ry. Co. v. Tucker*, 124 Ala. 514; *Adams v. State*, 52 Ala. 379; *Partridge v. Forsyth*, 29 Ala. 200; *Dunlap v. Robinson*, 28 Ala. 100; *Godbold v. Blair*, 27 Ala. 592; *Rolston v. Langdon*, 26 Ala. 661; *Swallow v. State*, 22 Ala. 20.

Georgia. *Macon Consol. St. R. Co. v. Barnes*, 113 Ga. 212.

Iowa. *Hall v. Hunter*, 4 G. Greene 539.

Maryland. *Stockton v. Frey*, 4 Gill 406, 45 Am. Dec. 138; *Whiteford v. Bruckmyer*, 1 Gill 127, 39 Am. Dec. 640n.

Ohio. *Ohliger v. City of Toledo*,

complete,⁸⁰ although a party is not required to state all the law of his case in a single instruction.⁸¹

20 Ohio Cir. Ct. R. 142, 10 Ohio Cir. Dec. 762.

Virginia. Kincheloe v. Tracewells, 11 Grat. 587; *Levasser v. Washburn*, 11 Grat. 572.

"The court never errs in refusing a charge requiring explanation, or which has a tendency to mislead or confuse the jury, e. g., as where the court in its charge enumerates several facts connected with a criminal transaction, upon consideration of which the jury might pronounce a verdict of guilty, and the defendant singles out one of these facts, and requests a charge that, 'from this fact alone,' guilt cannot be inferred." *Adams v. State*, 52 Ala. 379.

A request setting forth a proposition which is an absurdity is properly refused, "though it may be manifest that this is the result of a palpable and unintentional error on the part of counsel in framing the request." *Macon Consol. St. R. Co. v. Barnes*, 113 Ga. 212.

80—An incomplete and meaningless request as written may be refused. *Hooper v. State*, 106 Ala. 41.

A request for instructions "is properly refused when it does not state the question with sufficient fullness." *Ordway v. Sanders*, 58 N. H. 132.

An instruction that does not fully and perfectly state the facts involved may be refused. *Phenix Ins. Co. v. Woland*, 48 Ill. App. 535.

"Instructions which profess to fully state the law upon a particular subject, but which omit some material fact, essential to the validity of the hypothesis, may be properly

refused." *Pennsylvania Co. v. Weddle*, 100 Ind. 138.

A requested instruction on the whole case must be so framed as not to exclude the points raised by the evidence of the adverse party. *Evans Garden Cultivator Co. v. Missouri, K. & T. Ry. Co.*, 64 Mo. App. 305, 2 Mo. App. 973.

A charge predicated on an imperfect statement of the facts and circumstances bearing on the point to which they were directed is properly refused, as where, on a question of negligence, charges devolved on the plaintiff the duty of giving notice to the engineer in charge of the engine. Even if such duty existed, it might be dispensed with in certain cases, and circumstances tending to show that it was dispensed with are proper to be left to the jury. *Jenkins v. Little Miami R. Co.*, 2 Disn. (Ohio) 49.

In a proceeding to contest a will, an instruction that "the court charges the jury, on behalf of contestants, that the burden of proving the due execution of the will is, and, if he has failed to prove that the will was duly executed to the reasonable satisfaction of the jury, the jury must find for the contestant," is properly refused as incomplete, though what the court meant is apparent. *Schieffelin v. Schieffelin*, 127 Ala. 14.

81—*Chicago City Ry. Co. v. Schmidt*, 217 Ill. 396, *aff'd* 117 Ill. App. 213.

"The plaintiff is only obliged to state the law correctly in his instructions applicable to his theory of the case, and is not bound, in

Where a requested instruction has been given, an inconsistent instruction asked by the same party is properly refused, although the latter instruction is in itself correct,⁸² and argumentative instructions are properly refused.⁸³

Requests singling out and giving undue prominence to issues, theories or evidence should be refused,⁸⁴ and it is not error to refuse an instruction relevant to a question about which there is no dispute.⁸⁵

A party cannot complain that the court did not, of its own motion, modify and correct the request, and then give it as corrected. No such duty rests upon the court.⁸⁶

every instruction, to anticipate and exclude every possible defense." *Mt. Olive & S. Coal v. Rademacher*, 190 Ill. 538, aff'g 92 Ill. App. 442; *Mitchell v. Milholland*, 106 Ill. 175.

"In preparing instructions, each party may assume any reasonable hypothesis in relation to the facts of the case; and ask the court to declare the law as applicable to it; and it is error to refuse an instruction so framed because the case supposed does not include some other hypothesis equally rational." *People v. Taylor*, 36 Cal. 255.

82—*Healey v. Rupp*, 28 Colo. 102, 63 Pac. 319.

83—*Singleton v. State*, 106 Ala. 49.

84—*Kenny v. Inhabitants of Ipswich*, 178 Mass. 368; *People v. Finley*, 38 Mich. 482; *Thornton's Ex'rs v. Thornton's Heirs*, 39 Vt. 122.

"The omission to give requests for instruction which tend to distract the jury by calling special attention to metaphysical subtleties or particular testimony," is not error. *People v. Finley*, 38 Mich. 482.

85—*Shartle v. City of Minneapolis*, 17 Minn. 308 (Gil. 284).

86—**Alabama.** *Callan v. McDaniel*, 72 Ala. 96; *Savery v. Moore*, 71 Ala. 236; *City Nat. Bank of Selma v. Burns*, 68 Ala. 267, 44 Am. Rep. 138; *Farrish v. State*, 63 Ala. 164; *Duvall v. State*, 63 Ala. 12; *Dotson v. State*, 62 Ala. 141, 34 Am. Rep. 2; *Green v. State*, 59 Ala. 68; *Leach v. Bush*, 57 Ala. 145; *Caldwell v. Farmer's Adm'r*, 56 Ala. 405; *McWilliams v. Rodgers*, 56 Ala. 87; *Swallow v. State*, 22 Ala. 20; *Carmichael v. Brooks*, 9 Port. 330; *Morrison v. Wright*, 7 Port. 67; *Rives v. McLosky*, 5 Stew. & P. 330.

Colorado. *Blackmore v. Neale*, 15 Colo. App. 49, 60 Pac. 952.

Illinois. *Rolfe v. Rich*, 149 Ill. 436, aff'g 46 Ill. App. 406; *Coney v. Pepperdine*, 38 Ill. App. 403; *Vanlandingham v. Huston*, 8 Ill. (4 Gilm.) 125.

Indiana. *Knapp v. State*, 168 Ind. 153, 11 Ann. Cas. 604; *Louisville, N. A. & C. Ry. Co. v. Shanks*, 132 Ind. 395; *Rogers v. Leyden*, 127 Ind. 50; *Mosier v. Stoll*, 119 Ind. 244; *Ricketts v. Harvey*, 106 Ind. 564; *Over v. Schiffing*, 102 Ind. 191; *Goodwin v. State*, 96 Ind. 550; *Toops v. State*, 92 Ind. 13; *Kluse v. Sparks*, 10 Ind. App. 444; *Goodwine v. State*, 5 Ind.

§ 176. Written request.

In many states, statutes exist requiring instructions to be in writing;⁸⁷ and in many jurisdictions requests for instructions must be presented in writing, and if not so presented their refusal is not error, though the instruction is otherwise correct.⁸⁸

App. 63; *Howlett v. Dilts*, 4 Ind. App. 23.

Iowa. *Keenan v. Missouri State Mut. Ins. Co.*, 12 Iowa 126; *Morrison v. Myers*, 11 Iowa 538; *Grimes v. Martin*, 10 Iowa 347; *Tifield v. Adams*, 3 Iowa 487.

Kansas. *Kansas Ins. Co. v. Berry*, 8 Kan. 159.

Kentucky. *Clarke v. Baker*, 7 J. J. Marsh. 197.

Maryland. *Garvey v. Wayson*, 42 Md. 178; *Baltimore & O. R. Co. v. Resley*, 14 Md. 424; *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. 159.

Missouri. *Dempsey v. Reinsedler*, 22 Mo. App. 43.

South Carolina. *Mitchell v. Charleston Light & Power Co.*, 45 S. C. 146.

Texas. *Missouri Pac. Ry. Co. v. Cullers*, 81 Tex. 382; *Rosenthal v. Middlebrook*, 63 Tex. 333; *Brownson v. Scanlan*, 59 Tex. 222; *Wells v. Barnett*, 7 Tex. 584; *Hardy v. De Leon*, 5 Tex. 211; *Pfeuffer v. Wilderman*, 1 White & W. Civ. Cas. Ct. App. § 1171; *Galveston, H. & S. A. Ry. Co. v. Schrader*, 1 White & W. Civ. Cas. Ct. App. § 1147.

Virginia. *Rosenbaums v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737; *Kincheloe v. Tracewells*, 11 Gratt. 587.

West Virginia. *Gas Co. v. Wheeling*, 8 W. Va. 371; *Henry v. Davis*, 7 W. Va. 715.

United States. *Smith v. Carrington*, 4 Cranch 62, 2 L. Ed. 550; *Catts*

v. Phalen, 2 How. 381, 11 L. Ed. 308.

It is not error to refuse an instruction unless it ought to be given precisely in the terms prayed. *Knapp v. State*, 168 Ind. 153, 11 Ann. Cas. 604.

87—See ch. VI, § 42, *ante*.

88—**Alabama.** *Hooper v. State*, 106 Ala. 41; *Bellinger v. State*, 92 Ala. 86; *Winslow v. State*, 76 Ala. 42; *Tuttle v. Walker*, 69 Ala. 172; *Green v. State*, 66 Ala. 40, 41 Am. Rep. 744; *South & N. A. R. Co. v. Seale*, 59 Ala. 608; *Mayberry v. Leech*, 58 Ala. 339; *Jacobson v. State*, 55 Ala. 151; *Myatts v. Bell*, 41 Ala. 222.

Colorado. *Schmidt v. First Nat. Bank of Denver*, 10 Colo. App. 261, 50 Pac. 733.

Georgia. *Seaboard Air-Line Ry. v. Maddox*, 131 Ga. 799; *Atlanta Machine Works v. Pope*, 111 Ga. 872; *Fields v. Carlton*, 75 Ga. 556; *Williams v. Gunnels*, 66 Ga. 521; *Sims v. James*, 62 Ga. 260.

Illinois. *Mayville v. French*, 246 Ill. 434; *Harding v. Sandy*, 43 Ill. App. 442.

Indiana. *Burgett v. Burgett*, 43 Ind. 78; *Indianapolis Traction & Terminal Co. v. Rowe*, 43 Ind. App. 407; *Leeper v. State*, 12 Ind. App. 637.

Kansas. *Tays v. Carr*, 37 Kan. 141, 14 Pac. 456.

North Carolina. *Biggs v. Gurganus*, 152 N. C. 173; *Nail v. Brown & Williamson*, 150 N. C. 533; *Marshall*

Also, requests for the modification of a charge should be reduced to writing.⁸⁹

It has been held, however, that writing in ink is not essential and that a statute requiring requests to be in writing is satisfied if the instructions are written with a lead pencil.⁹⁰

A rule of court that, "before the argument of the case commences, the counsel on either side shall read and submit to the court in writing such propositions of law as they propose to rely on, which shall constitute the requests to charge," is designed mainly for the benefit of the trial judge, and there is no reason why he should not dispense with the rule requiring requests to be read; and the fact that a party is in court at the time instructions are given, and does not call

v. Stine, 112 N. C. 697; *State v. Horton*, 100 N. C. 443, 6 Am. St. Rep. 613.

North Dakota. *Landis v. Fyles*, 18 N. D. 587.

Ohio. *Cleveland, P. & E. R. Co. v. Nixon*, 12 Ohio Cir. Dec. 79.

Tennessee. *Williams v. Miller*, 2 Lea 405.

Texas. *Griffin v. Chadwick*, 44 Tex. 406; *Jones v. Thurmond's Heirs*, 5 Tex. 318; *Sparks v. State*, 23 Tex. App. 447; *Hobbs v. State*, 7 Tex. App. 117; *Mills v. Haas* (Tex. Civ. App.), 27 S. W. 263; *Osborne v. State* (Tex. Cr. App.), 56 S. W. 53; *Waechter v. State*, 34 Tex. Cr. App. 297.

Virginia. *Virginia Cedar Works v. Dalea*, 109 Va. 333.

Washington. *Northern Pac. R. Co. v. Myers-Parr Mill Co.*, 54 Wash. 447, 103 Pac. 453.

The refusal to grant an oral request to instruct that the jury shall disregard a remark of opposing counsel is not error. *Harding v. Sandy*, 43 Ill. App. 442

89—"The failure of the judge to comply with the oral request to modify the written charge was not error. When the court requested counsel to reduce the modification to writing, so that it could be understood, counsel should have complied with the request. The court is not bound to give in charge a request not made in writing, and clearly is not bound to give in charge oral modifications of a written request, especially where he has asked counsel to reduce the modification to writing, and counsel has failed to do so. A request of this kind is sometimes calculated to confuse the judge, and it would not always be safe to change or modify the written charge upon such a request, as the judge might misunderstand counsel, or not fully comprehend the modification desired." *Savannah, T. & I. of H. Ry. v. Beasley*, 94 Ga. 144.

90—*Harvey v. Tama County*, 53 Iowa 228.

the attention of the judge to his failure to charge upon requests, does not create an estoppel, nor preclude the judge from granting a new trial because of failure to charge on the requests.⁹¹

§ 177. Inspection by adverse party or counsel.

It is usual to permit the counsel on opposing sides to inspect instructions requested by their adversary, and a concealment with respect to such matters is a violation of the rights of litigants and contravenes the policy of public trials and the right of every party to be heard in court and throughout the trial of his cause.⁹²

§ 178. Submission of several requests on same proposition.

Where several instructions on the same proposition are submitted, the court may give that instruction which is least favorable to the party submitting the charges.⁹³

The failure to select the best instruction is not error,⁹⁴ and the court need not give that instruction which states the law in the most apt language.⁹⁵

§ 179. Limitation on number.

The trial court cannot arbitrarily fix the number of instructions,⁹⁶ and a rule of the trial court limiting the number of instructions on each side is unreasonable.⁹⁷

91—*Herskovitz v. Baird*, 59 S. C. 307.

92—*Alabama Great Southern R. Co. v. Arnold*, 80 Ala. 600; *Lampe v. United Rys. Co. of St. Louis*, 177 Mo. App. 652.

93—*East St. Louis & S. R. Co. v. Zink*, 229 Ill. 180, *aff'g* 133 Ill. App. 127; *National Enameling & Stamping Co. v. McCorkle*, 219 Ill. 557, *aff'g* 122 Ill. App. 344.

94—*Pioneer Fireproofing Co. v. Clifford*, 135 Ill. App. 417, *aff'd* 232 Ill. 150.

95—*Clifford v. Pioneer Fireproofing Co.*, 232 Ill. 150, *aff'g* 135 Ill. App. 417. See also, § 189, *post*.

96—*Chicago City Ry. Co. v. O'Donnell*, 208 Ill. 267, *rev'g* 108 Ill. App. 385; *Daily v. Smith-Hippen Co.*, 111 Ill. App. 319; *Chicago Union Traction Co. v. Ludlow*, 108 Ill. App. 357. *Contra*, *Chicago City Ry. Co. v. Brady*, 35 Ill. App. 460.

97—*Chicago City Ry. Co. v. Sandusky*, 198 Ill. 400, *aff'g* 99 Ill. App. 164.

Also, the fact that more instructions are asked than is necessary does not ordinarily justify the refusal of necessary and proper instructions,⁹⁸ although there are cases in which the fact that an excessive number of instructions were requested has been held to justify the court in refusing all the charges.⁹⁹

§ 180. Signing by party or counsel.

In some jurisdictions, requests for instructions must be signed by the party requesting them, or his counsel, and requests not so signed may be properly refused.¹

Where not required, the fact that instructions requested and given to the jury are signed by counsel is not error.²

§ 181. Disposition of requests.

In passing upon requests to charge, the judge is not required to give his reason for granting instructions³ and he should refrain from remarks which might mislead the jury.⁴

98—North Chicago St. Ry. Co. v. Polkey, 203 Ill. 225, rev'g 106 Ill. App. 98.

99—Ninety-three instructions held too many to ask court to consider. La Salle County Carbon Coal Co. v. Eastman, 99 Ill. App. 495.

Where a party tenders eighty-four instructions, the court is justified in refusing all. Chicago Athletic Ass'n v. Eddy Elec. Mfg. Co., 77 Ill. App. 204. See also, ch. IV, § 15, *ante*.

1—Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588; Orman v. Mannix, 17 Colo. 564, 17 L. R. A. 602n, 31 Am. St. Rep. 340, 30 Pac. 1037; Schoolfield v. Houle, 13 Colo. 394; Schmidt v. First Nat. Bank of Denver, 10 Colo. App. 261, 50 Pac. 733; Louisville & S. I. Traction Co. v. Korbe, — Ind. App. —, 90 N. E. 483; Supreme Tent, Knights of Maccabees of World, v. Ethridge, 43 Ind. App.

475; Collett v. State, 156 Ind. 64; Craig v. Frazier, 127 Ind. 286; Glover v. State, 109 Ind. 391; Childress v. Callender, 108 Ind. 394; State v. Sutton, 99 Ind. 300; Beatty v. Brummett, 94 Ind. 76; Hunt v. Elliott, 80 Ind. 245, 41 Am. St. Rep. 794; Citizens' St. Ry. Co. v. Hobbs, 15 Ind. App. 610; Buchart v. Ell, 9 Ind. App. 353; Conduitt v. Ryan, 3 Ind. App. 1; State v. Horton, 100 N. C. 443, 6 Am. St. Rep. 613; Houston v. Blythe, 60 Tex. 506; Redus v. Burnett, 59 Tex. 576; Texas & P. Ry. Co. v. Mitchell (Tex. Civ. App.), 26 S. W. 154; Smith v. Fordyce (Tex.), 18 S. W. 663.

2—Morissette v. Howard, 62 Kan. 463, 63 Pac. 756.

3—Strong v. Kadlec, 163 Ill. App. 298.

4—Biehler v. Coonce, 9 Mo. 347.

"The defendant asked the following charge: 'If the braces in ques-

Where a requested instruction is handed the court, it will be sufficient for the court to read it to the jury, and say, "I give you that in charge;"⁵ or that it is the law;⁶ or to state approval of it, without using any formal mode of statement.⁷

Indicating the authorship of given instructions, as by stating that these are the plaintiff's requested instructions is not error⁸ although it may be better practice to give the

tion [which proved defective] were fastened with twenty-penny nails or spikes, and the fastenings were reasonably sufficient to * * * guard against any accident therefrom which was probable, and could have been reasonably foreseen, then you will find for the defendant.' The instruction was refused, but it was written upon the same paper upon which was written another that was given. The trial judge, in handing the paper to the jury, cautioned them to disregard the refused instructions. Objection was made. It was held that, while the instruction was properly refused, yet in going to the jury, its rejection emphasized by the remark of the judge, it may have had the effect of withdrawing from their consideration the testimony noted therein, and the act was reversible error." *Trinity County Lumber Co. v. Denham*, 85 Tex. 56.

Where a statute provides that, when special instructions are requested, "the court shall either give or refuse these charges with or without modification, and certify thereto, and, when the court shall modify a charge, it shall be done in writing, and in such manner as to clearly show what the modification is," and a special instruction is requested that "an aggravated assault and battery may be committed by any

indecent handling or fondling of the person of a female by an adult male, without her consent and against her will," it is improper to add the words "Submitted by the court, and the jury will please be governed thereby." *Bradford v. State*, 25 Tex. App. 723.

Where the court, on being handed requests, states that "counsel have handed me some requests as stating propositions of law by which you should be guided in determining your verdict," and proceeds to read the instructions to the jury, the court need not also state that he gives the requests in charge to the jury, or that such requests are correct. *Noble v. Bessemer Steamship Co.*, 127 Mich. 103, 54 L. R. A. 456, 89 Am. St. Rep. 461.

5—*Feagan v. Cureton*, 19 Ga. 404.

6—*Long v. State*, 12 Ga. 293.

7—*State v. Stewart*, 26 S. C. 125.

When a judge said, "I told them that," as to a requested charge, the jury were bound to understand that he sanctioned and charged the request. *Caldwell v. Duncan*, 87 S. C. 331.

8—*Wilmarth v. Pacific Mut. Life Ins. Co. of California*, 168 Cal. 536, Ann. Cas. 1915 B 1120n, 143 Pac. 780.

Held not reversible error to state that the instructions were given at

instructions without saying at whose request they are given.⁹

An instruction need not be given as a requested instruction,¹⁰ nor in immediate response to the request, for it will be sufficient if, in the course of the instructions, it is given in charge to the jury.¹¹

In case a requested instruction is read by counsel to the court in the presence and hearing of the jury, the court need not repeat it, but may tell the jury that such is the law, and that it is given them as an instruction.¹²

It is sufficient if the law is given in a charge so plainly that the jury have no difficulty in understanding it, whether it is repeated in their hearing by the judge himself, or read by another, and sanctioned by him as read.¹³

If, however, it is provided by statute that the court shall read over to the jury all the instructions which it intends to give, and no others, it is reversible error to hand to the jury instructions announced as given, without first reading them to the jury.¹⁴

It is not improper to submit a request for instructions to

the defendant's request. *St. Louis Southwestern R. Co. of Texas v. Cleland*, 50 Tex. Civ. App. 499.

But see *Terre Haute Traction & Light Co. v. Payne*, 45 Ind. App. 132; *Maxwell v. Town of Wellington*, 138 Wis. 607.

9—See *Doyle v. Portland Railway, Light & Power Co.*, 71 Ore. 576, 143 Pac. 623, 8 N. C. C. A. 146, where the writer of the opinion states that it is better practice to give the instructions without informing the jury, or saying in their hearing, that certain parts are requested by the plaintiff and other portions by the defendant.

10—*Anderson v. City of Bath*, 42 Me. 346.

A requested instruction should be

given as that of the court and not as that of a party. *Werk v. Illinois Steel Co.*, 154 Ill. 427, aff'g 54 Ill. App. 302.

11—*Barkman v. State*, 13 Ark. 706; *Long v. State*, 12 Ga. 293. A party cannot complain that correct instructions requested by his adversary are given in connection with instructions requested by himself. *Robertson v. Parks*, 76 Md. 118.

12—*Dillon v. McRae*, 40 Ga. 107; *East Tennessee, V. & G. R. Co. v. Fain*, 12 Lea (Tenn.) 35. Compare *Leaptrot v. Robertson*, 44 Ga. 50.

13—*Dillon v. McRae*, 40 Ga. 107.

14—*Veneman v. McCurtain*, 33 Neb. 643; *McDuffie v. Bentley*, 27 Neb. 380; *State v. Missio*, 105 Tenn. 218.

the opposing counsel for examination and discussion before action on it.¹⁵

A refusal to give an instruction should be made in such a manner as not to mislead the jury as to the cause of the refusal.¹⁶

The refusal of an instruction is not equivalent to the assertion of the converse of the proposition contained in it.¹⁷

An arbitrary refusal to examine requested instructions is error¹⁸ and it has been held to be error not to answer directly a point proposed by counsel.¹⁹

The court should either affirm or deny a well-constructed

15—*East Tennessee, V. & G. R. Co. v. Gurley*, 12 Lea (Tenn.) 46.

See also, § 177, *ante*.

16—*State v. McCarty*, 17 Minn. 76 (Gil. 54). If the judge refuses to comply with a request to charge, on the ground that he has already so charged, he should refuse the request upon that ground, lest the jury should be misled by an unqualified refusal. *Welling v. Judge*, 40 Barb. (N. Y.) 193.

17—*Dempsey v. Reinsedler*, 22 Mo. App. 43; *Miles v. Davis*, 19 Mo. 408.

18—*Crane Co. v. Hogan*, 228 Ill. 338, rev'g 131 Ill. App. 314.

19—*Keitt v. Spencer*, 19 Fla. 748; *Sommer v. Gilmore*, 160 Pa. St. 129; *Tenbrooke v. Jahke*, 77 Pa. St. 392; *Hood v. Hood*, 2 Grant, Cas. (Pa.) 229; *Geiger v. Welsh*, 1 Rawle (Pa.) 349; *Selin v. Snyder*, 11 Serg. & R. (Pa.) 319; *Simpson v. Wray*, 7 Serg. & R. (Pa.) 336; *Fisher v. Larick*, 3 Serg. & R. (Pa.) 319; *Smith v. Thompson*, 2 Serg. & R. (Pa.) 49; *Powers v. McFerran*, 2 Serg. & R. (Pa.) 44; *Noble v. McClintock*, 6 Watts & S. (Pa.) 58; *Carpenter v. Mayer*, 5 Watts (Pa.) 483; *Slaymaker v. St. John*, 5 Watts (Pa.)

27; *Crumless v. Sturges*, 6 Heisk. (Tenn.) 190.

“The plaintiff's counsel submitted a series of points, ten in number, to which the court made this response: ‘So far as the points are in accordance with what we have said to you was the controlling question in the case, they are affirmed, and, so far as they are not in accordance with the opinion we expressed in the general charge, they are refused.’ It was not necessary to answer specifically every point in this series, but it was necessary to tell the jury the legal rule controlling the questions suggested by the points. We repeat what was said by our Brother Paxson in *Huddleston v. Borough of West Bellevue*, 111 Pa. St. 122: ‘This is a very unsatisfactory way of answering points. It renders the point of no possible value with the jury, and always adds greatly to our labors.’ When such answer leaves the jury without adequate instruction upon the questions presented by the points, it must, if the questions presented are fairly and legitimately raised, be ground for reversal.” *Duncan v. Sherman*, 121 Pa. St. 530.

point submitted,²⁰ although it is not necessary, to affirm or deny the points separately.²¹

It is error to evade a direct answer by telling the jury to be directed by the evidence before them. This is no instruction at all.²²

An alteration is equivalent to a refusal²³ and where the court is evenly divided in opinion as to a prayer, it is to be regarded as refused,²⁴ also, an accidental omission to give a requested instruction has the same effect as a refusal.²⁵

Instructions requested and refused need not be read to the jury,²⁶ nor need the court tell the jury "that it had received them, or that it charged or refused to charge them."²⁷

Where the court, instead of giving or refusing certain requested instructions, told the jury that they might "use them as far as the same are practicable in arriving at a verdict," it was error, because it left the jury to decide whether the requested instructions were correct or not.²⁸

It is bad practice, sufficient to endanger the verdict, for the trial judge to read instructions to the jury and not de-

20—*Awank v. Phillips*, 113 Pa. St. 482. A party is entitled to an answer which is intelligible to the jury. *Mills v. Buchanan*, 14 Pa. St. 59.

21—*Com. v. Cleary*, 135 Pa. St. 64, 26 Wkly. Notes Cas. 137. If the judge's charge contains a sufficient answer to the points, it is enough, although they are not answered separately. *Patterson v. Kountz*, 63 Pa. St. 246.

22—*Waynesboro Mut. Fire Ins. Co. v. Creaton*, 98 Pa. St. 451. Where the court is asked to charge what would be the legal effect of certain findings of fact, the answer must be responsive, and it is error to merely state that the jury must find the

facts from all the evidence. *Cross v. Tyrone Min. & Mfg. Co.*, 121 Pa. St. 387; *Kraft v. Smith*, 117 Pa. St. 183.

23—*Pensacola & A. R. Co. v. Atkinson*, 20 Fla. 450. A charge not given substantially as requested is to be regarded as refused. *McHugh v. State*, 42 Ohio St. 154.

24—*Michael v. Schroeder*, 4 Har. & J. (Md.) 227; *Smith v. Gilmor*, 4 Har. & J. (Md.) 177.

25—*State v. McNamara*, 3 Nev. 70.

26—*Stewart v. Mills*, 18 Fla. 57.

27—*Soper Lumber Co. v. Halsted & Harmount Co.*, 73 Conn. 547.

28—*Duthie v. Town of Washburn*, 87 Wis. 231.

termine until after they are read whether they should be given or not.²⁹

If the contents of requested instructions are read in the presence of the jury, or otherwise made known to them, and the court refuses such instructions on the ground that they have already been given in the general charge, or in the form of other special instructions, the ground of refusal should be plainly stated to the jury, for otherwise they might be misled into the belief that they were refused on the merits.³⁰

Where the jury are not made acquainted with the contents of a refused instruction, the rule stated does not apply. If the requests are not read in their presence, but are submitted in writing (as is the case in probably the greater number of jurisdictions) to the judge, who marks them "Refused" if he rejects them, the jury cannot be misled by the refusal of the request.³¹

It has been said in one case that, even if the jury do not know the substance of instructions refused, it would be well to note on the instruction the ground of the refusal, and in support of this view it is said: "A defendant might appeal without making any bill of exceptions, and in that case the charge of the judge would form no part of the record, whereas the instructions refused by him would come before us for review; and if we found that an instruction manifestly correct and applicable to the case had been refused, * * * we might be compelled to reverse the judgment for a reason that in fact did not exist."³²

29—*Revilla Fish Products Co. v. American-Hawaiian S. S. Co.*, 77 Wash. 49, 137 Pac. 337.

30—*People v. Williams*, 17 Cal. 148; *People v. Ramirez*, 13 Cal. 172; *People v. Hurley*, 8 Cal. 390; *State v. Ferguson*, 9 Nev. 106; *State v. Anderson*, 4 Nev. 265; *People v. Bonds*, 1 Nev. 33; *Davis v. Richmond & D. R. Co.*, 30 S. C. 613.

Contra, *Hopcraft v. Lachman*, 68

Hun (N. Y.) 433. See also, *People v. Hobson*, 17 Cal. 424, wherein it was held that failure to state the reason for refusal is not ground for reversal unless the refused request was entirely free from objection.

31—*People v. Saunders*, 25 Mich. 119. See also, *State v. O'Connor*, 11 Nev. 416.

32—*State v. O'Connor*, 11 Nev. 427.

§ 182. Marking instructions "Given" or "Refused."

A statutory provision requiring instructions to be marked "Given," "Refused" or "Modified" is intended simply to preserve a proper record, and it is not material that the court point out to the jury just what language is requested and what modifications are made by the court.³³

The principal object of such a statute is to avoid disputes as to what instructions were given; and the statute will be satisfied by marking at the bottom of the last of the pages on which the instructions were written, "The foregoing are all refused."³⁴

Where the trial judge marks instructions "Refused except as covered in the general charge" instead of "Refused," the notation is a sufficient compliance with the statute³⁵ and the indorsement by the court, upon a requested instruction, that it "did not consider and pass upon said proposition because it did not include and was not based on the leading facts upon which the case was tried," amounts to a refusal, and is a sufficient compliance with the statute.³⁶

If an instruction is refused merely because the substance thereof has already been given, advantage cannot be taken, upon appeal, of the fact that the court simply marked "Refused" on the instruction, without stating the ground of refusal.³⁷

Under a statute requiring the presiding judge to distinctly note a refusal and "subscribe his name thereto," a charge cannot be construed as refused when merely the word "Refused" written with a pen appears, and the court on appeal

33—*Farrell v. Citizen's Light & R. Co.*, 137 Iowa 309. See also, *Anderson v. Foley Bros.*, 110 Minn. 151.

34—*Territory v. Baker*, 4 N. M. (Gild.) 236, 13 Pac. 30; 4 N. M. (Johns.) 117, 13 Pac. 30.

35—C. L., § 10245; *Howell's Mich. St. Ann.*, § 11839; *People v. Smith*, 177 Mich. 358. This provision seems to have been omitted from the Mich-

igan Judicature Act of 1915. Ch. XVIII, section 59, of that act provides that "any request not substantially covered by the charge as given shall be deemed to be refused."

36—*Moore v. Sweeney*, 28 Ill. App. 547; appeal dismissed, 128 Ill. 204.

37—*People v. Douglass*, 100 Cal. 1, 34 Pac. 490.

cannot take official notice that such word is in the handwriting of the judge.³⁸

Where the court writes "Held" on an instruction, in compliance with the statute, the addition of an explanation that the instruction was not warranted by the evidence does not amount to a refusal.³⁹

The notation should not be misleading or unintelligible but, a notation on an instruction following the signature of plaintiff's attorneys reading "Requested after the reading of the main charge and after the court's refusal of plaintiff's request to give a peremptory instruction in its favor, and given," has been held not confusing or misleading.⁴⁰

Also, an instruction giving forms of a verdict of guilty and not guilty, both written on the same sheet of paper has been held not erroneous because the word "Given" appeared opposite the form for "Guilty."⁴¹

Where the court marked a requested instruction, "Not given; given in instruction 37. N., Judge," and he also drew his pencil through several of the lines which were type-written, and drew a pen across them vertically several times, and diagonally twice, and subsequently drew his pencil through all that he had written except the words, "Given. N., Judge," and added these words, "Pen and pencil marks not to be considered by the jury. N., Judge," and there is a photographic copy of the instruction in the record as handed to the jury, it cannot be contended that the marks upon the instruction rendered it unintelligible.⁴²

38—Texas Rev. St., art. 1320. Missouri, K. & T. Ry. Co. of Texas v. Hurdle, — Tex. Civ. App. —, 142 S. W. 992.

Special instructions whether given or refused must be authenticated by the signature of the trial judge, and if the record fails to show that such instructions were refused they will be presumed to have been given. Porter v. State, 60 Tex. Cr. App. 588.

See also, Rockwell Bros. & Co. v. Hudgens, 57 Tex. Civ. App. 504.

39—Flower v. Beveridge, 161 Ill. 53, affirming 58 Ill. App. 431.

40—Allison v. Arlington Heights Realty Co., — Tex. Civ. App. —, 164 S. W. 1033.

41—People v. Donaldson, 255 Ill. 19, Ann. Cas. 1913 D 307.

42—People v. Shears, 133 Cal. 154, 65 Pac. 295.

Where a requested instruction was modified by defining the limitations of the rules stated to prevent any misapprehension by the jury of its proper force and application, and marked "Instruction 1—given at the request of the defendant," it was not prejudicial error it appearing that the modified instruction presented a correct proposition of law.⁴³

Where there is a series of instructions, a refusal thereof, in a single sentence, instead of marking a refusal against the margin of each one singly, has been held sufficient.⁴⁴

So, where several instructions were asked, written on sheets of paper fastened at the top and on the margin of the first sheet, and the court wrote, "Instructions one to seven all refused," this was held a sufficient compliance with the statute.⁴⁵

The charge of the court, given of its own motion, need not be marked by the court.⁴⁶

§ 183. Effect of noncompliance with statute.

As a general rule, the provision of the statute that instructions shall be marked "Given" or "Refused" is merely directory, and failure to so mark certain instructions will not work a reversal, where the record shows that they were

43—Farrell v. Citizen's Light & R. Co., 137 Iowa 309.

44—Lawrenceville Cement Co. v. Parker, 60 Hun (N. Y.) 586.

Where the record shows that a series of instructions requested were actually refused, the mere failure to mark each instruction "Refused" is not reversible error. McDonald v. Fairbanks, Morse & Co., 161 Ill. 131.

45—Harvey v. Tama County, 53 Iowa 228.

46—People v. Samsels, 66 Cal. 99, 4 Pac. 1061.

Under a statutory provision which

requires the court to mark the word "Given" on instructions given, and the word "Refused" on instructions refused, it has been held that "an instruction or a series of instructions headed, 'Instructions given by the court on its own motion,' and so placed in the record as to be clearly separate and distinguishable from the instructions presented by the parties," will suffice. The word "Given" need not be marked on instructions given by the court of its own motion. Gillen v. Riley, 27 Neb. 158.

actually given or refused, and consequently no harm can have resulted from failure to obey the statute.⁴⁷

It has been held in one case that if instructions are asked by the defendant, and the court, through inadvertence, neither marks them "Given" nor "Refused," and they are not given to the jury, when such instructions announce correct principles of law, and have not already been given in substance, the effect is precisely the same as if the instructions had been formally marked "Refused," and is a ground for reversal.⁴⁸

So it has been held in another case that, "although the presiding judge does not write 'Given' or 'Refused' upon the written charg , and does not sign his name thereto, yet, if the charge is set forth in the bill of exceptions, which shows that it was asked in writing, and that exception was reserved to the ruling of the court, error can be assigned in the appellate court on such ruling."⁴⁹

In many jurisdictions it is held however, that, unless instructions are marked "Given" or "Refused," they will not be regarded as properly before the court on appeal, and no error can be assigned to the giving or refusal of such instructions.⁵⁰

That the trial court gave or refused instructions is not proven by the indorsements "Given" and "Refused" on

47—*Washington v. State*, 106 Ala. 58; *McDonald v. Fairbanks, Morse & Co.*, 161 Ill. 124; *Tobin v. People*, 101 Ill. 123; *McKenzie v. Remington*, 79 Ill. 388; *Cook v. Hunt*, 24 Ill. 550; *Daxanbelklav v. People*, 93 Ill. App. 553; *Harrigan v. Turner*, 65 Ill. App. 470; *Frame v. Murphy*, 56 Ill. App. 555; *St. Louis, A. & T. H. R. Co. v. Hawkins*, 39 Ill. App. 406; Where the court fails to mark a request as either "Given" or "Refused," but materially modifies it, and gives it, as modified, as coming

from one of the parties, it is reversible error. *Peart v. Chicago, M. & St. P. Ry. Co.*, 8 S. D. 431. See also, *Galloway v. McLean*, 2 Dak. 372.

48—*Calef v. Thomas*, 81 Ill. 486. See also, *Holcomb v. Norman*, 43 Ind. App. 506.

49—*Little v. State*, 58 Ala. 265.

50—*Jones v. Buzzard*, 2 Ark. 415; *Muncie & P. Traction Co. v. Black*, 173 Ind. 142; *Cadwallader v. Blair*, 18 Iowa 421; *Thompson v. Chumney*, 8 Tex. 394.

papers sent up, it not appearing who made the indorsements, nor by allegations made in motion for new trial.⁵¹

If the court refuses to make the proper indorsement and exception is taken, such refusal will constitute reversible error.⁵²

But where no exception is taken to the omission of the court to indorse such action upon the instructions, as the statute requires, it is presumed that the parties knew of the omission and consented thereto.⁵³

The act of indorsing by a written memorandum the action of the court in giving and refusing instructions is a judicial act.⁵⁴

All courts of record have the inherent power to make their records speak the truth, to correctly record what transpired in the court where through any omission or misprision of the clerk, this has not been done. But after judgment has been rendered in a cause and the term of court has closed, the power of the court ceases, and it cannot resurrect the cause disposed of for the purpose of performing any further judicial function therein.⁵⁵

§ 184. Right to instructions requested.

Where instructions correct in form and substance, and applicable to the law and facts of the case are submitted in apt and proper time, it is the duty of the court to give such instructions, and a failure to do so is ordinarily reversible error ⁵⁶ unless the court can say that the requested instruc-

51—Jones v. Buzzard, 2 Ark. 415. See generally, ch. XXXIV, *post*, "Appellate Review of Instructions."

52—Holcomb v. Norman, 43 Ind. App. 506.

53—Holcomb v. Norman, 43 Ind. App. 506.

54—Holcomb v. Norman, 43 Ind. App. 506.

55—Holcomb v. Norman, 43 Ind. App. 506.

56—Alabama. Boswell v. Thomp-

son, 160 Ala. 306; Harvey v. State, 125 Ala. 47.

Arkansas. A. G. Brown & Co. v. McKnight, — Ark. —, 118 S. W. 409.

California. Sperry v. Spaulding, 45 Cal. 544; Emerson v. Santa Clara Co., 40 Cal. 543; People v. Taylor, 36 Cal. 255.

Colorado. Kinkle v. People, 27 Colo. 459, 62 Pac. 197.

Connecticut. Morris v. Platt, 32 Conn. 75.

tions were covered by other correct instructions, which were given.

Florida. Keitt v. Spencer, 19 Fla. 748; Baker v. State, 17 Fla. 406.

Georgia. Central of Georgia Ry. Co. v. Bond, 111 Ga. 13; Haigler v. Adams, 5 Ga. App. 637.

Illinois. Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 253, aff'g 130 Ill. App. 81; Bennett v. Connelly, 103 Ill. 50; Bowman v. Wettig, 39 Ill. 416; Fisher v. Stevens, 16 Ill. 397; State v. Wilson, 2 Scam 225; Levin v. Cazier, 146 Ill. App. 188; McCabe v. Swift & Co., 143 Ill. App. 404; Chicago Union Traction Co. v. Hansen, 125 Ill. App. 153; Suttle v. Finnegan, 86 Ill. App. 423; Stearns v. Reidy, 18 Ill. App. 582; Chicago W. D. Ry. Co. v. Haviland, 12 Ill. App. 561; Cohen v. Schick, 6 Ill. App. 280; Leuder v. People, 6 Ill. App. 98.

Indiana. Parker v. State, 136 Ind. 284; Blacketer v. House, 67 Ind. 414; Carpenter v. State, 43 Ind. 371; Conaway v. Shelton, 3 Ind. 334; Case v. Weber, 2 Ind. 108; Taylor v. Hillier, 3 Blackf. 433, 26 Am. Dec. 430; Jared v. Goodtitle, 1 Blackf. 29; Fuelling v. Fuesse, 43 Ind. App. 441.

Iowa. Spaulding v. Adams, 63 Iowa 437; Prichard v. Hopkins, 52 Iowa 120; Muldowney v. Illinois Cent. R. Co., 32 Iowa 176; State v. Gibbons, 10 Iowa 117.

Kansas. Dickinson v. Beal, 10 Kan. App. 233, 62 Pac. 724.

Kentucky. Owings v. Trotter, 1 Bibb 157; Reading v. Metcalf, Hardin 544; Bell v. North, 4 Litt. 133.

Louisiana. State v. Tucker, 38 La. Ann. 789.

Maine. Anderson v. City of Bath, 42 Me. 346; Lapish v. Wells, 6 Me. 175.

Maryland. Wells v. Turner, 16

Md. 133; Union Bank of Maryland v. Kerr, 7 Md. 88.

Massachusetts. Coffin v. Coffin, 4 Mass. 25.

Michigan. People v. Jacks, 76 Mich. 218; Cooper v. Mulder, 74 Mich. 374; Babbitt v. Bumpus, 73 Mich. 331, 16 Am. St. Rep. 585; O'Callaghan v. Boeing, 72 Mich. 669; Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

Mississippi. Nichols v. State, 46 Miss. 284.

Missouri. Groshong v. United Rys. Co. of St. Louis, — Mo. App. —, 121 S. W. 1084; Pryor v. Metropolitan St. Ry. Co., 85 Mo. App. 367.

Nebraska. Glassey v. Dye, 83 Neb. 615; First Nat. Bank of Madison v. Carson, 30 Neb. 104; Gilbert v. Merriam & Roberson Sadlery Co., 26 Neb. 194; Skinner v. Majors, 19 Neb. 453; Billings v. McCoy, 5 Neb. 188.

New York. Foster v. People, 50 N. Y. 601; Brockman v. Metropolitan St. R. Co., 32 Misc. Rep. 728.

North Carolina. State v. Gilmer, 97 N. C. 429; State v. Gaskins, 93 N. C. 547; State v. Christmas, 51 N. C. 471.

Ohio. Jones v. State, 20 Ohio 46; Lewis v. State, 4 Ohio 389; Lytle v. Boyer, 33 Ohio St. 506; Cleveland, P. & E. R. Co. v. Nixon, 21 Ohio Cir. Ct. R. 736, 12 Ohio Cir. Dec. 79.

Pennsylvania. Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Belmont Church v. Devine, 28 Leg. Int. 85; Hughes v. Boyer, 9 Watts 556.

Tennessee. McGavock v. Ward, Cooke 405; Baird v. Trimble's Lessee, Cooke 289; Lawrence v. Hudson, 12 Heisk. 671; Johnson v. McCampbell, 11 Heisk. 28; Souey v. State,

Each party is entitled to instructions embodying his theory of the case.⁵⁷

13 Lea 472; *Kendrick v. Cisco*, 13 Lea 251; *Wilson v. Smith*, 5 Yerg. 379; *Williams v. Norwood*, 2 Yerg. 329.

Texas. *Purnell v. Gandy*, 46 Tex. 190; *Norwood v. Boon*, 21 Tex. 592; *Coyle v. McNabb* (Tex. App.), 18 S. W. 198; *Cleburne E. & G. Co. v. McCoy*, — Tex. Civ. App. —, 128 S. W. 457; *Missouri, K. & T. R. Co. v. Graves*, — Tex. Civ. App. —, 122 S. W. 458; *Gann v. State*, 42 Tex. Cr. App. 133.

Vermont. *Eastman v. Curtis*, 67 Vt. 432; *Brainard v. Burton*, 5 Vt. 97; *Washburn v. Tracy*, 2 D. Chip. 128, 15 Am. Dec. 661.

Virginia. *Gordon v. City of Richmond*, 83 Va. 436; *Womack v. Circle*, 29 Gratt. 208; *Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447; *Wells v. Washington's Adm'r*, 6 Munf. 532; *Brooke v. Young*, 3 Rand. 106; *Pickett v. Morris*, 2 Wash. 255.

Washington. *Pantages v. Seattle Electric Co.*, 55 Wash. 453, 104 Pac. 629; *McGee v. Wineholt*, 23 Wash. 748, 63 Pac. 571.

West Virginia. *Riley v. West Virginia Cent. & P. Ry. Co.*, 27 W. Va. 147.

Wisconsin. *Sailer v. Barnousky*, 60 Wis. 169; *Campbell v. Campbell*, 54 Wis. 90; *Connors v. State*, 47 Wis. 523; *Tupper v. Huson*, 46 Wis. 646; *Wheeler v. Konst*, 46 Wis. 398; *Roberts v. McGrath*, 38 Wis. 52; *Rogers v. Brightman*, 10 Wis. 55.

United States. *Thorwegan v. King*, 111 U. S. 549, 28 L. Ed. 514; *Livingston v. Maryland Ins. Co.*, 7 Cranch 506, 3 L. Ed. 421; *Douglass v. M'Allister*, 3 Cranch 298, 2 L. Ed. 445; *Mullen v. United States*, 4 C. C.

A. 22, 106 Fed. 892; *Texas & P. R. Co. v. Rhodes*, 30 U. S. App. 561, 18 C. C. A. 9, 71 Fed. 145.

Instructions germane to the case and declaratory of the law should not be refused. *Keokuk & H. Bridge Co. v. Wetzel*, 228 Ill. 253, aff'g 130 Ill. App. 81; *Levin v. Cazier*, 146 Ill. App. 188; *Chicago Union Traction Co. v. Hansen*, 125 Ill. App. 153.

The neglect or refusal of the judge to consider requests and give his ruling thereon to the jury in writing as required by statute is error. *Keitt v. Spencer*, 19 Fla. 748.

A refusal to charge the jury upon "reasonable doubt" in a criminal case is reversible error. *Parker v. State*, 136 Ind. 284.

It is often error to refuse a request, because such refusal amounts to an affirmance of the converse of the proposition requested. Thus, "it is error to refuse to charge that the jury are not to draw any deductions against either party from objections made and evidence excluded." *Scott v. Third Ave. R. Co.*, 59 Hun 456, 13 N. Y. Supp. 344.

"An instruction commenting on evidence is unnecessary." *Pryor v. Metropolitan St. Ry. Co.*, 85 Mo. App. 367.

57—*Chicago Union Traction Co. v. Browdy*, 206 Ill. 615, rev'g 108 Ill. App. 177; *Fessenden v. Doane*, 188 Ill. 228, aff'g 89 Ill. App. 229; *West Chicago St. R. Co. v. Foster*, 175 Ill. 396, aff'g 74 Ill. App. 414.

Defendants held entitled to an instruction on their theory though the theory was denied by the plaintiff. *Brzozowski v. National Box Co.*, 104 Ill. App. 338.

It is the privilege of a party to raise any question of law arising out of the facts, and to demand the opinion of the court distinctly upon it; and the opposite party has the equal privilege of asking an opinion upon additional facts, not embraced in the hypothesis of his adversary's prayer, but not of controlling or modifying that hypothesis.⁵⁸

What is admitted or conceded to be law by the plaintiff or defendant, as the case may be, is binding upon him, and, if it is accepted by the other side, it becomes the law of the particular case; and it is error in the court to reject a prayer the correctness of which has been conceded.⁵⁹

*The fact that in criminal cases the jury are the judges of both the law and the facts will not justify the court in refusing to instruct the jury on the law of the case, when properly requested.⁶⁰

The right to demand instructions, however, has a limit, and counsel will not be permitted to abuse the right.⁶¹

It is not error to refuse to give an instruction which would conflict with other instructions given at the request of the same party,⁶² and courts are not required to give instructions which necessitate qualification or modification. If not good as requested, it is not error to refuse them.⁶³

58—*Parkhurst v. Northern Cent. R. Co.*, 19 Md. 472, 81 Am. Dec. 648; *Birney v. New York & W. Printing Telegraph Co.*, 18 Md. 341, 81 Am. Dec. 607n; *Whiteford v. Burckmyer*, 1 Gill (Md.) 127. "Where all the facts and circumstances relating to the subject are admitted, a party has the right to ask the court to instruct the jury whether the evidence is sufficient to establish a waiver or not." *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1, 66 Am. Dec. 308; "After a party has obtained a correct statement of the law governing a point in the case, he has the right to an application of the principle to the facts in evidence, and a declara-

tion from the court that these facts, if believed by the jury to be established, call for the application of the principle." *Aldrige v. State*, 59 Miss. 250.

59—*Sittig v. Birkenstack*, 35 Md. 273.

60—*Leuder v. People*, 6 Ill. App. 98; *Parker v. State*, 136 Ind. 284.

61—*Fisher v. Stevens*, 16 Ill. 397.

62—*Scott v. Texas & P. Ry. Co.*, 93 Tex. 625, reversing (Tex. Civ. App.), 56 S. W. 97; *Texas & P. Ry. Co. v. Hassell*, 23 Tex. Civ. App. 681.

63—*American Ins. Co. v. Haynie*, 91 Ark. 43; *Fulsom-Morris Coal &*

Under some circumstances although it is the duty of the court to comply with a proper request for instructions, a failure to do so may constitute merely a harmless error, which is not a sufficient ground for reversal.⁶⁴

Thus, where a verdict is properly directed, a refusal to charge as requested is not error.⁶⁵

§ 185. Right to instructions as affected by state of evidence.

Where there is no evidence in the case supporting or tending to support the proposition involved in the request, it is not only proper to refuse the request, but it would be improper to give it,⁶⁶ and an instruction as to immaterial matters is properly refused.⁶⁷

But it is error to refuse a request applicable to the evidence upon a material point, where the evidence upon that point is conflicting.⁶⁸

Mining Co. v. Mitchell, 37 Okla. 575, 132 Pac. 1103.

64—*Douglass v. M'Allister*, 3 Cranch (U. S.) 298, 2 L. Ed. 445.

It is the duty of the court, when properly called upon, to declare the law applicable to the case. If, however, the verdict is, notwithstanding an omission to instruct, for the same amount as must have been awarded if the required instruction had been given, the error may be disregarded. *Douglass v. M'Allister*, 3 Cranch (U. S.) 298, 2 L. Ed. 445. See also, *Trial of Hodges*, Hall's Law Tracts, 111.

The refusal of a correct instruction is not ground for reversal if no harm resulted. *Cole v. City of East St. Louis*, 158 Ill. App. 494.

65—*Myers v. Kingston Coal Co.*, 126 Pa. St. 582, 24 Wkly. Notes Cas. 223; *Lewis v. Simon*, 72 Tex. 470.

66—*Bacon v. Green*, 36 Fla. 325; *Pensacola & A. R. Co. v. Atkinson*,

20 Fla. 450; *Willis v. Bullitt*, 22 Tex. 330. See ch. VIII, § 82, *ante*. The evidence relied on must be legally sufficient to warrant the conclusion sought to be deduced from it, or the request may be refused. *Wells v. Turner*, 16 Md. 133. "Where the payee of a note is dead, if the maker offers himself as a witness, and is excluded by reason of the death, there will be no need to instruct the jury why he cannot testify." *Harris v. State*, 142 Ga. 627; *Corbitt v. Mooney*, 84 Mo. App. 645.

A requested charge as to estoppel is properly refused where the evidence makes no question as to such issue. *Adams v. Wm. Cameron & Co., Inc.*, — Tex. Civ. App. —, 161 S. W. 417.

67—*Cowie v. Kinser*, 138 Ill. App. 143, *aff'd* 235 Ill. 383.

68—*California*. *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. 132; *Renton v.*

A party is entitled to instructions upon his theory if supported by the evidence.⁶⁹

Where there is any evidence, however slight, to sustain a legal claim or a legal defense, the party introducing such evidence has a right to have it submitted to the jury by appropriate instructions; and when an instruction is submitted, based upon evidence in the case, and stating correctly a principle of law applicable to such evidence, and not covered by any instruction given, it is error to refuse the instruction, however meager the evidence to sustain the hypothesis contained in it.⁷⁰

Monnier, 77 Cal. 449, 19 Pac. 820; Sperry v. Spaulding, 45 Cal. 549.

Illinois. Trask v. People, 104 Ill. 569; Wooters v. King, 54 Ill. 343.

Michigan. Wisner v. Davenport, 5 Mich. 501.

Missouri. State v. Partlow, 90 Mo. 608, 59 Am. Rep. 31.

Texas. Smith v. J. W. Wilson & Boatman Sav. Bank, 1 Tex. Civ. App. 115.

69—Carlin v. Grand Trunk W. Ry. Co., 243 Ill. 64, 134 Am. St. Rep. 354, rev'g 150 Ill. App. 121; Chicago City Ry. Co. v. Gates, 135 Ill. App. 180; Chicago Union Traction Co. v. Hansen, 125 Ill. App. 153.

“The judge is not authorized to refuse requested charges because, while not denying the material facts stated, he disputes the correctness of the contentions of counsel based thereon. Counsel has the right to urge his own theory as to the inferences of motive and intention to be drawn from the facts, and to impress the same upon the jury; and though the judge may take a different view, the question is to be determined by the jury, and, in case the jury should concur with counsel, defendant has the clear right to have

them instructed as to the law applicable to the case.” State v. Tucker, 38 La. Ann. 789.

70—**Alabama.** Liner v. State, 124 Ala. 1.

California. Davis v. Russell, 52 Cal. 611, 28 Am. Rep. 647; People v. Taylor, 36 Cal. 255.

Georgia. Cook v. Wood, 30 Ga. 891, 76 Am. Dec. 677.

Illinois. Cook County v. Harms, 108 Ill. 153; Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425n; Eames v. Rend, 105 Ill. 506; Trask v. People, 104 Ill. 569; City of Chicago v. Scholten, 75 Ill. 468; Wooters v. King, 54 Ill. 343; Peoria M. & F. Ins. Co. v. Anapow, 45 Ill. 86; Edwards v. Dettenmaier, 88 Ill. App. 366; Chicago Heights Land Ass'n v. Butler, 55 Ill. App. 461; Riedle v. Mulhausen, 20 Ill. App. 73.

Indiana. Carpenter v. State, 43 Ind. 371; Conaway v. Shelton, 3 Ind. 334.

Kentucky. Tribble v. Frame, 5 Litt. 189.

Maine. Anderson v. City of Bath, 42 Me. 346.

Michigan. Dikeman v. Arnold, 71 Mich. 656.

The party asking the instruction is entitled to the benefit of whatever inferences the jury may think proper to draw from the proof, however slight.⁷¹

§ 186. Requests embodied in instructions given.

It is a well settled rule announced in almost an innumerable number of cases, that it is not error to refuse to give requested instructions which are sufficiently covered by other instructions given in the case.⁷²

Mississippi. *Levy v. Gray*, 56 Miss. 318.

Nebraska. *Hancock v. Stout*, 28 Neb. 301.

Nevada. *State v. Levine*, 17 Nev. 435, 30 Pac. 1084.

New York. *Evarts v. Burton*, 17 N. Y. Wkly. Dig. 401.

Tennessee. *Lawrence v. Hudson*, 12 Heisk. 671.

Virginia. *Hopkins v. Richardson*, 9 Gratt. 485. When there is any evidence tending to prove a material fact in the case, the party in whose favor it is has the right, without regard to the amount of the evidence, to have the court instruct the jury as to the law arising upon the fact or facts which the evidence tends to prove, and leave to them to find whether or not the evidence is sufficient to establish the fact it was introduced to prove. *New York, P. N. R. Co. v. Thomas*, 92 Va. 606; *Honesty v. Com.*, 81 Va. 283; *Early v. Garland's Lessee*, 13 Gratt. 1; *Farish v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 666n; *Hopkins v. Richardson*, 9 Gratt. 485.

If there be any evidence of a fact, though the weight of evidence be against it, it is error to refuse to instruct the jury as to the legal effect of that fact, if they believe it

from the evidence. *Levy v. Gray*, 36 Miss. 318.

"If the court be requested, in writing, to give a legal charge, and refuses upon the ground that there is no evidence to support it, when in fact there is evidence, it is error, and on account of which a new trial will be awarded, if the point was material in the case." *Cook v. Wood*, 30 Ga. 891, 76 Am. Dec. 677.

71—*Peoria M. & F. Ins. Co. v. Anapow*, 45 Ill. 86; *Wells v. Turner*, 16 Md. 133; *Sword v. Keith*, 31 Mich. 247.

72—**Alabama.** *Corona Coal & Iron Co. v. Ferrier*, — Ala. —, 65 So. 780; *Birmingham Railway, Light & Power Co. v. Girod*, 164 Ala. 10, 137 Am. St. Rep. 17; *Birmingham Railway, Light & Power Co. v. Chastain*, 158 Ala. 421; *Liner v. State*, 124 Ala. 1; *Murphy v. State*, 108 Ala. 10; *Smith v. State*, 92 Ala. 30; *Henderson v. State*, 11 Ala. App. 37; *Hubbard v. State*, 10 Ala. App. 47; *Fowler v. State*, 8 Ala. App. 168. In this state, the rule in the text applies only where the instruction given was at the request of the same party. Instructions given at the request of the opposite party, or by the court of its own motion, furnish no ground for refusing a request, as

It is apparent that such a rule is necessary, since otherwise counsel could easily trip the court by multiplying requests for instructions concerning the same proposition in

a party is entitled to have an instruction given in the exact language of his request.

Refusal of requested instruction covered by those given held error without injury. *Kirk v. State*, 10 Ala. App. 216.

Arizona. *Rain v. State*, 15 Ariz. 125, 137 Pac. 550; *Southern Pac. Co. v. Hogan*, 13 Ariz. 34, 29 L. R. A. (N. S.) 813n.

Arkansas. *Western U. Tel. Co. v. Wilson*, — Ark. —, 170 S. W. 993; *School Dist. No. 30 v. Roth*, — Ark. —, 170 S. W. 561; *Whitley v. State*, — Ark. —, 169 S. W. 952; *Autrey v. State*, — Ark. —, 168 S. W. 556; *Turner v. State*, 100 Ark. 199.

California. *People v. Raber*, 168 Cal. 316, 143 Pac. 317; *People v. Williams*, 24 Cal. App. 646, 142 Pac. 124; *People v. Guaragna*, 23 Cal. App. 120, 137 Pac. 279; *Boye v. Andrews*, 10 Cal. App. 494, 102 Pac. 551.

Colorado. *Henwood v. People*, 57 Colo. 544, 143 Pac. 373; *Campbell v. People*, 55 Colo. 302, 133 Pac. 1043; *Mahler v. Beishline*, 46 Colo. 603, 105 Pac. 874.

Connecticut. *Easton v. Connecticut Co.*, 88 Conn. 494.

District of Columbia. *United States v. McBride*, 7 Mackey 371.

Florida. *Florida R. Co. v. Dorsey*, 59 Fla. 260; *Day v. State*, 54 Fla. 25; *Higginbotham v. State*, 42 Fla. 573, 89 Am. St. Rep. 237; *Coleman v. State*, 26 Fla. 61.

Georgia. *Hall v. State*, 141 Ga. 7; *Wilson v. Brock*, 134 Ga. 782; *Southern R. Co. v. Brock*, 132 Ga. 858.

Idaho. *State v. Trego*, 25 Idaho 625, 138 Pac. 1124; *State v. O'Neil*, 24 Idaho 582, 135 Pac. 60.

Illinois. *Jones v. Sanitary Dist. of Chicago*, 265 Ill. 98; *Kern v. Meyer*, 264 Ill. 560; *City of Kankakee v. Illinois Cent. R. Co.*, 263 Ill. 589; *People v. Harrison*, 261 Ill. 517; *Huffman v. Graves*, 245 Ill. 440; *Blair v. Illinois Cent. R. Co.*, 243 Ill. 224, aff'g 149 Ill. App. 306; *Smythe v. Charles P. Parish & Co.*, 237 Ill. 419, aff'g 140 Ill. App. 405; *North American Restaurant & Oyster House v. McElligott*, 227 Ill. 317, aff'g 129 Ill. App. 498; *People ex rel. Stead v. Board Sup'rs Edgar Co.*, 223 Ill. 287; *Illinois, I. & M. R. Co. v. Freeman*, 210 Ill. 270; *Rodgers v. Metropolitan Life Ins. Co.*, 180 Ill. App. 683; *Gibbons v. Aurora, E. & C. R. Co.*, 177 Ill. App. 572; *Sertiff v. Armour & Co.*, 173 Ill. App. 149; *Ballah v. Peoria Life Ass'n*, 159 Ill. App. 222; *City of Chicago v. Wieland*, 139 Ill. App. 197; *Chicago City Ry. Co. v. Phillips*, 138 Ill. App. 438; *Chicago City Ry. Co. v. Donnelly*, 136 Ill. App. 204, aff'd 235 Ill. 35; *Barlow v. Farmers' Mut. Fire Ins. Co.*, 128 Ill. App. 580.

Indiana. *Grand Rapids & I. R. Co. v. Oliver*, 181 Ind. 145; *Louisville & S. I. Traction Co. v. Lottich*, — Ind. App. —, 106 N. E. 903; *Pittsburgh, C., C. & St. L. Ry. Co. v. Crockett*, — Ind. —, 106 N. E. 875; *C. F. Adams Co. v. Helman*, — Ind. App. —, 106 N. E. 733; *Bray v. Tardy*, — Ind. —, 105 N. E. 772; *Wright v. Fox*, 56 Ind. App. 315; *Walley v. Wiley*, 56 Ind. App. 171.

Iowa. *Soderburg v. Chicago, St.*

various languages and thus speculate on the chance of securing a favorable verdict, and at the same time be in a position to secure a reversal because of the refusal of certain charges

P., M. & O. Ry. Co., — Iowa —, 149 N. W. 82; Correll v. Williams & Hunting, — Iowa —, 148 N. W. 633; Wood v. Sovereign Camp Woodmen of the World, — Iowa —, 147 N. W. 888; Korab v. Chicago, R. I. & P. Ry. Co., — Iowa —, 146 N. W. 765; Carnego v. Crescent Coal Co., 164 Iowa 552; Withey v. Fowler Co., 164 Iowa 377; Shuttlefield v. Neil, 163 Iowa 470; Dieckmann v. Chicago & N. W. R. Co., 163 Iowa 13; Kaus v. Gracey, 162 Iowa 671; Stokes v. Sac City, 162 Iowa 514; Phelps v. Chicago, R. I. & P. R. Co., 162 Iowa 123; Blades v. Des Moines City R. Co., 146 Iowa 580.

Kansas. McClintick v. Pyle, 91 Kan. 393, 137 Pac. 788; State v. Chiles, 90 Kan. 787, 136 Pac. 225; Anderson v. Canter, 10 Kan. App. 167, 63 Pac. 285.

Kentucky. Bonte v. Postel, 22 Ky. L. Rep. 583; Stafford v. Hussey, 17 Ky. L. Rep. 1194.

Louisiana. State v. Garner, 135 La. 746; State v. Addison, 134 La. 642.

Maine. Strickland v. Hanlin, 87 Me. 81.

Maryland. Shoop v. Fidelity & Deposit Co. of Maryland, 124 Md. 130; New York, P. & N. R. Co. v. Peninsula Produce Exch., 122 Md. 231.

Massachusetts. Dewey v. Boston El. R. Co., 217 Mass. 599; Hadlock v. Brooks, 178 Mass. 425.

Michigan. Conroy v. Haffner, — Mich. —, 148 N. W. 969; Shown v. J. L. Owens Co., — Mich. —, 148 N. W. 666; Karwick v. Pickands, 181 Mich. 169; Sievers v. Barton, 180

Mich. 59; People v. Hammond, 177 Mich. 416.

Minnesota. Watre v. Great Northern R. Co., 127 Minn. 118; Pierson v. Modern Woodmen of America, 125 Minn. 150; State v. Mueller, 122 Minn. 91; Parsons Band Cutter & Self-Feeder Co. v. Haub, 83 Minn. 180.

Mississippi. Matthews v. State, — Miss. —, 66 So. 325.

Missouri. City of Springfield v. Owen, — Mo. —, 170 S. W. 1118; Holzemer v. Metropolitan St. R. Co., 261 Mo. 379; Sterling v. Parker-Washington Co., 185 Mo. App. 192; Brickell v. Williams, 180 Mo. App. 572; Cowgill v. City of St. Joseph, 180 Mo. App. 327.

Montana. State v. Mahoney, 24 Mont. 281, 61 Pac. 647; Territory v. McAndrews, 3 Mont. 158; Territory v. Corbett, 3 Mont. 50.

Nebraska. Bloom v. State, 95 Neb. 710; Warner v. City of Wayne, 95 Neb. 682.

Nevada. Konig v. Nevada-California-Oregon Ry., 36 Nev. 181, 135 Pac. 141; State v. Maher, 25 Nev. 465, 62 Pac. 236.

New Hampshire. Smith v. Bank of New England, 70 N. H. 187; Whitman v. Morey, 63 N. H. 448.

New Jersey. Parks v. Delaware, L. & W. R. Co., 85 N. J. L. 577; Smith v. Irwin, 51 N. J. L. 507, 14 Am. St. Rep. 699.

New Mexico. Territory v. Baker, 4 N. M. (Gild.) 236, 13 Pac. 30; Anderson v. Territory, 4 N. M. (Johns.) 108, 13 Pac. 21.

New York. Lawson v. Metropolitan St. Ry. Co., 166 N. Y. 589, aff'g

if the verdict and judgment were unfavorable. A multiplication of instructions announcing in effect the same legal principle only tends to incumber the record and confuse the

40 App. Div. 307; *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502.

North Carolina. *South Atlantic Waste Co. v. Raleigh, C. & S. R. Co.*, 167 N. C. 340; *State v. Rogers*, 166 N. C. 388; *Hodges v. Wilson*, 165 N. C. 323; *Steeley v. Dare Lumber Co.*, 165 N. C. 27.

North Dakota. *Kersten v. Great Northern R. Co.*, 28 N. D. 3; *Willoughby v. Smith*, 26 N. D. 209; *State v. Miller*, 20 N. D. 509; *Landis v. Fyles*, 18 N. D. 587.

Ohio. *American Steel Packing Co. v. Conkle*, 86 Ohio St. 117; *Bond v. State*, 23 Ohio St. 349; *Stewart v. State*, 1 Ohio 66.

Oklahoma. *San Bois Coal Co. v. Resetz*, 43 Okla. 384, 143 Pac. 46; *St. Louis & S. F. R. Co. v. Model Laundry*, 42 Okla. 501, 141 Pac. 970; *Missouri, O. & G. R. Co. v. Vandivere*, 42 Okla. 427, 141 Pac. 799; *Farmers' Nat. Bank of Wewoka v. McCoy*, 42 Okla. 420, 141 Pac. 791; *Alfred v. St. Louis, I. M. & S. R. Co.*, 42 Okla. 4, 140 Pac. 415; *Coalgate Co. v. Hurst*, 25 Okla. 588, 107 Pac. 657.

Oregon. *Powder Valley State Bank v. Hudelson*, — Ore. —, 144 Pac. 494; *State v. Garrett*, 71 Ore. 298, 141 Pac. 1123; *Horn v. Davis*, 70 Ore. 498, 142 Pac. 544; *Stamper v. Raymond*, 38 Ore. 16, 62 Pac. 20.

Pennsylvania. *Guarantee Trust & Safe Deposit Co. v. Waller*, 240 Pa. 575.

Rhode Island. *Hampson v. Taylor*, 15 R. I. 83.

South Carolina. *Lowrimore v. Palmer Mfg. Co.*, 60 S. C. 153; *Mason*

v. Southern Ry. Co., 58 S. C. 70, 53 L. R. A. 913, 79 Am. St. Rep. 826, rh'g denied 58 S. C. 582; *State v. Robinson*, 35 S. C. 340; *Emory v. Hazard Powder Co.*, 22 S. C. 476.

South Dakota. *Hauff & Stormo v. South Dakota Cent. R. Co.*, 34 S. D. 183; *State v. Cline*, 27 S. D. 573; *State v. Barnes*, 26 S. D. 268.

Tennessee. *Stacker v. Louisville & N. R. Co.*, 106 Tenn. 450; *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 29; *Guaranty Fund Life Soc. v. Ford*, 104 Tenn. 533; *Brown v. Odill*, 104 Tenn. 250, 52 L. R. A. 660, 78 Am. St. Rep. 914; *Southern R. Co. v. Pugh*, 97 Tenn. 624; *Knights of Pythias v. Rosenfeld*, 92 Tenn. 508.

Texas. *Irvin v. Johnson*, — Tex. Civ. App. —, 170 S. W. 1059; *Planters' Oil Co. v. Keebler*, — Tex. Civ. App. —, 170 S. W. 120. *McSpadden v. Vannerson*, — Tex. Civ. App. —, 169 S. W. 1079; *Reece v. State*, — Tex. Cr. App. —, 170 S. W. 317; *Millner v. State*, — Tex. Cr. App. —, 169 S. W. 899; *Brown v. State*, — Tex. Cr. App. —, 169 S. W. 437; *Fondren v. State*, — Tex. Cr. App. —, 169 S. W. 411; *Hill v. State*, — Tex. Cr. App. —, 168 S. W. 864; *Brown v. State*, — Tex. Cr. App. —, 166 S. W. 508.

Utah. *Osborne v. Phenix Ins. Co.*, 23 Utah 428, 64 Pac. 1103; *Konold v. Rio Grande W. Ry. Co.*, 21 Utah 379, 81 Am. St. Rep. 693, 60 Pac. 1021; *People v. Chadwick*, 7 Utah 134, 25 Pac. 737; *Cunningham v. Union Pac. Ry. Co.*, 4 Utah 206, 7 Pac. 795.

Vermont. *Seeley v. Central Vermont R. Co.*, — Vt. —, 92 Atl. 28.

jury⁷³ and the trial court should not be burdened with the duty of passing upon a large number of instructions.⁷⁴

It is ordinarily sufficient for the court, in its charge to the jury, to "state once, fully and clearly," the propositions of law governing the case.⁷⁵

The court is not required to multiply instructions upon the same point,⁷⁶ and since the practice of requesting an unnecessarily large number of instructions is universally disapproved,⁷⁷ it is proper to refuse instructions which are but a reiteration in different language of those given,⁷⁸ even

Virginia. *Chesapeake & O. R. Co. v. Swartz*, 115 Va. 723; *Nesbit v. Webb*, 115 Va. 362; *Virginian R. Co. v. Jeffries' Adm'r*, 110 Va. 471.

Washington. *Bagley v. Foley*, 82 Wash. 222, 144 Pac. 25; *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160; *Woodard v. Cline Lumber Co.*, 81 Wash. 85, 142 Pac. 475; *State v. Lewis*, 80 Wash. 532, 141 Pac. 1025.

West Virginia. *Adkinson v. Baltimore & O. R. Co.*, — W. Va. —, 83 S. E. 291; *State v. Cooper*, — W. Va. —, 82 S. E. 358; *Martin v. Reiniger*, — W. Va. —, 82 S. E. 221.

Wisconsin. *Czapinski v. Thomas Furnace Co.*, 158 Wis. 635; *Behling v. Wisconsin Bridge & Iron Co.*, 158 Wis. 584.

United States. *Marchand v. Grif-fon*, 140 U. S. 516, 35 L. Ed. 527; *Indianapolis & St. L. R. R. v. Horst*, 93 U. S. (3 Otto) 291, 23 L. Ed. 898; *Denver & R. G. R. Co. v. Roller*, 41 C. C. A. 22, 100 Fed. 738.

73—*Haney v. Caldwell*, 43 Ark. 184; *Continental Ins. Co. v. Horton*, 28 Mich. 173; *Baltimore & O. R. Co. v. Resley*, 14 Md. 424; *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. Dec. 212n.

It is an evil practice to repeat the substance of instructions over and over in different language, for it can

only tend to confusion. *Chicago & E. R. Co. v. Lain*, 181 Ind. 386.

74—*People v. Warfield*, 261 Ill. 293.

75—*State v. Kearley*, 26 Kan. 77.

76—*St. Louis, I. M. & S. R. Co. v. Fuqua*, — Ark. —, 169 S. W. 786; *Fairchild v. Fleming*, 125 Minn. 431.

The court should not "multiply instructions, with changed phraseology, on a single proposition of law. One clear, pointed statement to the jury of each proposition advanced is sufficient." *Olive v. State*, 11 Neb. 1.

Instructions requested should not be repetitions of the same legal proposition. *American Steel Packing Co. v. Conkle*, 86 Ohio St. 117.

77—*Gracy v. Atlantic Coast Line R. Co.*, 53 Fla. 350.

78—*Robinson v. State*, — Ind. —, 106 N. E. 533; *Gulf, C. & S. F. Ry. Co. v. Justin Mill & Elevator Co.*, — Tex. Civ. App. —, 168 S. W. 411; *Harper v. State*, — Tex. Cr. App. —, 170 S. W. 721.

Where an instruction is given which presents an issue in such a manner that the ordinary juror will understand it, further instructions differently worded but covering the same point or making nice legal distinctions are properly refused. *John-*

though the charge refused is correct,⁷⁹ or more complete.⁸⁰

If a party requests two special charges presenting the same issue, and the court gives one of them, the party cannot be heard to complain that the other was not given,⁸¹ and when a person offers several instructions on the same proposition he cannot complain that the one most favorable to him was refused.⁸²

A multiplication of instructions announcing the same legal principle is likely to result in giving undue prominence to issues, theories, and evidence,⁸³ which, as already seen, is improper and erroneous,⁸⁴ and it has been held that where an issue is fully covered by the general charge, to give a

son v. Springfield Traction Co., 176 Mo. App. 174.

An instruction already given may be refused though differing in form. Chicago City Ry. Co. v. Mager, 185 Ill. 336, *aff'g* 85 Ill. App. 524; Chicago & W. I. R. Co. v. Bingenheimer, 116 Ill. 226.

"There is no more merit in instructional than in supplicatory or rhetorical repetitions." Jackson v. Kansas City, 181 Mo. App. 178.

"No suitor, civil or criminal, can claim, as matter of right, that a charge once given at his request shall be repeated. It is better and safer, however, if the charge assert a correct legal principle, when viewed in connection with the testimony, that it be given, unless it is an exact copy of one previously given in charge." Smith v. State, 92 Ala. 30.

"It is well to keep in mind the rule declared in the case of Louisville & N. R. Co. v. Hurt, 101 Ala. 34, where it is held that the court commits no error in refusing charges requested by a party which are mere repetitions of charges already given

at his request; and a mere variation in the use of words, which does not change the meaning in any respect, or application of the principles asserted, does not affect the rule." Murphy v. State, 108 Ala. 10; Smith v. State, 92 Ala. 30.

79—People v. Svendsen, 25 Cal. App. 1, 142 Pac. 861.

80—Where a charge is given which fully covers the issues, it is proper to refuse a requested charge which is more complete. Chicago, R. I. & G. Ry. Co. v. Pemberton, — Tex. Civ. App. —, 170 S. W. 108.

81—Texas & N. O. R. Co. v. Ochil-tree, — Tex. Civ. App. —, 127 S. W. 584; Lyon v. Bedgood, 54 Tex. Civ. App. 19.

82—Devine v. Sproul, 177 Ill. App. 563.

83—Campbell v. Holland, 22 Neb. 587; City of Lincoln v. Holmes, 20 Neb. 39; Hays v. Hays, 66 Tex. 606; Traylor v. Townsend, 61 Tex. 144; Newman v. Farquhar, 60 Tex. 640; Gray v. Burk, 19 Tex. 228; Powell v. Messer's Adm'r, 18 Tex. 401.

84—See ch. XIV, *ante*.

special charge, directly pointing out specific acts, is upon the weight of evidence.⁸⁵

The duty of the court is fully discharged if the instructions given embrace all the points of law arising in the case,⁸⁶ and its effort should be to render the instructions as free from complexity as possible.⁸⁷

The rule making it proper to refuse instructions reiterating a rule of law already announced to the jury applies, though the language of the request differs from the language used in the instruction given,⁸⁸ and without regard to whether the requested instructions are covered by the general charge,⁸⁹ or by instructions given at the request of the

85—*Sorrell v. State*, — Tex. Cr. App. —, 169 S. W. 299.

86—*Deitz v. Regnier*, 27 Kan. 95.

87—*Deford v. State*, 30 Md. 179.

88—**Arkansas.** *State v. Reed*, 68 Ark. 331; *Stanton v. State*, 13 Ark. 317.

Florida. *Richard v. State*, 42 Fla. 528; *Kenhard v. State*, 42 Fla. 581.

Illinois. *Keeler v. Stuppe*, 86 Ill. 309; *Earl v. People*, 73 Ill. 329; *Roth v. Smith*, 41 Ill. 314.

Indiana. *Chicago & E. I. R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761.

Iowa. *Norris v. Kipp*, 74 Iowa 444.

Kansas. *Lobenstein v. Pritchett*, 8 Kan. 213.

Missouri. *Marshall v. Bingle*, 36 Mo. App. 125.

Nebraska. *Binfield v. State*, 15 Neb. 484.

New York. *People v. O'Connell*, 62 How. Pr. 436.

Ohio. *Donald v. State*, 21 Ohio Cir. Ct. R. 124, 11 Ohio Cir. Dec. 483.

Texas. *Tucker v. Hamlin*, 60 Tex. 171; *Powell v. Messer's Adm'r*, 18 Tex. 401.

United States. *Grand Trunk Ry.*

Co. v. Ives, 144 U. S. 408, 36 L. Ed. 485.

Refusal to give an instruction in the language of the statute was not error, where it had been given in substance, and one merely in the language of the statute would have been of no assistance. *State v. Reed*, 68 Ark. 331.

89—**Iowa.** *State v. Hamann*, 113 Iowa 367; *Shannon v. Town of Tama City*, 74 Iowa 22.

Kansas. *Missouri Pac. Ry. Co. v. Johnson*, 44 Kan. 660, 24 Pac. 1116; *State v. Start*, 10 Kan. App. 583, 63 Pac. 448; *State v. Tulip*, 9 Kan. App. 454, 60 Pac. 659.

Louisiana. *State v. Fontenot*, 48 La. Ann. 283.

Minnesota. *Schultz v. Bower*, 64 Minn. 123.

New York. *Hummel v. Stern*, 164 N. Y. 603; *City Trust, Safe Deposit & Surety Co. of Philadelphia v. Fidelity & Casualty Co. of New York*, 58 App. Div. 18, 68 N. Y. Supp. 601; *Mahon v. Metropolitan St. Ry. Co.*, 68 N. Y. Supp. 775.

North Carolina. *Wilkie v. Raleigh & C. F. R. Co.*, 127 N. C. 203.

opposite party,⁹⁰ or by the court of its own motion.⁹¹

As a general rule the repetition of instructions will not work a reversal of the judgment unless the effect was to give undue prominence to some portion of the case, or to otherwise mislead the jury.⁹²

§ 187. Same—Illustrations.

In civil cases it is proper to refuse requested instructions as to the burden of proof,⁹³ or the weight or effect of evi-

North Dakota. *State v. McGahey*, 3 N. D. 293.

Oklahoma. *Gatliff v. Territory*, 2 Okla. 523, 37 Pac. 809.

Oregon. *State v. McDaniel*, 39 Ore. 161, 65 Pac. 520; *State v. Tucker*, 36 Ore. 291, 51 L. R. A. 246, 61 Pac. 894.

Pennsylvania. *Watterson v. Fuellhart*, 169 Pa. St. 612, 36 Wkly. Notes Cas. 565.

South Carolina. *Long v. Hunter*, 58 S. C. 152.

Texas. *Pless v. State*, 23 Tex. App. 73; *International & G. N. R. Co. v. Jackson*, 25 Tex. Civ. App. 619; *Bruce v. First Nat. Bank of Weatherford*, 25 Tex. Civ. App. 295; *Parlin & Orendorff Co. v. Coffey*, 25 Tex. Civ. App. 218; *Houston & T. C. R. Co. v. Byrd* (Tex. Civ. App.), 61 S. W. 147; *Houston & T. C. R. Co. v. George* (Tex. Civ. App.), 60 S. W. 313; *Sherman, S. & S. Ry. Co. v. Bell* (Tex. Civ. App.), 58 S. W. 147; *Texas & P. Ry. Co. v. Padgett* (Tex. Civ. App.), 36 S. W. 300; *Ramey v. State* (Tex. Cr. App.), 61 S. W. 126; *Gann v. State* (Tex. Cr. App.), 59 S. W. 896; *Dudley v. State* (Tex. Cr. App.), 58 S. W. 111; *Stevens v. State* (Tex. Cr. App.), 58 S. W. 96; *Courtney v. State* (Tex. Cr. App.), 57 S. W. 654; *Neely v. State* (Tex. Cr. App.), 56 S. W. 625; *Padron v.*

State, 41 Tex. Cr. App. 548; *Cannon v. State*, 41 Tex. Cr. App. 467.

United States. *Coffin v. United States*, 162 U. S. 664, 40 L. Ed. 1109.

90—*Casey v. State*, 37 Ark. 67; *Lake Roland El. Ry. Co. v. McKewen*, 80 Md. 593. In Alabama the rule is different. See § 189, *post*, "Duty to follow language of request."

91—*People v. Benc*, 130 Cal. 159, 62 Pac. 404.

"It is competent for the court to reject all the prayers offered, and grant instructions to the jury in its own language; and, where these are correct, and cover the whole ground, the judgment will not be reversed, even though some of the rejected prayers might properly have been granted." *McCarty v. Harris*, 93 Md. 741.

The refusal of a requested instruction is harmless error where the court on its own motion gives an instruction covering the point involved. *Kokomo Brass Works v. Doran*, — Ind. App. —, 105 N. E. 167.

92—*Lawder v. Hinderson*, 36 Kan. 754, 14 Pac. 164; *Ratto v. Bluestein*, 84 Tex. 57; *International & G. N. R. Co. v. Leak*, 64 Tex. 654.

93—Where the jury have been instructed that the plaintiff has the burden of proving a certain proposi-

dence and the credibility of witnesses,⁹⁴ when such matters are fully covered by the instructions given.

Where the court instructs that the rights of the parties are to be determined by the strict rules of law, a refusal to charge that plaintiff is not entitled to any sympathy from the jury is not error.⁹⁵

A requested charge submitting facts as a basis for a verdict the converse of those submitted in another instruction, is properly refused.⁹⁶

tion, the court may properly refuse to instruct that the burden of proof is not upon the defendant to prove the negative of such proposition. *Richmond R. Co. v. Howard*, 79 Ga. 44.

Where the jury have been instructed that a preponderance of evidence in plaintiff's favor is necessary to a recovery, it may refuse to instruct that the verdict should be for defendant if the evidence is evenly balanced. *Blitt v. Heinrich*, 33 Mo. App. 243.

It is not error to refuse a charge that the claimant of property taken on execution must sustain his title by "abundant proof" where the court has already instructed that the burden of proof is on the claimant. *Swinney v. Booth*, 28 Tex. 113.

94—An instruction that the jury, in weighing the evidence of a party who testifies in his own behalf, may consider his interest in the result, was properly refused, where the court had already instructed them that, in weighing evidence, they had the right to consider whatever interest the witnesses might have in the result. *Chicago City Ry. Co. v. Mager*, 185 Ill. 336, aff'g 85 Ill. App. 524.

The refusal of an instruction calling attention to the effect of impeaching evidence upon the credibil-

ity of any particular witness is not erroneous where a general instruction on the question has been given. *State v. Curran*, 51 Iowa 112.

Where the court has instructed the jury generally upon the effect of false testimony given knowingly and wilfully, it is not error to refuse an instruction as to the effect of a contradiction between testimony given on different occasions on a single point. *Bernstein v. Smith*, 10 Kan. 60.

Where the court fairly informs the jury as to the weight of evidence necessary to impeach a release, the refusal to state the rule in the language of a proffered request is not error. *Petterson v. Butler Bros.*, 123 Minn. 516.

Where the jury have been told that certain evidence had nothing to do with the case, and was to be disregarded, it was not erroneous to refuse to repeat the rule on a motion to strike out. *Rollins v. O'Farrel*, 77 Tex. 90.

95—*Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56, 60 Pac. 571, 927.

Where the jury have been warned against deciding the case by sympathy, a special charge on the subject may be refused. *Hay v. Carolina Midland Ry. Co.*, 41 S. C. 542.

96—*Texas Cent. R. Co. v. Perry*, — Tex. Civ. App. —, 147 S. W. 305.

A refusal to instruct that fraud is not presumed, and that, if the evidence is consistent with fair dealing, the jury should so find, is not error where an instruction is given that, where the evidence is as consistent with an honest purpose as a fraudulent one, the verdict should be for the person charged therewith.⁹⁷

Where the court has instructed that the jury must receive the law of the case from the court, it is proper to refuse an instruction that a statement by counsel of a certain rule of law is not correct. The court cannot undertake to follow counsel through an extended argument, and confine him at all times to an absolutely accurate statement of the law.⁹⁸

Requests for three instructions defining testamentary capacity have been held unnecessary and misleading. One definition should be selected and adhered to.⁹⁹

In negligence cases, it is unnecessary to repeat instructions as to contributory negligence,¹ or assumption of risk.²

An instruction that the particular negligence alleged must be proved may be refused where another instruction states that there can be no recovery if the negligence alleged is not proved.³ An instruction that a driver need not guard

97—*Connors v. Chingren*, 111 Iowa 437.

98—*International & G. N. R. Co. v. Crook* (Tex. Civ. App.), 56 S. W. 1005.

99—*Heinbach v. Heinbach*, — Mo. —, 170 S. W. 1143.

1—Where the court has given a very clear instruction on contributory negligence, it is proper to refuse an instruction concerning a particular circumstance from which contributory negligence may be inferred. *Paducah Railway & Light Co. v. Ledsinger*, 23 Ky. L. Rep. 441.

2—Where, in an action by a servant against a master to recover for injuries caused by defective machinery, the court has charged "that the plaintiff assumed all obvious risks,

including those caused by the breaking of belts, if she knew that they were frequently accustomed to break," it is proper to refuse an instruction that, "if belts were constantly breaking in the room where plaintiff worked, and the plaintiff knew of that fact, and continued to work there, she assumed the risk of being injured by such breaking. If belts were constantly breaking, it would be presumed that the plaintiff knew of the fact, and hence assumed the risk, and she cannot recover of the defendant corporation." *McGar v. National & Providence Worsted Mills*, 22 R. I. 347, 47 Atl. 1092.

3—*Smith v. East St. Louis Ry. Co.*, 169 Ill. App. 132.

against extraordinary occurrences is properly refused where another instruction states that there can be no recovery unless the driver was negligent or if the child who was injured ran under the horse.⁴

In an action for injuries to a servant from an unguarded saw, it is not error to refuse a charge stating the requirement of the statute as to guarding the saw, where other instructions state what the law requires.⁵

Where the court in a general charge sufficiently defines the distinction between commercial and logging railroads and the rule of law applicable to the latter when carrying passengers, it does not err in refusing a special request on the subject.⁶

Where, in an action against a telegraph company for failure to transmit a telegram, the principal question is as to the authority of the receiving agent to execute the alleged contract for the transmission of the telegram, and the court has charged that the receiving agent must have had actual or apparent authority to bind defendant, it is not error to refuse to charge upon the issue as to whether the delivering agent had notice of the want of authority, as such issue is immaterial.⁷

It is not error to refuse a special charge upon the right to recover nominal damages, where the instruction is fully covered in the main charge.⁸

The rule stated in the preceding section may be further illustrated in criminal cases where the charges given as to reasonable doubt and the degrees of proof are sufficient,⁹

4—*Carlin v. Deahl*, 172 Ill. App. 197.

5—*Robishaw v. Schiller Piano Co.*, 179 Ill. App. 163.

6—*Campbell v. Duluth & N. E. R. Co.*, 111 Minn. 410.

7—*Western U. Tel. Co. v. Carter*, 24 Tex. Civ. App. 80.

8—*Gorman v. Brazelton*, — Tex. Civ. App. —, 168 S. W. 434.

9—A refusal to charge that the

jury had a right to consider that innocent men had been convicted, and the danger of convicting men, was not error where the rule as to the degrees of proof required in criminal cases and the doctrine of reasonable doubt were fully stated and explained. *People v. Findley*, 132 Cal. 301, 64 Pac. 472.

Where, "in several of the instructions, the attention of the jury is

where the court has fully instructed as to degrees of an offense,¹⁰ or the law of principals,¹¹ as to what constitutes a deadly weapon,¹² or as to the particular kinds of insan-

called to the fact that to convict defendant they must be satisfied of his guilt beyond a reasonable doubt, and the jury is fully instructed as to what in law is a reasonable doubt," error cannot be assigned "to the giving of certain instructions because the jury are not told therein that, before they can find the defendant guilty, they must be satisfied of his guilt beyond a reasonable doubt. It is not practicable for a trial court to state all the law governing a case in each and every instruction given." *State v. Tippet*, 94 Iowa 646.

In a prosecution for theft, where the jury have been instructed that "the evidence, on the whole, must produce in your minds, to a reasonable and moral certainty, that the accused, and none other, committed the offense," it is proper to refuse an instruction, "if the jury believe from the evidence or have a reasonable doubt whether appellant or some one else took the money from the injured party, to acquit defendant." *McNamara v. State* (Tex. Cr. App.), 55 S. W. 823.

10—Where the court has explicitly instructed the jury upon the subject of degrees of the offense charged against defendant, and defined the different degrees, "and expressly informed them that the defendant might be convicted of either, * * * it is not required, that the court shall repeat such instruction in every possible connection in which reference could be made to the degrees of the offense." *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204.

Where, in a prosecution for larceny, "full and clear definitions of the crime with which the appellant is charged are given, and the jury is properly instructed as to the difference between a mere trespass and the crime of larceny," a modification of an instruction tendered by defendant "by striking therefrom the words, 'Larceny is something more than mere trespass,' does not constitute reversible error." *Currer v. State*, 157 Ind. 114.

11—In a prosecution for an assault, the court was not required to give a charge that a "mere knowledge on the part of defendant that an assault would be committed did not render him a principal in the offense," where the court "sufficiently instructed the jury on the doctrine of principals, and required the jury to believe beyond a reasonable doubt that defendant acted as a principal in committing the assault on the prosecutor, before they could find him guilty,—having previously defined to the jury the law of principals." *Grammer v. State*, 42 Tex. Cr. App. 518.

12—Where "the court instructs the jury that, if they believe from the evidence that the defendant * * * stabbed and cut T. with a knife, with intent to kill said T., and that said knife was a deadly weapon, they should find defendant guilty," it is not necessary that every subsequent instruction "should submit to the jury the question as to whether or not the knife was a dangerous or deadly weapon." *State v. Weeden*, 133 Mo. 70.

ity,¹³ or the corroboration of the testimony of accomplices.¹⁴

An instruction that a defendant is not on trial for certain offenses is properly excluded when the information and the instructions given correctly inform the jury.¹⁵

§ 188. Same—Qualifications and exceptions to rule.

A special charge should be given, and its refusal is error where the issues are not sufficiently submitted in the court's general charge.¹⁶

Thus, if the court charges generally upon a given issue which is determinative of the case, it is the duty of the court to give a requested charge pertinently applying the law to the facts in evidence relating to such issue,¹⁷ and where the law governing the case is stated in an abstract

13—Where the court has charged that if defendant "was insane, and did not know the nature and quality of his act, then he was not amenable to punishment," it is proper to refuse to charge "upon the species of insanity known as 'temporary mental aberration, as produced by adequate causes, and arising from surrounding circumstances; said state or condition of the mind being an excuse for crime committed.'" *Castlin v. State* (Tex. Cr. App.), 57 S. W. 827.

14—Where the court has charged that if the jury believe that certain witnesses are accomplices, they shall not find the defendant guilty upon their testimony unless they are satisfied "that the same had been corroborated by other evidence tending to establish that the defendant did in fact commit the offense," it is proper to refuse to charge that "one accomplice cannot corroborate another, and that two or more accomplices cannot corroborate each other," though, where more than one

accomplice testifies, it is advisable for the court to instruct that one accomplice cannot corroborate another. *Stevens v. State* (Tex. Cr. App.), 58 S. W. 96.

15—*People v. Loverkamp*, 165 Ill. App. 532.

16—*Cariker & Wintz v. W. J. Vawters & Son*, — Tex. Civ. App. —, 134 S. W. 780. See also, *Western Coal & Mining Co. v. Moore*, 96 Ark. 206; *Fujise v. Los Angeles R. Co.*, 12 Cal. App. 207, 107 Pac. 317; *McLean v. Sandusky Lumber & Box Co.*, 160 Mich. 324; *Lyon v. Bedgood*, 54 Tex. Civ. App. 19.

17—*Fox v. Brady*, 1 Tex. Civ. App. 590.

"Where the testimony tends to show facts which, if found, constitute a complete defense, the defendant is entitled to have a special charge upon such issue, and a refusal to give such charge is reversible error where the general charge fails to present clearly the law upon such issue." *Western U. Tel. Co. v. Andrews*, 78 Tex. 305.

and general way, without applying it to the facts of the case, it is error to refuse an instruction stating correctly the law as applied to the specific facts involved.¹⁸

Especially is a party entitled to a full and correct charge on the facts of the particular case, if requested, in close cases.¹⁹

Where a proposition in the general charge or in other instructions is given in such a disconnected manner as to impair its force, it is error to refuse a proper instruction;²⁰ and the same rule has been held to apply where the charge given was apt to mislead the jury, and the fault was corrected by the required instruction,²¹ where the requested charge was not fairly covered by the instructions given,²² or where it was not given in terms as full, clear and favorable as in the one requested.²³

Ordinarily, it is better to give a requested instruction which is correct, as a refusal may cause an appeal which would otherwise not be resorted to.²⁴

§ 189. Duty to follow language of request.

It is a general well-settled rule of practice which obtains in the majority of states that a judge is not bound to give instructions in the identical words of a request, but may

18—Metropolitan St. R. Co. v. Johnson, 90 Ga. 500; Thompson v. Thompson, 77 Ga. 692; Parkhill v. Town of Brighton, 61 Iowa 103; Muldowney v. Illinois Cent. R. Co., 39 Iowa 615; Gerdine v. State, 64 Miss. 798; Lamar v. State, 64 Miss. 428; Aldrige v. State, 59 Miss. 250.

19—Souey v. State, 13 Lea (Tenn.) 472.

20—Mynning v. Detroit, L. & N. R. Co., 59 Mich. 257.

21—Manuel v. Chicago, R. I. & P. R. Co., 56 Iowa 655; Haines v. Illi-

nois Cent. R. Co., 41 Iowa 227; Willis v. McNeill, 57 Tex. 465.

22—McCormick Harvesting Mach. Co. v. Volkert, 81 Minn. 434. See §§ 184, *et seq.*, *ante*, "Necessity of giving requested instructions."

23—Muldowney v. Illinois Cent. R. Co., 32 Iowa 180; State v. Maher, 25 Nev. 465, 62 Pac. 236. But see § 184, *ante*.

24—People v. Murray, 41 Cal. 66; People v. Strong, 30 Cal. 151; People v. King, 27 Cal. 515; Banks v. State, 7 Tex. App. 591.

do so in his own language, if the matter or principle embraced therein is correctly and amply presented.²⁵

25—Arkansas. Crisman v. McDonald, 28 Ark. 8; Sadler v. Sadler, 16 Ark. 628; Metcalf v. Little Rock St. Ry. Co., 13 S. W. 729.

California. O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930; People v. Dodge, 30 Cal. 451; People v. Kelly, 28 Cal. 425.

Colorado. Martin v. Hazzard Powder Co., 2 Colo. 596; Jenkins v. Tynon, 1 Colo. App. 133, 27 Pac. 893.

Connecticut. Tiesler v. Town of Norwich, 73 Conn. 199.

Florida. Young v. State, 24 Fla. 147; Nickels v. Mooring, 16 Fla. 76.

Georgia. Freeman v. Coleman, 88 Ga. 421; Robinson v. State, 82 Ga. 535; Durham v. State, 70 Ga. 264.

Illinois. City of Chicago v. Moore, 139 Ill. 201, aff'g 40 Ill. App. 332; Chicago & A. R. Co. v. Pillsbury, 123 Ill. 9, 5 Am. St. Rep. 483; Hanchett v. Kimbark, 118 Ill. 121; Chicago & W. I. R. Co. v. Bingenheimer, 116 Ill. 226; Hill v. Parsons, 110 Ill. 107; Chicago, B. & Q. R. Co. v. Avery, 109 Ill. 314; Pennsylvania Co. v. Rudel, 100 Ill. 603; Village of Fairbury v. Rogers, 98 Ill. 554; Bromley v. Goodwin, 95 Ill. 118; Chicago, B. & Q. R. Co. v. Dickson, 88 Ill. 431; Hays v. Borders, 6 Ill. (1 Gilm.) 46; Bland v. People, 4 Ill. (3 Scam.) 364; Birmingham Fire Ins. Co. of Pittsburg v. Pulver, 27 Ill. App. 17.

Indiana. Trogdon v. State, 133 Ind. 1; White v. Gregory, 126 Ind. 95.

Iowa. National State Bank of Burlington v. Delahaye, 82 Iowa 34; Larsh v. City of Des Moines, 74 Iowa

512; Norris v. Kipp, 74 Iowa 444; Bixby v. Carskaddon, 70 Iowa 726; Galpin v. Wilson, 40 Iowa 90; Smith v. Sioux City & P. R. Co., 38 Iowa 173; State v. Stanley, 33 Iowa 526; State v. Gibbons, 10 Iowa 117; Abbott v. Striblen, 6 Iowa 191; Paukett v. Livermore, 5 Iowa 277.

Kansas. Missouri Pac. Ry. Co. v. Cassity, 44 Kan. 207, 24 Pac. 88; Chicago, K. & W. R. Co. v. Brunson, 43 Kan. 371, 23 Pac. 495; State v. Tatlow, 34 Kan. 80, 8 Pac. 267.

Kentucky. Jackson v. Com., 17 Ky. L. Rep. 1197.

Louisiana. State v. Miller, 41 La. Ann. 677; State v. Durr, 39 La. Ann. 751.

Maine. Inhabitants of Naples v. Inhabitants of Raymond, 72 Me. 213; Foye v. Southard, 64 Me. 389.

Maryland. Kershner v. Kershner's Lessee, 36 Md. 334; Smith v. Wood, 31 Md. 300; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666.

Massachusetts. Tripp v. Taft, 219 Mass. 81; Com. v. Mullen, 150 Mass. 394.

Michigan. Moore v. City of Kalamazoo, 109 Mich. 176; People v. Weaver, 108 Mich. 649; Eldredge v. Sherman, 79 Mich. 484; Babbitt v. Bumpus, 73 Mich. 331, 16 Am. St. Rep. 585; Champlain v. Detroit Stamping Co., 68 Mich. 238; Brown v. McCord & Bradfield Furniture Co., 65 Mich. 360; Lewis v. Rice, 61 Mich. 97; Kendrick v. Towle, 60 Mich. 363, 1 Am. St. Rep. 526; Mynning v. Detroit, L. & N. R. Co., 59 Mich. 258; People v. Hare, 57 Mich. 506; Fraser v. Jennison, 42 Mich. 206; Campau v. Dubois, 39 Mich. 274;

This rule seems to follow as a necessary consequence of the rule already considered, that requests for instructions may be refused without error when substantially covered by other instructions given in the case. While the court

Ulrich v. People, 39 Mich. 245; Fowler v. Hoffman, 31 Mich. 215.

Minnesota. Anderson v. Foley Bros., 110 Minn. 151; Smith v. St. Paul & D. R. Co., 51 Minn. 86; State v. Mims, 26 Minn. 183; Chandler v. De Graff, 25 Minn. 88; State v. Beebe, 17 Minn. 241 (Gil. 218); State v. McCartey, 17 Minn. 76 (Gil. 54); Dodge v. Rogers, 9 Minn. 223 (Gil. 209). The object of the statute is to notify counsel of the propositions of law to be submitted. Anderson v. Foley Bros., 110 Minn. 151.

Mississippi. Scott v. State, 56 Miss. 287; Marks v. State, 36 Miss. 77; Green v. State, 28 Miss. 688; Doe v. Peck, 4 How. 407; Boles v. State, 9 Smedes & M. 284.

Missouri. Taylor v. Missouri Pac. R. Co., 16 S. W. 206; Muehlhausen v. St. Louis R. Co., 91 Mo. 332; State v. St. Louis Brokerage Co., 85 Mo. 411; State v. Jones, 61 Mo. 232; Harman v. Shotwell, 49 Mo. 423; State v. Ott, 49 Mo. 326; Mitchell v. City of Plattsburg, 33 Mo. App. 555; Smith v. Eno, 15 Mo. App. 576.

Nebraska. Lau v. W. B. Grimes Dry-Goods Co., 38 Neb. 215.

Nevada. State v. Davis, 14 Nev. 407.

New Hampshire. Walker v. Walker, 64 N. H. 55.

New Jersey. Miller v. Delaware River Transp. Co., 85 N. J. L. 700; Fath v. Thompson, 58 N. J. L. 180.

New York. Sherlock v. German American Ins. Co., 162 N. Y. 656; Sherman v. Wakeman, 11 Barb. 262.

North Carolina. Marcom v. Dur-

ham & S. R. Co., 165 N. C. 259; Carter v. Seaboard Air Line R. Co., 165 N. C. 244; State v. Crews, 128 N. C. 581; State v. Mills, 116 N. C. 992; State v. Thomas, 98 N. C. 599, 2 Am. St. Rep. 351; State v. Bowman, 80 N. C. 432; State v. Hargett, 65 N. C. 669; Hawkins v. House, 65 N. C. 614; State v. Dunlap, 65 N. C. 288.

Ohio. McHugh v. State, 42 Ohio St. 154; Bolen v. State, 26 Ohio St. 371; Bond v. State, 23 Ohio St. 349; Ashtabula Rapid Transit Co. v. Dagenbach, 11 Ohio Cir. Dec. 307; United States Home & Dower Ass'n v. Kirk, 9 Wkly. Law Bul. 48.

Oklahoma. Veseley v. Engelke-meier, 10 Okla. 290, 61 Pac. 924.

Oregon. State v. Garrett, 71 Ore. 298, 141 Pac. 1123; Astoria Southern R. Co. v. Pacific Surety Co., 68 Ore. 569, 137 Pac. 857; Scheurmann v. Matheson, 67 Ore. 419, 136 Pac. 330.

Pennsylvania. Hufnagle v. Delaware & Hudson Co., 227 Pa. 476, 19 Ann. Cas. 850; Duncan v. Sherman, 121 Pa. St. 520; Groft v. Weakland, 34 Pa. St. 304; Ridgway v. Longaker, 18 Pa. St. 215.

South Carolina. Broom v. Atlantic Coast Line R. Co., 96 S. C. 368; Thomason v. Victor Mfg. Co., 95 S. C. 239; State v. Wine, 58 S. C. 94; State v. Petsch, 43 S. C. 132; Hay v. Carolina Midland R. Co., 41 S. C. 542.

Texas. Missouri Pac. Ry. Co. v. Williams, 75 Tex. 4; Shultz v. State, 13 Tex. 401.

Utah. Scoville v. Salt Lake City, 11 Utah 60, 39 Pac. 481; People v. Chadwick, 7 Utah 134, 25 Pac. 737;

may give its own instructions in lieu of those asked,²⁶ the charges as given must cover all the points of the instructions requested,²⁷ and the court in modifying the phrase-

People v. Olsen, 4 Utah 413, 11 Pac. 577.

Vermont. *Reed v. Newcomb*, 64 Vt. 49; *State v. Eaton*, 53 Vt. 574; *Whittaker v. Perry*, 38 Vt. 107; *Campbell v. Day*, 16 Vt. 558.

Virginia. *Richmond & D. R. Co. v. Norment*, 84 Va. 167, 10 Am. St. Rep. 827.

Washington. *Harris v. Brown's Bay Logging Co.*, 57 Wash. 8, 106 Pac. 152; *Rangenier v. Seattle Electric Co.*, 52 Wash. 401, 100 Pac. 842; *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650; *City of Seattle v. Buzby*, 2 Wash. T. 25, 3 Pac. 180.

United States. *Ayers v. Watson*, 137 U. S. 584, 34 L. Ed. 803; *Ohio & M. Ry. Co. v. McCarthy*, 96 U. S. (6 Otto) 258, 24 L. Ed. 693; *Continental Improvement Co. v. Stead*, 95 U. S. (5 Otto) 161, 24 L. Ed. 403; *Indianapolis & St. L. R. R. v. Horst*, 93 U. S. (3 Otto) 291, 23 L. Ed. 898; *Clymer's Lessee v. Dawkins*, 3 How. 674, 11 L. Ed. 778; *Kelly v. Jackson*, 6 Pet. 622, 8 L. Ed. 523; *Pitts v. Whitman*, 2 Story 609, Fed. Cas. No. 11196; *Chicago & N. W. Ry. Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151; *Southern Bell Telephone & Telegraph Co. v. Watts*, 13 C. C. A. 586, 66 Fed. 466.

26—*City of Chicago v. Moore*, 139 Ill. 201, aff'g 40 Ill. App. 332.

"Where the court, in its general charge, covers a request except as to an item which is not disputed, the request is substantially covered." *Crane Lumber Co. v. Otter Creek Lumber Co.*, 79 Mich. 307.

"The prayer was that every link

in the chain of circumstantial evidence must be as satisfactorily proved as the main fact of the murder, and the judge in reply said that, in a case in which the jury are asked to convict on circumstantial evidence, they must be fully satisfied of every link in the chain. It was held to be a substantial compliance with the prayer." *State v. Bowman*, 80 N. C. 432.

Where, in a prosecution for forcible trespass, the court charges "that there must be a sufficient display of force to intimidate, or such as was calculated to produce a breach of the peace, and that they must judge from all the facts whether there had been a sufficient display of force to intimidate," it is proper to refuse to charge "that, before the jury can find the defendant guilty, they must first find that he entered with a strong hand, accompanied with a display of weapons or other force." The court is not required to give an instruction asked in the very language of the request. *State v. Hinson*, 83 N. C. 640.

27—**California.** *People v. Dodge*, 30 Cal. 448.

Illinois. *City of Chicago v. Moore*, 139 Ill. 201, aff'g 40 Ill. App. 332; *People's Fire Ins. Co. v. Pulver*, 127 Ill. 246; *Alexander v. Mande-ville*, 33 Ill. App. 589.

Kansas. *Missouri Pac. Ry. Co. v. Cassity*, 44 Kan. 207, 24 Pac. 88.

Louisiana. *State v. Carr*, 25 La. Ann. 407.

Maine. *State v. Reed*, 62 Me. 129; *State v. Barnes*, 29 Me. 561.

Michigan. *Mynning v. Detroit, L.*

ology cannot do so in such a manner as to alter the sense of the charge,²⁸ or change the language so as to render the instruction misleading,²⁹ or so as to obscure its vital point³⁰ or essentially weaken its force.³¹

Counsel have a right to a clear formulation of every important view of the law, either as they drew it up, or in some equally proper form,³² and where an instruction as requested properly announces the law, it is better to give it as requested.³³

"When an instruction asked presents the law accurately, the court ought always to give it in the very words asked, especially in criminal cases," though failure to do so is not necessarily a ground for reversal.³⁴

For the court below to refuse to charge the jury, when requested, in writing, in the language of the judgment of a higher court, on the same statement of facts in a case be-

& N. R. Co., 59 Mich. 258; Campau v. Dubois, 39 Mich. 274.

Missouri. State v. St. Louis Brokerage Co., 85 Mo. 411; Coleman v. Roberts, 1 Mo. 97.

North Carolina. McDonald v. Carson, 94 N. C. 507; Rencher v. Wynne, 86 N. C. 268; Newbern Com'rs v. Dawson, 32 N. C. 436.

Pennsylvania. Duncan v. Sherman, 121 Pa. St. 520.

Virginia. Baltimore & O. R. Co. v. Laffertys, 14 Gratt. 478.

Where instructions present the law of the case with reasonable accuracy, it is immaterial that all points sought to be covered by instructions requested are not met. People's Fire Ins. Co. v. Pulver, 127 Ill. 246.

28—Jamson v. Quivey, 5 Cal. 490; Russel v. Amador, 3 Cal. 400; Conrad v. Lindley, 2 Cal. 173; Chicago & W. I. R. Co. v. Bingenheimer, 116 Ill. 226; Chicago, B. & Q. R. Co. v. Dickson, 88 Ill. 431; Kinney v. Laugh-

enour, 89 N. C. 368; Brink v. Black, 77 N. C. 59; Rood v. Dutcher, 23 S. D. 70, 20 Ann. Cas. 480.

29—Russel v. Amador, 3 Cal. 400; Baltimore & O. R. Co. v. Laffertys, 14 Gratt. (Va.) 478.

30—Parrish v. Bradley, 73 Mich. 610.

31—Young v. State, 24 Fla. 147; Horton v. Williams, 21 Minn. 187; Patterson v. McIver, 90 N. C. 493; Brink v. Black, 77 N. C. 59; State v. Evans, 33 W. Va. 421.

The judge cannot so alter the phraseology as to weaken the force of the instruction. Marcom v. Durham & S. R. Co., 165 N. C. 259; Carter v. Seaboard Air Line R. Co., 165 N. C. 244.

32—Campau v. Dubois, 39 Mich. 274.

33—Matthews v. State, — Miss. —, 66 So. 325.

34—People v. Williams, 17 Cal. 142.

tween the same parties, which had previously been adjudicated in the latter court, has been held error.³⁵

But where the defendant requests a series of instructions, the court may separate them and give them in an order chosen by itself. It is certainly "not objectionable to group the instructions on particular subjects, and give them to the jury, so that they may have those upon the same subject, and which qualify each other, in juxtaposition, forming a more connected statement of the law than if separated."³⁶

A statute providing that all instructions "shall be given or refused by the court without modification or change, unless modified or changed by consent of counsel," does not require all instructions to be given in the order requested. It is a matter of the court's discretion as to the arrangement and substance of the instructions,³⁷ and the purpose of such a statute is to prevent the giving of abridged or indefinite instructions in lieu of those requested.³⁸

In a few states the rule obtains, either by virtue of a statute or as an established rule of practice, that requested instructions must be given in the exact language of the request,³⁹ and where the requested charge is correct, its re-

35—Pugh v. McCarty, 44 Ga. 384.

36—Crowell v. People, 190 Ill. 508.

37—Fawcett v. Ryder, 23 N. D. 20, 3 N. C. C. A. 153.

38—Fawcett v. Ryder, 23 N. D. 20, 3 N. C. C. A. 153.

39—**Alabama.** United States Life Ins. Co. v. Lesser, 126 Ala. 568; East Tennessee, V. & G. R. Co. v. Bayliss, 77 Ala. 429, 54 Am. Rep. 69; Cunningham v. State, 73 Ala. 53; Eiland v. State, 52 Ala. 322; Hogg v. State, 52 Ala. 2; Baker v. State, 49 Ala. 351; Sawyer v. Lorillard, 48 Ala. 332; Bush v. Glover, 47 Ala. 167; Warren v. State, 46 Ala. 549; Lyon v. Kent, 45 Ala. 656; Milner v. Wil-son, 45 Ala. 478; Knight v. Clements,

45 Ala. 89, 6 Am. Rep. 693; Edgar v. State, 43 Ala. 45; Polly v. McCall, 37 Ala. 21; Bell's Adm'r v. Troy, 35 Ala. 186; Phillips v. Beene, 16 Ala. 721; Cole v. Spann, 13 Ala. 537; Hinton v. Nelms, 13 Ala. 222; Clealand v. Walker, 11 Ala. 1058, 46 Am. Dec. 238; Ivey v. Phifer, 11 Ala. 535.

Dakota. Galloway v. McLean, 2 Dak. 372.

Florida. Pensacola & A. R. Co. v. Atkinson, 20 Fla. 450.

Indiana. Pate v. Wright, 30 Ind. 476, 95 Am. Dec. 705.

Michigan. People v. Stewart, 75 Mich. 21.

Ohio. Lutterbeck v. Toledo Con-

fusal is not cured by giving a charge of equivalent import.⁴⁰

When a special instruction in writing is asked for, the court must examine it, and, if correct, it must be given in whole in writing, or refused. It is error to hand it to the jury with an indorsement, "Accepted and given to the jury, except in so far as they conflict with the principles laid down in the charge." It is reversible error to require the jury to compare diverse charges to find the law of the case.⁴¹

A party has the right to a judgment on an instruction, as requested, and when modified it becomes the court's instruction.⁴²

An alteration of a requested instruction under this rule is equivalent to a refusal of the request.⁴³ But the general rule that instructions must be given in the language of the request does not deprive the court of the right to give additional and explanatory charges, where necessary to

sol. St. R. Co., 5 Ohio Cir. Dec. 141; Lake Shore & M. S. Ry. Co. v. Schultz, 19 Ohio Cir. Ct. R. 639; Murphy v. City of Cincinnati, 8 Ohio N. P. 244, 11 Ohio S. & C. P. Dec. 119.

South Dakota. Peart v. Chicago, M. & St. P. Ry. Co., 8 S. D. 431; Green v. Hughitt School Tp., 5 S. D. 452.

Texas. Dillingham v. Fields, 9 Tex. Civ. App. 4.

Virginia. Baltimore & O. R. Co. v. Laffertys, 14 Gratt. 478.

West Virginia. State v. Evans, 33 W. Va. 417.

Wisconsin. Grace v. Dempsey, 75 Wis. 313; Mason v. Whitbeck Co., 35 Wis. 164; Eldred v. Oconto Co., 33 Wis. 134; Castello v. Landwehr, 28 Wis. 522; Andrea v. Thatcher, 24 Wis. 471; Rogers v. Brightman, 10 Wis. 55.

40—East Tennessee, V. & G. R. Co. v. Bayliss, 77 Ala. 429, 54 Am. Rep. 69; Carson v. State, 50 Ala.

134; Williams v. State, 47 Ala. 659; Bush v. Glover, 47 Ala. 167; Knight v. Clements, 45 Ala. 89, 6 Am. Rep. 693; Edgar v. State, 43 Ala. 45; Polly v. McCall, 37 Ala. 20; Phillips v. Beene, 16 Ala. 720; Cole v. Spann, 13 Ala. 537; Hinton v. Nelms, 13 Ala. 222; Clealand v. Walker, 11 Ala. 1058, 46 Am. Dec. 238; Ivey v. Phifer, 11 Ala. 535; Maynard v. Johnson, 4 Ala. 116; Rives v. McLosky, 5 Stew. & P. (Ala.) 330; Rogers v. Brightman, 10 Wis. 55. The earlier cases in Alabama establishing this rule were overruled in Long v. Rodgers, 19 Ala. 321, and Ewing v. Sanford, 21 Ala. 157, but the original rule was restored by statute. Rev. Code 1907, § 5364. See Eiland v. State, 52 Ala. 322.

41—Lang v. State, 16 Lea (Tenn.) 433.

42—Turner v. Butler, 253 Mo. 202.

43—Pensacola & A. R. Co. v. Atkinson, 20 Fla. 450.

prevent a misunderstanding or misapplication of the charge by the jury;⁴⁴ although the court cannot, by such additional instructions, so limit, restrict and modify the requested instruction as to limit or weaken its force.⁴⁵

In Alabama, charges moved for in writing must, under the statute, be given in the terms in which they are written,⁴⁶ but, if the request is oral, it is subject to qualification, and the court may charge in its own language.⁴⁷ On appeal, it will be presumed, in support of the judgment, that the charges were asked orally, unless the record shows affirmatively that they were requested in writing.⁴⁸

In Texas, it is held that the judge should give or refuse a charge in the very terms of the request, and, if he wishes to give it in a qualified form, he should make the changes separately and distinctly from the charge as asked.⁴⁹ He

44—Blair v. State, 52 Ala. 343; Eiland v. State, 52 Ala. 322; Hogg v. State, 52 Ala. 2; Bell's Adm'r v. Troy, 35 Ala. 184; Morris v. State, 25 Ala. 58; Eldred v. Oconto Co., 33 Wis. 134. Giving the requested instruction "in connection with the general charge" is not a violation of the statute. Baker v. State, 49 Ala. 350. A further charge requiring the jury to look to the evidence or all the evidence in determining a question covered by requested instructions does not violate the statute. Blair v. State, 52 Ala. 343; Hogg v. State, 52 Ala. 2.

45—Eiland v. State, 52 Ala. 322.

46—Barfield v. Evans, — Ala. —, 65 So. 928. As to earlier cases, see note 39, *ante*.

47—Richardson v. State, 54 Ala. 158; Warren v. State, 46 Ala. 549; Lyon v. Kent, 45 Ala. 656; Milner v. Wilson, 45 Ala. 478; Broadbent v. Tuskaloosa Scientific & Art Ass'n, 45 Ala. 170.

48—Milner v. Wilson, 45 Ala. 478.

49—Missouri Pac. Ry. Co. v. Williams, 75 Tex. 4, 16 Am. St. Rep. 867; Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587; Grigsby v. Reib, — Tex. Civ. App. —, 139 S. W. 1027; Trezevant v. Rains (Tex. Civ. App.), 25 S. W. 1092. See also, King v. Rea, 13 Colo. 69, 21 Pac. 1084; Parker v. Georgia Pac. Ry. Co., 83 Ga. 539.

"It is the right of the party asking a special charge to have the same kept distinct from any qualifications made by the judge presiding, so that it may clearly appear to the appellate court what the charge was as asked, and what modifications, if any, were made by the court below." Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 602.

It is not strictly proper to qualify a requested charge. It should be given either as requested or refused. Missouri, K. & T. Ry. Co. of Texas v. Gillenwater, — Tex. Civ. App. —, 146 S. W. 589.

should not make changes by erasure and interlineations.⁵⁰

In some jurisdictions it is held that instructions should be given in the language of the request if found correct, and that a failure to do so is error unless the substance of the request is as well stated by the court in its own language.⁵¹

But though the judge may limit himself to giving the instructions submitted by counsel, it is entirely competent for him to prepare his own charge, embodying the substance of all proper instructions asked by counsel, and such a practice will often result in furnishing to the jury a terse, consecutive and logical statement of the law applicable to the case, in place of the loose and fragmentary presentation of the law which is the natural consequence of giving instructions in the form in which they are requested by the respective counsel. In other jurisdictions it is said to be the better practice for the court to put aside the instructions asked by counsel, and to cover the whole ground of the controversy in a methodical and corrected charge of its own, stating the questions of fact to be decided, and the law applicable thereto under the issues and the evidence.⁵²

Failure to charge in the exact language of the request may be, in many cases, mere harmless error, and not ground

50—Southern Cotton Press & Manufacturing Co. v. Bradley, 52 Tex. 602.

51—People v. Williams, 17 Cal. 142; Snively v. Fahnestock, 18 Md. 391; Fells Point Sav. Inst. of Baltimore v. Weedon, 18 Md. 320, 81 Am. Dec. 603; People v. Stewart, 75 Mich. 29; Babbitt v. Bumpus, 73 Mich. 338; Cook v. Brown, 62 Mich. 473, 4 Am. St. Rep. 870; Mynning v. Detroit, L. & N. R. Co., 59 Mich. 257; Mask v. State, 36 Miss. 77. See also, Hall v. Hall, 6 Gill & J. (Md.) 386; Harman v. Shotwell, 49 Mo. 423.

52—Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 9 Am. St. Rep. 598; City of Chicago v. Moore, 40 Ill. App. 334; State v. Collins, 20 Iowa 85; Key v. Dent, 6 Md. 142; Bulkeley v. Keteltas, 4 Sandf. (N. Y.) 450. See also, Alexander v. Mandeville, 33 Ill. App. 589; Fowler v. Hoffman, 31 Mich. 215. It is not good practice for the court to charge the jury in chief, and then give all the instructions asked by either party. "A clear and distinct enunciation of the law" should be given. Wilson Sew. Mach. Co. v. Bull, 52 Iowa 554.

for reversal,⁵³ as, where the instructions given are more favorable than those requested and refused.⁵⁴ In Alabama and Ohio, however, it is held that the statute is peremptory, and that the doctrine of error without injury cannot be applied to a refusal to charge in the terms of the request.⁵⁵

53—Illinois. *State v. Wilson*, 3 Ill. (2 Scam.) 225.

Indiana. *Lafayette, M. & B. R. Co. v. Murdock*, 68 Ind. 137; *Kramer v. Warth*, 66 Ind. 548; *Binns v. State*, 66 Ind. 428; *Jones v. State*, 64 Ind. 473; *Hadley v. Prather*, 64 Ind. 137; *Pate v. First Nat. Bank of Aurora*, 63 Ind. 254; *Brooks v. Allen*, 62 Ind. 401; *Crandall v. First Nat. Bank of Auburn*, 61 Ind. 349; *Beard v. Sloan*, 38 Ind. 128; *Nelson v. Hardy*, 7 Ind. 364; *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96; *Lawrenceburgh & U. M. R. Co. v. Montgomery*, 7 Ind. 474; *Abrams v. Smith*, 8 Blackf. 95; *Gentry v. Bargis*, 6 Blackf. 261.

Iowa. *Norris v. Kipp*, 74 Iowa 444.

Maryland. *Hall v. Hall*, 6 Gill & J. 386.

Minnesota. *Smith v. St. Paul & D. R. Co.*, 51 Minn. 86.

South Dakota. *Green v. Hughitt School Tp.*, 5 S. D. 452.

Tennessee. *Turner v. State*, 4 Lea (Tenn.) 208.

Texas. *Missouri, K. & T. Ry. Co. of Texas v. Gillenwater*, — Tex. Civ. App. —, 146 S. W. 589; *Dillingham v. Fields*, 9 Tex. Civ. App. 1; *Trezevant v. Rains* (Tex. Civ. App.), 25 S. W. 1092.

Wisconsin. *Grace v. Dempsey*, 75 Wis. 313; *Mason v. H. Whitbeck Co.*, 35 Wis. 164; *Eldred v. Oconto Co.*, 33 Wis. 134; *Andrea v. Thatcher*, 24 Wis. 471; *Rogers v. Brightman*, 10 Wis. 55.

United States. *Schools v. Risley*, 10 Wall. 115, 19 L. Ed. 858.

“Counsel have a right to require of the court to give an instruction as asked, when the same is in conformity with the law; and if, in the opinion of the court, the jury may not fully comprehend, or may be misled by, such instructions, unless explained, it is then the province of the court to give such additional instructions or explanations as may obviate the danger of misapprehension on the part of the jury. But where such course has not been pursued, and the instruction given has but slightly varied from the one asked, and if its legal import is substantially the same, the judgment of the court below will not, for that reason alone, be disturbed.” *State v. Wilson*, 3 Ill. (2 Scam.) 225.

A failure to charge a settled rule of law when requested is reversible error when the charge given in the new language of the court is doubtful. *Turner v. State*, 4 Lea (Tenn.) 208; *Lawless v. State*, 4 Lea (Tenn.) 173.

54—*Dillingham v. Fields*, 9 Tex. Civ. App. 1; *Watson v. Com.*, 87 Va. 608.

55—*East Tennessee, V. & G. R. Co. v. Bayliss*, 77 Ala. 429, 54 Am. Rep. 69; *Eiland v. State*, 52 Ala. 322; *Carson v. State*, 50 Ala. 134; *Williams v. State*, 47 Ala. 659; *Bush v. Glover*, 47 Ala. 167; *Polly v. McCall*, 37 Ala. 20; *City of Cincinnati v. Lochner*, 8 Ohio N. P. 436, 11 Ohio

§ 190. Modification of requested instructions.

In the preceding sections the duty of the court to follow the language of a correct requested instruction has been considered.⁵⁶

It has also been noted that the court may refuse to give a requested instruction which is incorrect, or which for any reason should not be given, but it is not bound to do so, and, if it sees fit, may modify the instruction so that it states the law correctly.⁵⁷

S. & C. Pl. Dec. 119. Compare Sawyer v. Lorillard, 48 Ala. 333.

56—See §§ 181-189, *ante*.

57—**Alabama.** Eiland v. State, 52 Ala. 330. See also, Morris v. State, 25 Ala. 57.

California. People v. Methaver, 132 Cal. 326, 64 Pac. 481; People v. Dolan, 96 Cal. 315, 31 Pac. 107; People v. Hall, 94 Cal. 595, 30 Pac. 7; People v. Cotta, 49 Cal. 166; People v. Davis, 47 Cal. 93; King v. Davis, 34 Cal. 100; People v. Williams, 32 Cal. 280; Boyce v. California Stage Co., 25 Cal. 460.

Connecticut. State v. Duffy, 66 Conn. 551.

Florida. Evans v. Givens, 22 Fla. 476.

Georgia. Lacewell v. State, 95 Ga. 346; Doe d. Stephens v. Roe, 37 Ga. 289.

Illinois. Chenoweth v. Burr, 242 Ill. 312; Sanitary Dist. of Chicago v. City of Joliet, 189 Ill. 270; Village of Cullom v. Justice, 161 Ill. 372; City of Chicago v. Moore, 139 Ill. 201; Jansen v. Grimshaw, 125 Ill. 468; Chicago, B. & Q. R. Co. v. Perkins, 125 Ill. 127; Kreigh v. Sherman, 105 Ill. 49; Kimmel v. People, 92 Ill. 457; Meyer v. Mead, 83 Ill. 19; Trustees of Schools v. McCormick, 41 Ill. 323; Hovey v. Thompson, 37 Ill. 538; Morgan v. Peet, 32

Ill. 281; Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478; Bannister v. Read, 6 Ill. (1 Gilm.) 92; Bland v. People, 4 Ill. (3 Scam.) 364; Kenny v. Marquette Cement Mfg. Co., 149 Ill. App. 173, *aff'd* 243 Ill. 396; Eckels v. Hawkinson, 138 Ill. App. 627; Wells v. Ipperson, 48 Ill. App. 580; Cary v. Norton, 35 Ill. App. 365; Terre Haute & I. R. Co. v. Voelker, 31 Ill. App. 324; Kadgin v. Miller, 13 Ill. App. 474; Cohen v. Schick, 6 Ill. App. 280; Doggett v. Ream, 5 Ill. App. 174; Town of Earlville v. Carter, 2 Ill. App. 34.

The court is not bound to modify erroneous instructions. Nelson v. Fehd, 203 Ill. 120, *aff'g* 104 Ill. App. 114. The court is not bound to modify an inaccurate instruction, but may refuse it. Rolfe v. Rich, 149 Ill. 436, *aff'g* 46 Ill. App. 406.

Indiana. Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380; Musgrave v. State, 133 Ind. 297; Sherfey v. Evansville & T. H. R. Co., 121 Ind. 427; Smith v. State, 117 Ind. 167; Louisville, N. A. & C. Ry. Co. v. Hubbard, 116 Ind. 193; City of Logansport v. Dykeman, 116 Ind. 15; Over v. Schiffling, 102 Ind. 191; Board Com'rs Howard Co. v. Legg, 93 Ind. 523, 47 Am. Rep. 390; Bishop v. Welch, 54 Ind. 527; Lake Erie & W. R. Co. v. Arnold, 8 Ind. App. 297.

And it has been held that a modification may be made even after the court has indicated what instructions would be given and what refused.⁵⁸

See also, *Taylor v. Wootan*, 1 Ind. App. 188, 50 Am. St. Rep. 200.

Iowa. *Large v. Moore*, 17 Iowa 258; *Keenan v. Missouri State Mut. Ins. Co.*, 12 Iowa 126; *State v. Gibbons*, 10 Iowa 117; *Abbott v. Striblen*, 6 Iowa 191; *Paukett v. Livermore*, 5 Iowa 280; *Tifield v. Adams*, 3 Iowa 487.

Kansas. *Evans v. Lafeyth*, 29 Kan. 736; *Reed v. Golden*, 28 Kan. 632, 42 Am. Rep. 180; *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47.

Kentucky. *Pleak v. Chambers*, 7 B. Mon. 569.

Michigan. *Evans v. Montgomery*, 95 Mich. 497; *Weimer v. Bunbury*, 30 Mich. 201; *American Merchants' Union Exp. Co. v. Phillips*, 29 Mich. 515.

Minnesota. *Bartlett v. Hawley*, 38 Minn. 308; *Blackman v. Wheaton*, 13 Minn. 326 (Gil. 299); *Dodge v. Rogers*, 9 Minn. 223 (Gil. 209).

Mississippi. *Brown v. State*, 72 Miss. 990; *Scott v. State*, 56 Miss. 289; *White v. State*, 52 Miss. 216; *Archer v. Sinclair*, 49 Miss. 343; *Wilson v. Kohlheim*, 46 Miss. 346; *Doss v. Jones*, 5 How. 158; *Doe d. Vick v. Peck*, 4 How. 407; *Cicely v. State*, 13 Smedes & M. 202; *Boles v. State*, 9 Smedes & M. 284.

Missouri. *State v. Ott*, 49 Mo. 326; *Kaw Brick Co. v. Hogsett*, 82 Mo. App. 546.

Nebraska. *Tracey v. State*, 46 Neb. 361.

Nevada. *State v. Davis*, 14 Nev. 407; *State v. Watkins*, 11 Nev. 30; *State v. Smith*, 10 Nev. 123; *Gerhauser v. North British & M. Ins. Co.*, 7 Nev. 174..

New York. *Knickerbocker v. People*, 57 Barb. 365; *Stewart v. New York, O. & W. R. Co.*, 54 Hun 638.

North Carolina. *State v. Horton*, 100 N. C. 443, 6 Am. St. Rep. 613; *Overcash v. Kitchie*, 89 N. C. 384.

North Dakota. *Landis v. Fyles*, 18 N. D. 587. In this state the modification must be consented to by counsel under N. D. Comp. 1913, § 7620.

Ohio. *Avery v. House*, 2 Ohio Cir. Ct. R. 246.

Pennsylvania. *Yardley v. Cuthbertson*, 108 Pa. St. 395, 56 Am. Rep. 218; *Killion v. Power*, 51 Pa. St. 429, 91 Am. Dec. 127; *Hays v. Paul*, 51 Pa. St. 134, 88 Am. Dec. 569; *Lloyd v. Carter*, 17 Pa. St. 216; *Amer v. Longstreth*, 10 Pa. St. 145.

South Carolina. *Fletcher v. South Carolina & G. Extension R. Co.*, 57 S. C. 205.

Texas. *Brownson v. Scanlan*, 59 Tex. 222.

Utah. *Gibson v. George G. Doyle & Co.*, 37 Utah 21, 106 Pac. 512; *Clampitt v. Kerr*, 1 Utah 246.

Virginia. *Rosenbaums v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737.

Washington. *State v. Robinson*, 12 Wash. 491, 41 Pac. 884.

United States. *Smith v. Carrington*, 4 Cranch 62, 2 L. Ed. 550.

58—"The court may modify instructions asked, even after indicating, according to the requirement of the statute, what instructions would be given and what refused." *Louisville, N. A. & C. Ry. Co. v. Hubbard*, 116 Ind. 193; *City of Logansport v. Dykeman*, 116 Ind. 15, 26. "It would be a travesty upon the admin-

In some cases it has been said to be the duty of the court, when not entirely satisfied with the instructions requested, to prepare other instructions which will properly submit the case to the jury.⁵⁹ And it has been held under a statute prohibiting the modification of requested instructions that the modification of an erroneous instruction asked, though in disregard of the statute, was not ground for reversal, unless the party asking the instruction was injured by the modification.⁶⁰

The modification made by the court must not be such as to render the instructions as given erroneous, misleading or otherwise objectionable,⁶¹ and a correct instruction should not be modified unless the modification is supported by the evidence.⁶²

§ 191. Particular modifications considered.

A modification which does not change the sense and legal import of an instruction is not error.⁶³ The judge may

istration of justice if a court was compelled to give an erroneous instruction, simply because it had acted incautiously in indicating what instructions would be given." *City of Logansport v. Dykeman*, *ante*.

59—**Alabama.** *Bell's Adm'r v. Troy*, 35 Ala. 185.

Illinois. *Kadgin v. Miller*, 13 Ill. App. 474.

Mississippi. *Wilson v. Kohlheim*, 46 Miss. 346.

Missouri. *State v. Jones*, 61 Mo. 232; *Harman v. Shotwell*, 49 Mo. 423.

North Carolina. *Phifer v. Alexander*, 97 N. C. 335. "If a defendant in his prayer for instructions sets up a broader right than he is entitled to, the judge should not deny it altogether, but should explain to the jury the true extent of his right." *Amer v. Longstreth*, 10 Pa. St. 145.

60—*Franke v. Riggs*, 93 Ala. 252;

Eiland v. State, 52 Ala. 330; *Sawyer v. Lorillard*, 48 Ala. 333; *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422; *Morris v. State*, 25 Ala. 57; *Dillingham v. Fields*, 9 Tex. Civ. App. 1; *Grace v. Dempsey*, 75 Wis. 313; *Mason v. H. Whitbeck Co.*, 35 Wis. 164.

61—*Orr v. Jason*, 1 Ill. App. 446; *State v. Green*, 20 Iowa 424.

62—*Shelby v. Offutt*, 51 Miss. 128; *Walker v. Stetson*, 14 Ohio St. 89, 84 Am. Dec. 362; *Bain v. Wilson*, 10 Ohio St. 14.

63—*Reisch v. People*, 229 Ill. 574, aff'g 130 Ill. App. 164. A modification which does not change the meaning is not erroneous.

California. *People v. Davis*, 47 Cal. 93.

Illinois. *Chicago, R. I. & P. Ry. Co. v. Kinnare*, 190 Ill. 9; *Richelieu Hotel Co. v. International Military*

properly correct a clerical error,⁶⁴ and the mere addition of a legal principle, pertinent and proper to be considered with the facts of the case, is not error.⁶⁵

The court may add such observations as are necessary to show the proper application of the principle to the case in hand,⁶⁶ and the addition of a proper explanation is not error.⁶⁷ It is not error to make a modification which merely requires the jury to determine the issue from all the evidence in the case,⁶⁸ or which confines the jury to the evidence, or conforms the instructions to the pleadings,⁶⁹ or

Encampment Co, 140 Ill. 248, 33 Am. St. Rep. 234.

Iowa. Moore v. Chicago, B. & Q. Ry. Co., 65 Iowa 505, 54 Am. Rep. 26.

Kansas. Reed v. Golden, 28 Kan. 632, 42 Am. Rep. 180.

Missouri. John Deere Plow Co. v. Sullivan, 158 Mo. 440; State v. Fannon, 158 Mo. 149.

Nevada. State v. Smith, 10 Nev. 123. See also, § 190, *ante*.

South Carolina. State v. Powers, 59 S. C. 200.

The court read the jury an instruction asked, and then, disliking the last sentence, struck it out, told the jury he would read it again, and did so without said sentence. It was held no error. Wells v. Ipperson, 48 Ill. App. 580.

64—Kenny v. Marquette Cement Mfg. Co., 149 Ill. App. 173, *aff'd* 243 Ill. 396.

65—People v. Davis, 47 Cal. 93; Meyer v. Mead, 83 Ill. 19; Reed v. Golden, 28 Kan. 632, 42 Am. Rep. 180; Pleak v. Chambers, 7 B. Mon. (Ky.) 569.

66—State v. Duffy, 66 Conn. 551; Green v. State, 28 Miss. 687; Lloyd v. Carter, 17 Pa. St. 216; Reed v. Newcomb, 64 Vt. 49. It is not error for the court, after answering a

point affirmatively, to qualify it by stating that if the facts were different from those assumed, the law would be otherwise. Lloyd v. Carter, 17 Pa. St. 216; Columbia Bridge Co. v. Kline, Brightly N. P. (Pa.) 320, 4 Clark 39.

67—State v. Duffy, 66 Conn. 551; Meserve v. Delaney, 105 Ill. 53; Needham v. People, 98 Ill. 275; Reinback v. Crabtree, 77 Ill. 182; Overcash v. Kitchie, 89 N. C. 384. The court may append explanation in writing to instruction requested. Knapp v. King, 6 Ore. 243. In an action against a master for injuries to a servant, on the request of counsel to charge that the question before the jury was not one of science, the judge said he was in doubt as to the meaning of the request, but, if it meant that the defendant was not bound to use the most scientific method, he so charged. He then gave counsel an opportunity for explanation. It was held no error. Stewart v. New York, O. & W. R. Co., 54 Hun (N. Y.) 638.

68—Meserve v. Delaney, 105 Ill. 53; Kreigh v. Sherman, 105 Ill. 49.

69—Florida. Evans v. Givens, 22 Fla. 476.

Illinois. Chenoweth v. Burr, 242 Ill. 312; Kimmel v. People, 92 Ill.

which adds a cautionary statement of an abstract principle of law.⁷⁰ It is proper to strike out mere repetitions and reiterations,⁷¹ or unnecessary and irrelevant matters,⁷² and where an instruction as requested is ambiguous, obscure, involved or misleading, it is proper for the court to modify it so as to make it intelligible, or to give additional instructions properly presenting the case to the jury.⁷³ A modification to make the instruction harmonize with other instructions requested by the same party is not erroneous,⁷⁴ but a modification of an instruction which causes it to contradict other instructions correctly stating the law is error.⁷⁵ Where abstract instructions have been given tending to mis-

457; *Terre Haute & I. R. Co. v. Voelker*, 31 Ill. App. 314.

Indiana. *Smith v. State*, 117 Ind. 167.

Iowa. *Large v. Moore*, 17 Iowa 258.

Mississippi. *Shelby v. Offutt*, 51 Miss. 128.

Missouri. *O'Neil v. Capelle*, 56 Mo. 296; *Newby v. Chicago, R. I. & P. Ry. Co.*, 19 Mo. App. 391.

Nevada. *Burch v. Southern Pac. Co.*, 32 Nev. 75, Ann. Cas. 1912 B 1166n, 104 Pac. 225.

Pennsylvania. *Hays v. Paul*, 51 Pa. St. 134, 88 Am. Dec. 569; *Killion v. Power*, 51 Pa. St. 429, 91 Am. Dec. 127.

70—*Yardley v. Cuthbertson*, 108 Pa. St. 395, 56 Am. Rep. 218.

71—*Gerhauser v. North British & M. Ins. Co.*, 7 Nev. 174.

72—*People v. Cotta*, 49 Cal. 166; *Chicago City Ry. Co. v. McKeon*, 143 Ill. App. 598; *Sherfey v. Evansville & T. H. R. Co.*, 121 Ind. 427.

73—**Alabama.** *Eiland v. State*, 52 Ala. 330; *Bell's Adm'r v. Troy*, 35 Ala. 185.

California. *People v. Dolan*, 96 Cal. 315, 31 Pac. 107.

Illinois. *Trustees of Schools v. McCormick*, 41 Ill. 323; *Kadgin v. Miller*, 13 Ill. App. 474; *Cohen v. Schick*, 6 Ill. App. 280.

Kansas. *Evans v. Lafeyth*, 29 Kan. 736.

Kentucky. *Pleak v. Chambers*, 7 B. Mon. 569.

Michigan. *American Merchants' Union Exp. Co. v. Phillips*, 29 Mich. 515.

Nevada. *State v. Davis*, 14 Nev. 407; *Gaudette v. Travis*, 11 Nev. 149; *State v. Watkins*, 11 Nev. 30; *State v. Smith*, 10 Nev. 106.

Oregon. *Knapp v. King*, 6 Ore. 243.

Pennsylvania. *Com. v. McMurray*, 198 Pa. St. 51, 82 Am. St. Rep. 787.

Virginia. *Keen's Ex'r v. Monroe*, 75 Va. 424; *Womack v. Circle*, 29 Gratt. 192.

Wisconsin. *Dodge v. O'Dell's Estate*, 106 Wis. 296.

74—*Feary v. Metropolitan St. Ry. Co.*, 162 Mo. 75.

75—*Chicago & A. R. Co. v. Henline*, 120 Ill. App. 134.

lead the jury by diverting their attention from the issues in the case, a modification which fits such instructions to the facts of the case is not only proper, but it is error not to give the modification.⁷⁶

In a civil action, a request to charge that the jury is "not authorized to find, except upon clear and convincing proof," etc., is properly changed by the court so as to read, "except upon a fair preponderance of proof,"⁷⁷ and an instruction requiring the jury to reject the testimony of a witness who has "wilfully and knowingly" sworn falsely is properly modified by the addition of the word "correctly."⁷⁸

In a prosecution for nuisance, an instruction that the jury must take into consideration the location of the plant, "whether convenient or not," is properly modified by striking out the phrase quoted.⁷⁹

An instruction asked by one defendant may be modified to make it applicable to the other defendant,⁸⁰ and an instruction that brewery corporations are entitled to the same fair treatment as individuals may be modified by striking out the word "brewery."⁸¹

"Where the defendant demands a special verdict, and then asks the court to give an instruction to the jury which can apply only to a general verdict, the court may, without committing any error, so change the instruction as to make

76—*Trustees of Schools v. McCormick*, 41 Ill. 323; *Bannister v. Read*, 6 Ill. (1 Gilm.) 92; *Blackman v. Wheaton*, 13 Minn. 326 (Gil. 299); *Gaudette v. Travis*, 11 Nev. 149.

"Parties have a right to require the court to give an instruction as asked, when it is in conformity with the law, and if, in the opinion of the court, the jury may be misled by such instruction, unless explained, it is the province of the court to give such further instructions as may obviate the danger of misapprehension; but it is error to add

to an instruction upon one point of the case words directing the jury as to other branches of the case." *Cohen v. Schick*, 6 Ill. App. 280.

77—*Evans v. Montgomery*, 95 Mich. 497.

78—*Chicago City Ry. Co. v. Olis*, 192 Ill. 514, aff'g 94 Ill. App. 323.

79—*People v. Archibald*, 258 Ill. 383.

80—*Cooper v. Kankakee Elec. Light Co.*, 164 Ill. App. 581.

81—*Star Brewery Co. v. Hauck*, 222 Ill. 348, 113 Am. St. Rep. 420, aff'g 126 Ill. App. 608.

it apply to a special verdict. Indeed, the court might in such a case refuse the instruction entirely.”⁸²

Where a party requested a charge that the measure of damages was the cash value of the property in question and the court struck out the word “cash,” it was held not error where the record did not show that any two standards of value were placed before the jury.⁸³

The court may refuse to give a charge that, in an action of slander, the plea of justification is no evidence that the words were spoken, though the general issue be also pleaded, and may charge in lieu thereof that such plea is evidence of malice, and may be considered by the jury by way of aggravation of damages.⁸⁴

The following instruction was properly modified by the insertion of the words inclosed in brackets: “From the want of probable cause in the prosecution, the jury are not bound to [but they may] imply malice; and if they are not satisfied that the prosecution was instituted or carried on through malice [express or implied], they will find for the defendant.”⁸⁵

On an issue whether defendants, as insurance brokers, had agreed to keep plaintiff’s property insured, a requested instruction that, “if defendants were the agents of plaintiff for the purpose of keeping plaintiff insured,” certain consequences followed, was properly modified to read, “if defendant agreed with plaintiff to keep the plaintiff insured,” since the instruction as requested left the jury to determine a question of law.⁸⁶

The insertion of the word “sole” before the word “cause” is a proper modification of an instruction on liability for negligence.⁸⁷

82—*St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47.

83—*Weimer v. Bunbury*, 30 Mich. 200.

84—*Doss v. Jones*, 5 How. (Miss.) 158.

85—*Paukett v. Livermore*, 5 Iowa 277.

86—*Kaw Brick Co. v. Hogsett & Woodward*, 82 Mo. App. 546.

87—*Lebow v. Wiggins Ferry Co.*, 147 Ill. App. 287, *aff’d* 241 Ill. 582.

An instruction in an action for injury in an elevator, that the jury may disregard all testimony of any witness whom they believe has testified falsely, is properly modified so as to limit it to false testimony on a material matter.⁸⁸

“An instruction which attempts to tell the jury that a plaintiff cannot recover for a present bodily condition not resulting from an injury received on a defective sidewalk may properly be modified so as not to deprive the jury of the right to give damages for other injuries not connected with such present condition.”⁸⁹

Where, in an action for personal injuries, an instruction was asked that the failure of plaintiff to perform certain acts would constitute a bar to recovery, thereby telling the jury that such omission would constitute negligence, it was proper to substitute an instruction, “the law required of the plaintiff that she should exercise ordinary care for her safety.”⁹⁰

In criminal cases, the court is not bound to address instructions to each one of the jury, and a request to charge that “each and every one of the jury” must be satisfied of defendant’s guilt beyond a reasonable doubt is properly modified by striking out the qualifying words.⁹¹

An instruction that the jury should receive the testimony of an accomplice with great caution, and might disbelieve it altogether, is properly qualified by adding, “if they have a reasonable doubt of its truth.”⁹²

A requested instruction that every witness, including defendant, is presumed to speak the truth, and the jury are bound to remember such presumption, is properly modified by adding that such presumption is disputable, and the jury are the sole judges of credibility and of the weight of the

88—*Thompson v. Northern Hotel Co.*, 256 Ill. 77, aff’g 166 Ill. App. 618.

89—*Village of Cullom v. Justice*, 161 Ill. 372, aff’g 59 Ill. App. 304.

90—*City of Chicago v. Moore*, 139 Ill. 201, aff’g 40 Ill. App. 332.

91—*State v. Robinson*, 12 Wash. 491, 41 Pac. 884.

92—*Brown v. State*, 72 Miss. 990.

evidence, and that they may consider the interest, conduct and demeanor of a witness.⁹³

Where a defendant asked a special instruction, beginning: "If the jury believe the testimony of S. W.," etc., and the judge gave the instruction thus: "If the jury believe from the testimony of S. W.," etc., it was held that it was proper to insert the word "from," because it is the province of the jury to interpret and determine what is proved by a witness.⁹⁴

"On the trial of one for robbery, the court was asked on the part of the defendant to instruct the jury that 'concealment of the robbery does not amount to participation in it,' which the court modified by adding, 'but it is a circumstance to be weighed with all others in determining the question of participation.' Held, that there was no error in the modification."⁹⁵

In the following charge: "The jury are instructed that the following persons, among others, are not capable of committing crime under the laws of the state of California: Lunatics and insane persons, persons who commit the act charged without being conscious thereof, persons who commit the act charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence; and if the jury are satisfied beyond a reasonable doubt, by the evidence in this case, that the defendant, when he killed the deceased, was either a lunatic or an insane person [as 'insanity' is defined in these instructions],"—it was proper to insert, after the words "insane person," the words "as insanity is defined in these instructions."⁹⁶

§ 192. Modification as harmless or reversible error.

Where the modification of an instruction could not have misled the jury to the injury of the plaintiff in error, the

93—*People v. Dolan*, 96 Cal. 315, 31 Pac. 107.

94—*State v. Horton*, 100 N. C. 443, 6 Am. St. Rep. 613.

95—*Needham v. People*, 98 Ill. 275.

96—*People v. Methever*, 132 Cal. 326, 64 Pac. 481.

judgment will not be reversed,⁹⁷ and a modification rendering the instruction more favorable than the one asked is, at most, harmless error as respects the party making the request.⁹⁸

The striking of a clause cannot be complained of if its substance is given in another instruction.⁹⁹ It has also been held that a party cannot complain of a faulty modification of his own faulty instruction,¹ and that no modification of an erroneous instruction can be assigned as error by the party asking the instruction, because the court might have wholly refused to give such instruction.² But it seems to be the better view that an instruction modified by the court is to be regarded as an instruction given by the court of its own motion, and, if it fails to properly state the law, it is

97—*Meserve v. Delaney*, 105 Ill. 53; *Reinback v. Crabtree*, 77 Ill. 182; *Howard Fire & Marine Ins. Co. v. Cornick*, 24 Ill. 455; *Bartlett v. Hawley*, 38 Minn. 308; *Alexander v. Richmond & D. R. Co.*, 112 N. C. 720.

"A plaintiff asked a certain instruction, authorizing a verdict for him in a certain state of facts. The court modified it by adding, 'unless the jury believe from the evidence the facts stated in the instructions for the defendant.' The instructions referred to were correct. Held, that the sole effect of this modification was to call the attention of the jury, perhaps unnecessarily, to the defendant's instructions, but in itself is not sufficient to cause a reversal of the case." *Moyers v. Columbus Banking & Ins. Co.*, 64 Miss. 48.

Striking out from a requested charge on credibility of witnesses the words, "from the appearance of the witnesses on the stand," is harmless error, the charge, as left, stat-

ing that the jury "have the right to determine * * * from their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit," etc. *City of La Salle v. Kostka*, 190 Ill. 130, aff'g 92 Ill. App. 91.

98—*King v. Rea*, 13 Colo. 69, 21 Pac. 1084; *Watson v. Com.*, 87 Va. 608. See also, *St. Paul's Episcopal Church v. Fields*, 81 Conn. 670.

99—*McGuire v. North Breese Coal & Mining Co.*, 179 Ill. App. 592.

A party cannot complain of the modification of an instruction where the substance of the stricken part was contained in another instruction given. *McGuire v. North Breese Coal & Mining Co.*, 179 Ill. App. 592.

1—*Wilkerson v. Willis Coal & Mining Co.*, 158 Ill. App. 620; *Wibel v. Illinois Cent. R. Co.*, 147 Ill. App. 187.

2—*Louisville, N. O. & T. Ry. Co.*

erroneous, and open to objection from either party.³ A proviso qualifying an instruction to the prejudice of the party asking it is reversible error.⁴

§ 193. Manner of making modification.

In modifying an instruction by striking out part thereof, it has been held that the judge should completely obliterate such part so as not to give possible emphasis to the act of modification.⁵

In some states the court is forbidden to modify instructions by interlineation or erasure,⁶ and in all states good

v. Suddoth, 70 Miss. 265, wherein the court said: "It may be admitted that the instruction, as modified, imposed upon the defendant too great a degree of care to avoid injury to the animal after its danger was discovered, and was therefore erroneous; but this will avail nothing unless the instruction, as asked, was correct. If the defendant was not content with the instruction as modified, it should have declined to read it to the jury. No modification of an erroneous instruction can be assigned for error by the party asking the instruction, for the court might refuse such instruction outright. One who is entitled to nothing cannot complain that he gets something, but less than he asks. The instruction, as asked, was erroneous, because of its statement, in the disjunctive, that doing what could have been done to avoid the injury, after the danger was discovered, discharged the defendant from any precedent negligence."

3—Morgan v. Peet, 32 Ill. 288; O'Niel v. Orr, 5 Ill. (4 Scam.) 1; Town of Earlville v. Carter, 2 Ill. App. 34. See State v. Gibbons, 10 Iowa 117; Abbott v. Stribley, 6 Iowa 191.

4—Little Rock Traction & Electric Co. v. Trainer, 68 Ark. 106; Wells v. Turner, 16 Md. 133.

5—McGuire v. North Breese Coal & Mining Co., 179 Ill. App. 592.

6—Ham v. Wisconsin, I. & N. R. Co., 61 Iowa 720; Phillips v. Starr, 26 Iowa 349; Tracey v. State, 46 Neb. 370; Daly v. Bernstein, 6 N. M. 380, 28 Pac. 764.

"The statute points out the mode in which instructions may be modified, and prohibits this from being done 'by interlineation or erasure.' Revision, section 3053 (Iowa Rev. 1907, § 3706). The first instruction asked by the plaintiff has indorsed on the margin, 'Given as modified;' with this memorandum by the clerk: 'The words underscored are added by the judge, and those with a pencil mark through them are erased by the judge. T. A. Bereman, Clerk.' We cannot act upon any such certificate. The clerk is not authorized to make it. How dangerous it would be to allow a clerk to certify that the judge erased portions of instructions by drawing pencil marks through them. We are not disposed to be overnice in matters of practice. Every lawyer knows how important—how vital—a part of a

practice requires that it shall distinctly appear what the instruction asked and given is, and what the qualification is, so that exceptions may be properly saved for review;⁷ but a disregard of the prohibition is not ground for reversal unless an exception was saved, and it appears that the party complaining may have been prejudiced.⁸ The fact that the erasure left the words stricken out still legible is immaterial.⁹

cause the instructions are. It is a wise provision of the statute which forbids interlineations and erasures in modifying instructions asked, and it should be followed; at least, if modifications are made in this way, the judge, and not the clerk, should certify in what they consist." *Phillips v. Starr*, 26 Iowa 352.

7—**California.** *King v. Davis*, 34 Cal. 100.

Georgia. *Stephens v. Mattox*, 37 Ga. 289.

Indiana. *Bishop v. Welch*, 54 Ind. 527.

Iowa. *Ham v. Wisconsin, I. & N. Ry. Co.*, 61 Iowa 716.

Kansas. *Campbell v. Fuller*, 25 Kan. 723.

Missouri. *Exchange Bank v. Cooper*, 40 Mo. 169; *Meyer v. Pacific R. Co.*, 40 Mo. 151.

Modification of instructions asked may be made by cutting off a part of the sheet on which the instruction is written, notwithstanding the, particular provisions of Code 1873, § 2785, as to the method of making modifications. *Ham v. Wisconsin, I. & N. R. Co.*, 61 Iowa 716.

Although the judge has the right to qualify propositions requested to be presented by him to the jury, when they are not strictly legal or pertinent, or when they require some addition or diminution to make them

entirely correct, or are unauthorized by the facts in the case, yet, when the matters involved in the qualification made by the judge are entirely separable from the request made, and substantially disconnected from it, those matters of qualification should be presented, not in connection with the instruction requested, but independently. *Stephens v. Mattox*, 37 Ga. 289.

8—*Campbell v. Fuller*, 25 Kan. 723; *Tracey v. State*, 46 Neb. 361; *Daly v. Bernstein*, 6 N. M. 380, 28 Pac. 764; *Denver & R. G. Ry. Co. v. Harris*, 3 N. M. (Gild.) 114, 2 Pac. 369; 3 N. M. (Johns.) 109, 2 Pac. 369.

9—*Union Railway & Transit Co. v. Kallagher*, 114 Ill. 325; *Gerhauser v. North British & Mercantile Ins. Co.*, 7 Nev. 174. "The court modified an instruction by erasing the words, 'and the jury must find for the defendant,' with one stroke of the pen, leaving them legible to the jury. It was held that it was the privilege of the appellant to ask leave to rewrite the instruction, or obliterate the rejected words, and, not having done so, she is not in a position to complain of the action of the court, the instruction being otherwise correct." *Allison v. Hagan*, 12 Nev. 38. See also, *Ger-*

It is not necessary that an instruction given should show that a modification was made by the court, and words so indicating should be omitted, but error in this regard is not so material as to justify a reversal.¹⁰

In some states the modified instruction must be rewritten and given as an instruction of the court,¹¹ but it has been held that the failure of the court to follow the statute, by rewriting the instructions as modified, cannot be objected to on appeal where no objection was made until the modified instructions had been read to the jury.¹²

hauser v. North British & Mercantile Ins. Co., 7 Nev. 174.

10—Manrose v. Parker, 90 Ill. 581.

11—It is not proper to give an instruction asked by a party as a modification. Such instruction can only be given as one given by the

court of its own motion. Burns' Ann. St. 1914, § 561; Wea Tp. Tippecanoe Co. v. Cloyd, 46 Ind. App. 49.

12—Baxter v. Baxter, 46 Ind. App. 514.

CHAPTER XVI.

CONSTRUCTION AND INTERPRETATION OF INSTRUCTIONS.

- § 194. General rules.
- § 195. Reasonable and liberal construction.
- § 196. Construction to support judgment.
- § 197. Construction as a whole.
- § 198. Same—Illustrations.
- § 199. Particular words and phrases.

§ 194. General rules.

The court's instructions are to be considered in their application to the facts of the case on trial,¹ and in the light of the issues and proof,² although it has been held that an instruction applicable to the theory upon which the case is tried is not erroneous, though in the abstract it is not clear.³ While "instructions must be considered with reference to the possibilities of their interpretation,"⁴ the charge to the jury should also be judged by its general scope and spirit,⁵ and the general effect, rather than casual expressions, must govern the interpretation or construction of an instruction.⁶

1—*Central of Georgia R. Co. v. Chicago Varnish Co.*, 169 Ala. 287.

Instructions must be considered in connection with the facts of the case. *Kaler v. Swift & Co.*, 173 Ill. App. 135.

2—Instructions must be construed in the light of the issues and proof. *Petefish v. Becker*, 176 Ill. 448; *Chicago & A. R. Co. v. Dillon*, 123 Ill. 570, 5 Am. St. Rep. 565, rev'g 23 Ill. App. 486.

3—*Lingle v. Kitchen*, 69 Ind. 349.

4—*State v. Chatham Nat. Bank*, 10 Mo. App. 482.

5—*Paschall v. Williams*, 11 N. C. 292. The effect of the instructions, when taken as a whole, must be considered. *Wadhams & Co. v. Inman, Poulsen & Co.*, 38 Ore. 143, 63 Pac. 11. See § 197 *post*.

6—*Kyle v. Southern Electric Light & Power Co.*, 174 Pa. St. 570.

The general effect of a charge is

Where a party, by his counsel, concedes that an instruction given in his favor is erroneous, the court, on appeal, will not look into it to determine whether the concession is properly or improperly made.⁷

§ 195. Reasonable and liberal construction.

The sense of an instruction depends upon how ordinary men understand it and not upon what the ingenuity of counsel can make it mean.⁸

“The practical administration of justice should not be defeated by a too rigid adherence to a close and technical analysis of the instructions.”⁹

The charge and the language thereof must have a reasonable and not a strained and unreasonable construction,¹⁰ and the jury must be considered to be reasonably intelligent and capable men, sufficiently so as to put such reasonable construction on the charge.¹¹

Such meaning should be ascribed to an instruction as is

to be considered, and hypercritical objections thereto will not avail. *Knapp v. State*, 168 Ind. 153.

7—*Blackburn v. Morton*, 18 Ark. 384.

8—*Dale v. Chicago Junct. Ry. Co.*, 174 Ill. App. 495; *Young v. City of Fairfield*, 173 Ill. App. 311; *Kargman v. Carlo*, 85 N. J. L. 632; *Alaska S. S. Co. v. Pacific Coast Gypsum Co.*, 78 Wash. 247, 138 Pac. 875.

An instruction will not receive that construction which the professional mind might assume the court intended, but it must be given that meaning which the language used would reasonably convey to the jury. *State v. Billings*, 77 Iowa 417.

9—*People v. Bruggy*, 93 Cal. 476, 29 Pac. 26.

10—*Arnott v. State*, 109 Ark. 378; *Williams v. State*, 168 Ind. 87; *Davenport v. Cummings*, 15 Iowa 219;

Coffman v. State, — Tex. Cr. App. —, 165 S. W. 939; *Graham v. State*, — Tex. Cr. App. —, 163 S. W. 726.

The charge to the jury “must receive a reasonable interpretation.” *South & North Alabama R. Co. v. Jones*, 56 Ala. 507; *First Unitarian Soc. of Chicago v. Faulkner*, 91 U. S. (1 Otto) 415, 23 L. Ed. 283; *Bliven v. New England Screw Co.*, 23 How. (U. S.) 420, 16 L. Ed. 510.

It is not proper to seek after some far-fetched and unusual signification of the language used, and base a reversal thereon. The language should be given its usual and ordinary meaning. *State v. Huxford*, 47 Iowa 16.

11—*Watts v. Murphy*, 9 Cal. App. 564, 99 Pac. 1104; *Coffman v. State*, — Tex. Cr. App. —, 165 S. W. 939; *Graham v. State*, — Tex. Cr. App. —, 163 S. W. 726.

reasonably apparent from all the language employed when fairly construed,¹² and the words should not be subjected to "a nice criticism * * * when the meaning of the instruction is plain and obvious, and cannot mislead the jury."¹³

The test is, were the jury fairly and fully instructed, or were they misinformed or misled?¹⁴

Hypercritical niceties should be disregarded.¹⁵

§ 196. Construction to support judgment.

If the language used in an instruction is capable of different constructions, that construction is to be preferred which will lead to an affirmance of the judgment, unless it can reasonably be said that the instruction was calculated to mislead the jury.¹⁶

On appeal it will be presumed, if a charge is proper in one sense, that the judge charged in that sense,¹⁷ and where it does not clearly appear to which of two matters the language of the charge to the jury is applicable, the language will be referred to that matter which would make the charge correct.¹⁸

Where any remark made by the circuit judge will admit of two constructions,—the one against the law and the other in conformity with it,—the latter will be adopted.¹⁹

It is also held on appeal that the construction least favorable to the party asking the charge will be adopted.²⁰

12—*Lay Co. v. Mendenhall*, 54 Ind. App. 342.

13—*Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 39 L. Ed. 624, citing *Evanston v. Gunn*, 99 U. S. (9 Otto) 660, 25 L. Ed. 306, and *Rogers v. The Marshal*, 1 Wall. (U. S.) 644, 17 L. Ed. 714.

14—*Burdette v. Chicago Auditorium Ass'n*, 166 Ill. App. 186.

15—*South & North Alabama R. Co. v. Jones*, 56 Ala. 507; *Paschall v. Williams*, 11 N. C. 292.

16—*Williams v. State*, 168 Ind. 87; *People v. McCallam*, 103 N. Y. 587; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Looram v. Second Ave. R. Co.*, 11 N. Y. St. 652.

17—*Harding v. New York, L. E. & W. R. Co.*, 36 Hun (N. Y.) 72.

18—*State v. Gilreath*, 16 S. C. 104.

19—*Rome R. Co. v. Sullivan*, 14 Ga. 277.

20—*Smith v. State*, 88 Ala. 23.

§ 197. Construction as a whole.

It is an elementary and well-settled rule of practice, which has been announced and applied in almost an innumerable number of cases, that instructions are to be construed together and as a whole.²¹

The citations in support of this proposition might be multiplied to an almost indefinite extent, but it would serve no

21—**Alabama.** *Southern R. Co. v. Weatherlow*, 164 Ala. 151; *Southern Ry. Co. v. Lynn*, 128 Ala. 297; *Decatur Car Wheel & Manufacturing Co. v. Mehaffey*, 128 Ala. 242; *Alabama Great Southern R. Co. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65.

Arizona. *Lenord v. State*, 15 Ariz. 137, 137 Pac. 412.

Arkansas. *Arnott v. State*, 109 Ark. 378; *St. Louis, I. M. & S. R. Co. v. Rogers*, 93 Ark. 564; *Prescott & N. W. R. Co. v. Morris*, 92 Ark. 365.

California. *People v. Watson*, 165 Cal. 645; 133 Pac. 298; *Valente v. Sierra R. Co. of California*, 158 Cal. 412, 111 Pac. 95; *Big Three Mining & Milling Co. v. Hamilton*, 157 Cal. 130, 107 Pac. 301; 137 Am. St. Rep. 118; *Ingalls v. Monte Cristo Oil & Development Co.*, 23 Cal. App. 652, 139 Pac. 97; *People v. Wah Hing*, 15 Cal. App. 195, 114 Pac. 416; *Antonian v. Southern Pac. Co.*, 9 Cal. App. 718; 100 Pac. 877.

Colorado. *Foster v. People*, 56 Colo. 452, 139 Pac. 10; *In re Hayes' Estate*, 55 Colo. 340, Ann. Cas. 1914 C 531n, 135 Pac. 449; *National Fuel Co. v. Maccia*, 25 Colo. App. 441, 139 Pac. 22.

Connecticut. *Bernier v. Woodstock Agr. Society*, 88 Conn. 558.

Florida. *Phoenix Ins. Co. v. Bryan*, 58 Fla. 341; *Kennard v. State*, 42 Fla. 581; *Richard v. State*,

42 Fla. 528; *Gray v. State*, 42 Fla. 174.

Georgia. *Webb v. Wight & Westlosky Co.*, 112 Ga. 432; *Flemister v. State*, 81 Ga. 768.

Idaho. *Anderson v. Great Northern R. Co.*, 15 Idaho 513, 99 Pac. 91.

Illinois. *Moore v. Aurora, E. & C. R. Co.*, 246 Ill. 56, aff'g 150 Ill. App. 484; *Shickle-Harrison & Howard Iron Co. v. Beck*, 212 Ill. 268, aff'g 112 Ill. App. 444; *Baker v. Baker*, 202 Ill. 595; *Central R. Co. v. Bannister*, 195 Ill. 48, aff'g 96 Ill. App. 332; *Mueller v. Pels*, 192 Ill. 76, aff'g 94 Ill. App. 353; *Fessenden v. Doane*, 188 Ill. 228, aff'g 89 Ill. App. 229; *Howard v. People*, 185 Ill. 552; *Placek v. Marquette Third Vein Coal Min. Co.*, 168 Ill. App. 335; *Coolahan v. Marshall Field & Co.*, 159 Ill. App. 466; *Hackett v. Harmon*, 155 Ill. App. 55; *Moore v. Aurora, E. & C. R. Co.*, 150 Ill. App. 484, aff'd 246 Ill. 56; *O'Shaughnessy v. Chicago City Ry. Co.*, 144 Ill. App. 174; *Illinois Steel Co. v. Swiercz*, 135 Ill. App. 141, rev'd 231 Ill. 456; *Chicago Consol. Traction Co. v. Mahoney*, 131 Ill. App. 591; *McMaster v. Spencer*, 129 Ill. App. 131; *Thomas v. Mosher*, 128 Ill. App. 479; *Chicago City Ry. Co. v. Jordan*, 116 Ill. App. 650, rev'd 215 Ill. 390; *United States Brewing Co. v. Stoltenberg*, 113 Ill. App. 435, aff'd 211 Ill. 531; *Chicago & W. I. R. Co. v. Doan*, 93 Ill. App. 247; *McNulta v. Jenkins*, 91 Ill. App. 309;

useful purpose to do so, as the proposition has never been denied, and the rule is an obvious and necessary one. As

Malott v. Crow, 90 Ill. App. 628;
Johnston v. Hirschberg, 85 Ill. App. 47.

Indiana. **Chicago & E. R. Co. v. Dinius**, 180 Ind. 596; **Johnson v. Johnson**, 156 Ind. 592; **Surber v. Mayfield**, 156 Ind. 375; **Anderson v. Anderson**, 128 Ind. 254; **Coble v. Eltzroth**, 125 Ind. 429; **Conway v. Vizzard**, 122 Ind. 266; **Barnett v. State**, 100 Ind. 171; **Louisville, N. A. & C. Ry. Co. v. Shanklin**, 98 Ind. 573; **Olds v. Lochner**, — Ind. App. —, 106 N. E. 889; **Walley v. Wiley**, 56 Ind. App. 171.

Iowa. **Corell v. Williams & Hunting**, — Iowa —, 148 N. W. 633; **Doran v. Waterloo, C. F. & N. Ry. Co.**, — Iowa —, 147 N. W. 1100; **Stotts v. Fairfield**, 163 Iowa 726; **Moore v. Pearson**, 160 Iowa 449; **Witt v. Town of Latimer**, 139 Iowa 273.

Kansas. **City of Wyandotte v. White**, 13 Kan. 191.

Kentucky. **Wiltshire's Adm'x v. Kister**, 156 Ky. 168.

Maryland. **Gill v. Staylor**, 93 Md. 453.

Michigan. **Folks v. Burletson**, 177 Mich. 6; **Weidman v. Phillips**, 159 Mich. 380; **Hodgins v. Bay City**, 156 Mich. 687, 132 Am. St. Rep. 546; **Kirchner v. Detroit City Ry.**, 91 Mich. 400; **Brown v. McCord & Bradford Furniture Co.**, 65 Mich. 360; **Watson v. Watson**, 58 Mich. 507.

Minnesota. **Whitaker v. Chicago, St. P., M. & O. R. Co.**, 115 Minn. 140; **Larkin v. City of Minneapolis**, 112 Minn. 311; **Hanson v. Hellie**, 107 Minn. 375.

Mississippi. **Smith v. State**, — Miss. —, 65 So. 498.

Missouri. **State v. Montgomery**, 230 Mo. 660; **Scheurer v. Banner Rubber Co.**, 227 Mo. 347, 28 L. R. A. (N. S.) 1207n, 21 Ann. Cas. 1110; **Stoltze v. United Rys. Co. of St. Louis**, 183 Mo. App. 304; **Pendegrass v. St. Louis & S. F. R. Co.**, 179 Mo. App. 517; **Hales v. Raines**, — Mo. App. —, 130 S. W. 425; **Luecke v. United Rys. Co.**, 146 Mo. App. 500; **Johnson v. Daily**, 136 Mo. App. 534.

Montana. **Michalsky v. Centennial Brewing Co.**, 48 Mont. 1, 134 Pac. 307; **Rand v. Butte Elec. R. Co.**, 40 Mont. 398, 107 Pac. 87; **State v. Whorton**, 25 Mont. 11, 63 Pac. 627; **Territory v. Hart**, 7 Mont. 489, 17 Pac. 718.

Nebraska. **Cunningham v. Modern Brotherhood of America**, 96 Neb. 827; **Fink v. Busch**, 83 Neb. 599; **Ford v. State**, 46 Neb. 390.

New Jersey. **Sullivan v. North Hudson County R. Co.**, 51 N. J. L. 518.

New York. **Caldwell v. New Jersey Steamboat Co.**, 47 N. Y. 282.

North Carolina. **Bain v. Lamb**, 167 N. C. 304; **Bird v. Bell Lumber Co.**, 163 N. C. 162; **Revis v. City of Raleigh**, 150 N. C. 348.

Ohio. **Cleveland, C. & C. R. Co. v. Terry**, 8 Ohio 570.

Oklahoma. **First Nat. Bank of Tishomingo v. Ingle**, 37 Okla. 276, 132 Pac. 895; **Killough v. State**, 6 Okla. Cr. 311, 118 Pac. 620.

Oregon. **Powder Valley State Bank v. Hudelson**, — Ore. —, 144 Pac. 494; **State v. Goff**, 71 Ore. 352, 142 Pac. 564; **Astoria Southern R. Co.**

has already been noted, it is apparent that a charge cannot usually be given in one paragraph as a whole. It must necessarily be given in separate and distinct paragraphs,²² and accordingly when a paragraph is objected to, it should be read and construed in connection with other paragraphs.²³

v. Pacific Surety Co., 68 Ore. 569, 137 Pac. 857.

Pennsylvania. Irvin v. Kutruff, 152 Pa. St. 609.

South Carolina. Bryan v. Donnelly, 87 S. C. 388; Bellamy v. Conway, C. & W. R. Co., 85 S. C. 450; Black v. Atlantic Coast Line R. Co., 82 S. C. 478; State v. Lee, 58 S. C. 335; State v. Martin, 47 S. C. 67; State v. Boyd, 35 S. C. 269; Bauskett v. Keitt, 22 S. C. 187; Jordan v. Lang, 22 S. C. 159.

South Dakota. Duprel v. Collins, 33 S. D. 365.

Tennessee. State v. Cagle, 2 Humph. 414.

Texas. Good v. Texas & P. Ry. Co., — Tex. Civ. App. —, 166 S. W. 670; Texas Co. v. Earles, — Tex. Civ. App. —, 164 S. W. 28; Glover v. Houston Belt & Terminal Ry. Co., — Tex. Civ. App. —, 163 S. W. 1063; St. Louis, B. & M. Ry. Co. v. Jenkins, — Tex. Civ. App. —, 163 S. W. 621; Atchison, T. & S. F. Ry. Co. v. Bryant, — Tex. Civ. App. —, 162 S. W. 400; Hightower v. State, — Tex. Cr. App. —, 165 S. W. 184; Bussey v. State, 71 Tex. Cr. App. 612; Reynolds v. State, 71 Tex. Cr. App. 454; Rogers v. State, 71 Tex. Cr. App. 149; Melton v. State, 71 Tex. Cr. App. 130.

Utah. Cromeenes v. San Pedro, L. A. & S. L. R. Co., 37 Utah 475, Ann. Cas. 1912 C 307n, 109 Pac. 10.

Virginia. Higgins v. Whitmore,

116 Va. 414; Peek v. City of Hampton, 115 Va. 855; Adamson's Adm'r v. Norfolk & P. Traction Co., 111 Va. 556; Longley v. Com., 99 Va. 807.

Washington. Munson v. Johnson, 80 Wash. 628, 142 Pac. 18; Gosky v. Seattle Taxicab & Transfer Co., 79 Wash. 425, 140 Pac. 342; Harkins v. Seattle Elec. Co., 53 Wash. 184, 101 Pac. 836; Rangenier v. Seattle Elec. Co., 52 Wash. 401, 100 Pac. 842; Cook v. Pittock & Leadbetter Lumber Co., 51 Wash. 316, 98 Pac. 1130.

West Virginia. State v. Hamrick, — W. Va. —, 81 S. E. 703; Parkersburg Nat. Bank v. Hannaman, 63 W. Va. 358.

Wisconsin. Tuckwood v. Hanthorn, 67 Wis. 326.

United States. Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 38 L. Ed. 958; Congress & Empire Spring Co. v. Edgar, 99 U. S. (9 Otto) 645, 25 L. Ed. 487; Charles v. United States, 130 C. C. A. 221, 213 Fed. 707, Ann. Cas. 1914 D 1251n.

22—See § 12, *et seq.*, *ante*. And see also the following cases: St. Louis, I. M. & S. R. Co. v. Rogers, 93 Ark. 564; Curtis & Gartside Co. v. Pigg, 39 Okla. 31, 134 Pac. 1125; Graham v. State, — Tex. Cr. App. —, 163 S. W. 726; Christian v. State, 71 Tex. Cr. App. 566; Rogers v. State, 71 Tex. Cr. App. 149; Wallace v. Skinner, 15 Wyo. 233, 88 Pac. 221.

23—Glover v. Pfeuffer, — Tex. Civ. App. —, 163 S. W. 984; Ft.

It is unfair to the trial court to take isolated paragraphs and complain of them,²⁴ or to criticize a single sentence or expression as incorrect.²⁵

Each instruction must be read as a whole and all of its parts must be considered in determining its meaning.²⁶

A portion of an instruction must be construed and interpreted in the light of what preceded and followed.²⁷

"A fragmentary excerpt from the charge of the court, isolated from its context, may be amenable to criticism, but when this fragment is replaced in its proper setting, and the instruction upon the subject to which it is applicable is viewed as a whole, every semblance of error therein may be dissolved and disappear."²⁸

The whole law applicable to a case can rarely be given in a single instruction,²⁹ and as a general rule it is not required

Worth & D. C. Ry. Co. v. Taylor, — Tex. Civ. App. —, 162 S. W. 967; Posener v. Harvey, — Tex. Civ. App. —, 125 S. W. 356; Roberts v. State, — Tex. Cr. App. —, 168 S. W. 100.
24—Brown v. State, 72 Tex. Cr. App. 33.

25—Ingalls v. Monte Cristo Oil & Development Co., 23 Cal. App. 652, 139 Pac. 97; Eggleston v. State, 59 Tex. Cr. App. 542.

It would be difficult, if not impossible for any judge or court to deliver a proper instruction orally or in writing from which parts of sentences could not be taken that standing alone, would be error. Southern Hardware & Supply Co. v. Standard Equipment Co., 165 Ala. 582.

26—Southern Anthracite Coal Co. v. Bowen, 93 Ark. 140.

In determining the sufficiency of a charge, it must be construed as a whole and not by isolated extracts, excerpts or paragraphs. Coffman v. State, — Tex. Cr. App. —, 165 S. W.

939; Graham v. State, — Tex. Cr. App. —, 163 S. W. 726; Christian v. State, 71 Tex. Cr. App. 566.

27—Doran v. Waterloo, C. F. & N. Ry. Co., — Iowa —, 147 N. W. 1100.

The charge must be treated as an entirety, and regard must be had to the connection and interdependence of its several parts. Coffman v. State, — Tex. Cr. App. —, 165 S. W. 939; Graham v. State, — Tex. Cr. App. —, 163 S. W. 726; Christian v. State, 71 Tex. Cr. App. 566.

28—Bishop v. Georgia Nat. Bank, 13 Ga. App. 38.

Error in a single expression is not ground for reversal where the charge as a whole is correct. Wheeler v. Cole, 164 N. C. 378; Howard v. Washington Water Power Co., 75 Wash. 255, 134 Pac. 927.

29—Southern Anthracite Coal Co. v. Bowen, 93 Ark. 140; People v. Watson, 165 Cal. 645, 133 Pac. 298; People v. Wah Hing, 15 Cal. App. 195, 114 Pac. 416; Thain v. State, — Ind. —, 106 N. E. 690.

that each separate instruction must embody every fact or element essential to sustain or defeat an action.³⁰

Nor need an instruction contain in itself all the qualifica-

Each instruction given need not embrace all the issues, or the whole case, or the whole of any branch of the case.

Alabama. Hawkins v. Hudson, 45 Ala. 482.

Arkansas. St. Louis, I. M. & S. Ry. Co. v. Baker, 67 Ark. 531.

California. People v. Clark, 84 Cal. 573, 24 Pac. 313; People v. Tamkin, 62 Cal. 468; People v. Morine, 61 Cal. 367.

Illinois. City of Rock Island v. Starky, 189 Ill. 515.

Indiana. Bundy v. McKnight, 48 Ind. 502; Hayes v. West, 37 Ind. 21; Taylor v. Wootan, 1 Ind. App. 188, 50 Am. St. Rep. 200.

Iowa. Munger v. City of Waterloo, 83 Iowa 559; Chapin v. Chicago, M. & St. P. Ry. Co., 79 Iowa 582; Deere v. Wolf, 77 Iowa 115; Timins v. Chicago, R. I. & P. Ry. Co., 72 Iowa 94; Funston v. Chicago, R. I. & P. R. Co., 61 Iowa 452.

Kansas. State v. Kyne, 10 Kan. App. 277, 62 Pac. 728.

Kentucky. Welsh v. Com. (Ky.), 60 S. W. 185.

Michigan. Anderson v. Walter, 34 Mich. 113.

Minnesota. Peterson v. Chicago, M. & St. P. Ry. Co., 38 Minn. 511.

Mississippi. Clisby v. Mobile & O. R. Co., 78 Miss. 937.

Missouri. Schroeder v. Michel, 98 Mo. 43; Dougherty v. Missouri R. Co., 97 Mo. 647; Muehlhausen v. St. Louis R. Co., 91 Mo. 332; Karle v. Kansas City, St. J. & C. B. R. Co., 55 Mo. 476; McKeon v. Citizens' Ry. Co., 43 Mo. 405; Shaw v. Missouri & K. Dairy Co., 56 Mo. App. 521;

Fletcher v. Milburn Mfg. Co., 35 Mo. App. 321.

Nebraska. Nebraska Nat. Bank v. Burke, 44 Neb. 234.

North Carolina. Barringer v. Burns, 108 N. C. 606.

Ohio. Ohliger v. City of Toledo, 20 Ohio Cir. Ct. R. 142, 10 Ohio Cir. Dec. 762.

Oregon. Smitson v. Southern Pac. Co., 37 Ore. 74, 60 Pac. 907.

Texas. Freiberg v. Johnson, 71 Tex. 558.

30—State v. Byrd, 41 Mont. 585, 111 Pac. 407; Grant v. Milam, 20 Okla. 672, 95 Pac. 424.

No single instruction is required to contain all the law applicable to the case. If it is correct as to the statement of the law with reference to the matter upon which it purports to advise the jury, it is sufficient. Harrod v. Bisson, 48 Ind. App. 549.

It is not essential that a single instruction should embody the entire law of the case, and the omission to state the entire law in one instruction is not error if the omission is reasonably supplied elsewhere, so that the charge as a whole fully and fairly states the law applicable to the issues. First Nat. Bank of Tishomingo v. Ingle, 37 Okla. 276, 132 Pac. 895.

Each separate instruction need not cover the entire case provided there is no conflict in the law as stated, and the different instructions considered as a whole fairly present the law of the case. Grant v. Milam, 20 Okla. 672, 95 Pac. 424.

tions and conditions necessary to render it correct and applicable to the case at bar.³¹

The proper qualification may be made in separate instructions.³²

The trial judge cannot be expected to reiterate every qualification and condition with every clause of the charge.³³

Omissions of one instruction may be supplied by the contents of another,³⁴ and when reference is made in one in-

31—California. *People v. Etting*, 99 Cal. 577, 34 Pac. 237; *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *People v. Hurtado*, 63 Cal. 288; *People v. Welch*, 49 Cal. 174; *People v. Doyell*, 48 Cal. 85.

Indiana. *Taylor v. Wootan*, 1 Ind. App. 188, 50 Am. St. Rep. 200.

Iowa. *Rice v. City of Des Moines*, 40 Iowa 638.

Minnesota. *Gates v. Manny*, 14 Minn. 21.

Missouri. *Perrette v. City of Kansas City*, 162 Mo. 238.

New York. *Hickenbottom v. Delaware, L. & W. R. Co.*, 122 N. Y. 91.

Oregon. *Farmers' & Traders' Nat. Bank v. Woodell*, 38 Ore. 294, 61 Pac. 837, 65 Pac. 520.

32—California. *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *Davis v. Button*, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545; *Bradley v. Lee*, 38 Cal. 362.

Colorado. *De St. Aubin v. Marshall Field & Co.*, 27 Colo. 414, 62 Pac. 199.

Florida. *Keech v. Enriquez*, 28 Fla. 597.

Georgia. *City Council of Augusta v. Tharpe*, 113 Ga. 152.

Illinois. *West Chicago St. Ry. Co. v. Kromshinsky*, 185 Ill. 92.

Iowa. *Allen v. Burlington, C. R. & N. R. Co.*, 57 Iowa 623; *Lombard*

v. Chicago, R. I. & P. R. Co., 47 Iowa 494; *Stier v. City of Oskaloosa*, 41 Iowa 353.

Missouri. *Meyer v. Southern Ry. Co. (Mo.)*, 36 S. W. 367.

Nebraska. *Omaha Fair & Exposition Ass'n v. Missouri Pac. Ry. Co.*, 42 Neb. 105.

Oregon. *Smitson v. Southern Pac. Co.*, 37 Ore. 74, 60 Pac. 907.

South Carolina. *Fletcher v. South Carolina & G. E. R. Co.*, 57 S. C. 205; *Thackston v. Port Royal & W. C. Ry. Co.*, 40 S. C. 80.

33—Watson v. Watson, 58 Mich. 507.

34—Placek v. Marquette Third Vein Coal Min. Co., 168 Ill. App. 335; *Evansville & T. H. R. Co. v. Hoffman*, 56 Ind. App. 530; *Gambino v. Manufacturers' Coal & Coke Co.*, 180 Mo. App. 643; *St. Louis, B. & M. Ry. Co. v. Jenkins*, — Tex. Civ. App. —, 163 S. W. 621.

The mere incompleteness of an instruction is not ground for condemning it, unless it is so erroneous in itself or so in conflict with some of the others that both cannot stand as correct expositions of the law. *Colono v. Consolidated Coal Co.*, 147 Ill. App. 327; *State v. Johnson*, 162 Iowa 597.

An incomplete statement in one instruction may be cured by a sup-

struction to some other part of the charge, or when words are used in some instructions that are correctly defined in others, the other parts of the charge referred to and the other instructions must be considered in determining whether or not the particular instructions under consideration are correct.³⁵

Reversal will not necessarily follow the giving of a defective instruction if, when taken in connection with the other charges, the law of the case is fairly given,³⁶ and no one instruction should be condemned as reversible error if it appears to be entirely clear as a guide to the jury when read with the others given in the case.³⁷

An entire oral charge must be construed as a unit,³⁸ and oral charges are to be read and construed together with written charges.³⁹

If two instructions are given on the same subject they should be considered together,⁴⁰ and where two instructions construed together fairly state the law, the case will not be reversed for error existing in one of them.⁴¹

The general charge must be construed in connection with the special charges, and errors or defects in the general charge may be cured by correct special instructions.⁴² But

plemental statement in another, if when both are read together the court can see that the jury could not have been misled by the incomplete charge. *Higgins v. Whitmore*, 116 Va. 414.

Where an omission is cured by other instructions plainly and intelligently submitting the omitted evidence to the jury, the error is corrected. *Johnson v. Springfield Traction Co.*, 176 Mo. App. 174.

35—*Southern Anthracite Coal Co. v. Bowen*, 93 Ark. 140.

36—*Ryan v. City of Chicago*, 181 Ill. App. 642; *Corell v. Williams & Hunting*, — Iowa —, 148 N. W. 633.

37—*Stoltze v. United Rys. Co. of St. Louis*, 183 Mo. App. 304.

38—*Swancutt v. W. M. Trout Auto Livery Co.*, 176 Ill. App. 606.

39—*Roberson v. State*, 183 Ala. 43.

40—*Utah Ass'n of Credit Men v. Boyle Furniture Co.*, 43 Utah 523, 136 Pac. 572.

41—*Chickasha St. R. Co. v. Marshall*, 43 Okla. 192, 141 Pac. 1172.

42—*Hammett v. Brown*, 60 Ala. 498; *Hemmingway v. Garth*, 51 Ala. 530; *Simpson v. Krumdick*, 28 Minn. 352; *Clafin v. Swoyer*, 5 Kulp (Pa.) 107; *Missouri, K. & T. Ry. Co. of Texas v. Rodgers*, 89 Tex. 675; *Gold-*

it is usually held that errors in the specific charges are not cured by the correctness of the general charge.⁴³

The rule that instructions must be read together and considered as a whole is frequently applied rather liberally.⁴⁴ If, when so construed, the instructions are fair and correct as a whole, and justice has been done, it is immaterial that a part or one or more of the instructions, considered separately, are erroneous. In such case the error is harmless, and not ground for reversal.⁴⁵

berg v. McCracken (Tex.), 8 S. W. 676; Campbell v. Fisher (Tex. Civ. App.), 24 S. W. 661.

43—Trogdon v. State, 133 Ind. 1; Pittsburgh, C. & St. L. Ry. Co. v. Krouse, 40 Ohio St. 217, 48 Am. Rep. 676; Rice v. Olin, 79 Pa. St. 391; Murray v. Com., 79 Pa. St. 311; Baxter v. Waite, 2 Wash. T. 228, 6 Pac. 429. But see Pierce v. Cloud, 42 Pa. St. 102, 82 Am. Dec. 496.

An obscure answer to a point may be aided by the general charge, but not an erroneous one. Rice v. Olin, 79 Pa. St. 391; Murray v. Com., 79 Pa. St. 311.

44—Langstaff-Orm Mfg. Co. v. Wilford, 160 Ky. 733.

45—Alabama. Southern Ry. Co. v. Lynn, 128 Ala. 297; Montgomery & E. Ry. Co. v. Stewart, 91 Ala. 421.

Arkansas. Hurley v. State, 29 Ark. 17.

California. People v. Emerson, 130 Cal. 562, 62 Pac. 1069; Ballou v. Andrews Banking Co., 128 Cal. 562, 61 Pac. 102; People v. Anderson, 105 Cal. 32, 38 Pac. 513; Murray v. White, 82 Cal. 119, 23 Pac. 35; People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719.

Colorado. Simonton v. Rohm, 14 Colo. 51, 23 Pac. 86; Dozenback v. Raymer, 13 Colo. 451, 22 Pac. 787;

Coleman v. Davis, 13 Colo. 98, 21 Pac. 1018; Hurd v. Atkins, 1 Colo. App. 449, 29 Pac. 528.

Florida. Kennard v. State, 42 Fla. 581.

Georgia. Webb v. Wight & Westlosky Co., 112 Ga. 432.

Idaho. Territory v. Evans, 2 Idaho 391, 17 Pac. 139.

Illinois. Fessenden v. Doane, 188 Ill. 228; Howard v. People, 185 Ill. 552; Ritzman v. People, 110 Ill. 363; City of Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683; Toledo, W. & W. Ry. Co. v. Ingraham, 77 Ill. 309; Chicago & W. I. R. Co. v. Doan, 93 Ill. App. 247; Johnston v. Hirschberg, 85 Ill. App. 47.

Indiana. McCaughey v. State, 156 Ind. 41; Wabash & W. Ry. Co. v. Morgan, 132 Ind. 430; Craig v. Frazier, 127 Ind. 286; Cowger v. Land, 112 Ind. 263; Boyle v. State, 105 Ind. 469, 55 Am. Rep. 218; Conrad v. Kinzie, 105 Ind. 281; Lemmon v. Moore, 94 Ind. 40; McDermott v. State, 89 Ind. 187; Branstetter v. Dorrrough, 81 Ind. 527; Eggleston v. Castle, 42 Ind. 531; Citizens' St. Ry. Co. v. Mere, 26 Ind. App. 284.

Iowa. State v. Murdy, 81 Iowa 603; Jamison v. Weaver, 81 Iowa 212; Riegelmann v. Todd, 77 Iowa 696; Harrison v. Snair, 76 Iowa 558;

This rule is, of course, always subject to the qualification that the jury must not have been misled by the alleged error

State v. Pugsley, 75 Iowa 743; **Helt v. Smith**, 74 Iowa 667; **Knapp v. Sioux City & P. R. Co.**, 71 Iowa 41; **Albertson v. Keokuk & D. M. R. Co.**, 48 Iowa 292.

Kansas. **Hays v. Farwell**, 53 Kan. 78, 35 Pac. 794; **Cain Bros. Co. v. Wallace**, 46 Kan. 138, 26 Pac. 445; **Central Branch Union Pac. R. Co. v. Andrews**, 41 Kan. 370, 21 Pac. 276; **State v. Yarborough**, 39 Kan. 581, 18 Pac. 474; **State v. Dickson**, 6 Kan. 209.

Kentucky. **Rucker v. Hamilton**, 3 Dana 43.

Louisiana. **State v. Hannibal**, 37 La. Ann. 619; **State v. Ferguson**, 37 La. Ann. 51.

Maryland. **Gill v. Staylor**, 93 Md. 453.

Michigan. **Cleveland v. Miller**, 94 Mich. 97; **Pray v. Cadwell**, 50 Mich. 222; **Dibble v. Nash**, 47 Mich. 589; **Driscoll v. People**, 47 Mich. 413; **Frankel v. Coots**, 41 Mich. 75; **Greenlee v. Lowing**, 35 Mich. 64; **McGinnis v. Kempsey**, 27 Mich. 363.

Minnesota. **Spencer v. Tozer**, 15 Minn. 146 (Gil. 112).

Mississippi. **Hawthorne v. State**, 58 Miss. 778; **Evans v. State**, 44 Miss. 731; **Mask v. State**, 7 George 77.

Missouri. **State v. Miller**, 159 Mo. 113; **Harrington v. City of Sedalia**, 98 Mo. 583; **State v. Mathews**, 98 Mo. 125; **Reilly v. Hannibal & St. J. R. Co.**, 94 Mo. 600; **Wallich v. Morgan**, 39 Mo. App. 469; **Missouri P. R. Co. v. Schoennen**, 37 Mo. App. 612; **Blaydes v. Adams**, 35 Mo. App. 526; **Chicago, S. F. & C. Ry. Co. v. Vivian**, 33 Mo. App. 583; **State v. Gregory**, 30 Mo. App. 582.

Montana. **State v. Whorton**, 25 Mont. 11, 63 Pac. 627.

Nebraska. **Omaha & C. B. Railway & Bridge Co. v. Levinston**, 49 Neb. 17.

Nevada. **State v. Raymond**, 11 Nev. 98; **Caples v. Central Pac. R. Co.**, 6 Nev. 265.

New York. **Loram v. Second Ave. R. Co.**, 11 N. Y. St. 652.

North Carolina. **Lewis v. Albe-marle & R. R. Co.**, 95 N. C. 179.

Oregon. **Farmers' & Traders' Nat. Bank v. Woodell**, 38 Ore. 294, 61 Pac. 837, 65 Pac. 520.

Pennsylvania. **Lehigh Val. R. Co. v. Brandtmaier**, 113 Pa. St. 610.

South Carolina. **State v. Lee**, 58 S. C. 335; **McGhee v. Wells**, 57 S. C. 280, 76 Am. St. Rep. 567; **State v. Butler**, 47 S. C. 25; **Ballou v. Young**, 42 S. C. 170; **State v. Williams**, 35 S. C. 344; **State v. Banister**, 35 S. C. 290.

Texas. **St. Louis & S. F. Ry. Co. v. McLain**, 80 Tex. 85; **Rost v. Missouri Pac. Ry. Co.**, 76 Tex. 168; **Pridham v. Weddington**, 74 Tex. 354; **Fort Worth & D. C. Ry. Co. v. Hogsett**, 67 Tex. 685; **Ross v. State**, 29 Tex. 499; **Wood v. Chambers**, 20 Tex. 247, 70 Am. Dec. 382; **Robinson v. Varnell**, 16 Tex. 382; **Mercer v. Hall**, 2 Tex. 284; **Hodges v. State**, 22 Tex. App. 415; **Street v. State**, 7 Tex. App. 5; **Jobe v. Houston (Tex. Civ. App.)**, 23 S. W. 408; **Spears v. State**, 41 Tex. Cr. App. 527.

Utah. **McCornick v. Queen of Sheba Gold Mining & Milling Co.**, 23 Utah 71, 63 Pac. 820; **People v. Sensabaugh**, 2 Utah 473; **Nickles v. Wells**, 2 Utah 167.

to the prejudice of the party complaining, and in most cases the rule is stated with this qualification.⁴⁶

Mere insufficiency in an instruction correct as far as it goes may be cured by other instructions.⁴⁷ So, mere am-

West Virginia. *Huffman v. Alderson's Adm'r*, 9 W. Va. 616.

United States. *Evanston v. Gunn*, 99 U. S. (9 Otto) 660, 25 L. Ed. 306; *Gregg v. Moss*, 14 Wall. 564, 20 L. Ed. 740; *Western Coal & Mining Co. v. Ingraham*, 17 C. C. A. 71, 70 Fed. 219.

46—Alabama. *Alabama Consol. Coal & Iron Co. v. Heald*, 168 Ala. 626; *Louisville & N. R. Co. v. Orr*, 94 Ala. 602; *Magee v. Billingsley*, 3 Ala. 680.

Arkansas. *Wilcox v. Hebert*, 90 Ark. 145.

California. *Hansecom v. Drullard*, 79 Cal. 234, 21 Pac. 736; *People v. Cleveland*, 49 Cal. 578; *Carrington v. Pacific Mail Steamship Co.*, 1 Cal. 475.

Colorado. *Finerty v. Fritz*, 6 Colo. 136; *Patrick Red Sandstone Co. v. Skoman*, 1 Colo. App. 323, 29 Pac. 21.

Connecticut. *Collins v. Richmond Stove Co.*, 63 Conn. 361; *Morehouse v. Remson*, 59 Conn. 401; *Knowles v. Crampton*, 55 Conn. 344.

Illinois. *North Chicago St. R. Co. v. Boyd*, 156 Ill. 416; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320n; *Toledo, W. & W. Ry. Co. v. Ingraham*, 77 Ill. 309; *Lodge v. Gatz*, 76 Ill. 272; *Springdale Cemetery Ass'n v. Smith*, 24 Ill. 480.

Indiana. *Coble v. Eltzroth*, 125 Ind. 429; *Hutchins v. Weldin*, 114 Ind. 80; *Kopelke v. Kopelke*, 112 Ind. 435; *Louisville, N. A. & C. Ry. Co. v. Jones*, 108 Ind. 551; *Stockwell v. Brant*, 97 Ind. 474; *Stout v. State*, 96 Ind. 407; *Siebert v. State*, 95 Ind.

471; *Young v. Clegg*, 93 Ind. 371; *Cleveland, C., C. & I. Ry. Co. v. Bates*, 91 Ind. 289.

Iowa. *Parker v. Dubuque Southwestern R. Co.*, 34 Iowa 399; *Smothers v. Hanks*, 34 Iowa 286, 11 Am. Rep. 141; *Brown v. Bridges*, 31 Iowa 138; *Ferguson v. Beadle*, 30 Iowa 477.

Kansas. *Lawder v. Hinderson*, 36 Kan. 754, 14 Pac. 164.

Michigan. *Daniels v. Clegg*, 28 Mich. 32.

Mississippi. *Nelson v. State*, 61 Miss. 212.

Missouri. *First Nat. Bank of Burlington v. Hatch*, 98 Mo. 376; *McDowell v. Friedman Bros. Shoe Co.*, 135 Mo. App. 276; *Ferris v. Chicago, S. F. & C. R. Co.*, 51 Mo. App. 297.

New York. *People v. Dimick*, 107 N. Y. 13; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

South Dakota. *State v. Brennan*, 2 S. D. 384.

Texas. *Vaughan v. State*, 21 Tex. 752; *Able v. Lee*, 6 Tex. 427; *Bayne v. State*, 29 Tex. App. 132; *Rand v. C. R. Johns & Sons (Tex. App.)* 15 S. W. 200.

Vermont. *Fassett v. Town of Roxbury*, 55 Vt. 552.

Washington. *State v. Rosener*, 8 Wash. 42, 35 Pac. 357.

United States. *Village of Evanston v. Gunn*, 99 U. S. 660, 25 L. Ed. 306; *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114.

47—Alabama. *Johnson v. State*, 81 Ala. 54.

biguity, uncertainty, or a misleading tendency may be thus cured.⁴⁸ Verbal inaccuracies, obscurity and loose expres-

Arkansas. *Lowe v. Hart*, 93 Ark. 548.

California. *Hearne v. De Young*, 132 Cal. 357, 64 Pac. 576; *People v. Wallace*, 109 Cal. 611, 42 Pac. 159.

Colorado. *Doherty v. Morris*, 17 Colo. 105, 28 Pac. 85.

Florida. *Keech v. Enriquez*, 23 Fla. 597; *Montgomery v. Knox*, 23 Fla. 595.

Illinois. *Burt v. Garden City Sand Co.*, 237 Ill. 473.

Indiana. *Chicago. St. L. & P. R. Co. v. Spilker*, 134 Ind. 380; *Evansville & T. H. R. Co. v. Talbot*, 131 Ind. 221; *Western U. Tel. Co. v. Buskirk*, 107 Ind. 549; *Louisville, N. A. & C. Ry. Co. v. Grantham*, 104 Ind. 353; *Stockwell v. Brant*, 97 Ind. 474; *Young v. Clegg*, 93 Ind. 371; *Western U. Tel. Co. v. Young*, 93 Ind. 118; *Wright v. Nipple*, 92 Ind. 310; *Smurr v. State*, 88 Ind. 504; *Walker v. Heller*, 73 Ind. 46; *Binns v. State*, 66 Ind. 428; *Achey v. State*, 64 Ind. 56; *Jones v. State*, 49 Ind. 549; *Pittsburgh, C., C. & St. L. Ry. Co. v. Noftsgger*, 26 Ind. App. 614; *Maxon v. Clark*, 24 Ind. App. 620; *Mendenhall v. Stewart*, 18 Ind. App. 262; *Lake Erie & W. R. Co. v. Carson*, 4 Ind. App. 185.

Iowa. *De Goey v. Van Wyk*, 97 Iowa 491; *Shively v. Cedar Rapids, I. F. & N. W. Ry. Co.*, 74 Iowa 169, 7 Am. St. Rep. 471; *State v. Calkins*, 73 Iowa 128.

Mississippi. *Cook v. State (Miss.)* 28 So. 833.

Nebraska. *Parsons v. State*, 61 Neb. 244.

New York. *Hickenbottom v. Delaware, L. & W. R. Co.*, 122 N. Y. 91.

North Carolina. *Barringer v. Burns*, 108 N. C. 606.

Oregon. *State v. Savage*, 36 Ore. 191, 60 Pac. 610, 61 Pac. 1128.

Texas. *Smith v. State*, 22 Tex. App. 316.

48—**Alabama.** *Koosa & Co. v. Warten*, 158 Ala. 496.

Arkansas. *Junction City Lumber Co. v. Sharp*, 92 Ark. 538; *Fitzpatrick v. State*, 37 Ark. 238; *Burton v. Merriek*, 21 Ark. 357.

California. *Doty v. O'Neil*, 95 Cal. 244, 30 Pac. 526; *People v. Chun Heong*, 86 Cal. 329, 24 Pac. 1021; *People v. Turcott*, 65 Cal. 126, 3 Pac. 461; *People v. Hunt*, 59 Cal. 430; *Livermore v. Stine*, 43 Cal. 274.

Florida. *Pensacola Elec. Co. v. Bissett*, 59 Fla. 360; *Kennard v. State*, 42 Fla. 581; *Gray v. State*, 42 Fla. 174.

Illinois. *Cleveland, C., C. & St. L. Ry. Co. v. Keenan*, 190 Ill. 217; *Milling v. Hillenbrand*, 156 Ill. 310; *Tedens v. Sanitary Dist. of Chicago*, 149 Ill. 87; *Illinois Cent. R. Co. v. Swearingen*, 47 Ill. 206.

Indiana. *Cleveland, C., C. & I. Ry. Co. v. Bates*, 91 Ind. 289.

Iowa. *Riegelman v. Todd*, 77 Iowa 696.

Kansas. *State v. McLafferty*, 47 Kan. 140, 27 Pac. 843; *Gillett v. Corum*, 7 Kan. 156.

Kentucky. *Clark v. Fox*, 9 Dana 195.

Michigan. *Noble v. Bessemer Steamship Co.*, 127 Mich. 103, 54 L. R. A. 456, 89 Am. St. Rep. 461; *People v. Ricketts*, 108 Mich. 584; *Hart v. Walker*, 100 Mich. 406; *Wreggitt*

sions in an instruction may be cured by other instructions,⁴⁹ but the giving of instructions not correct, when considered alone or in connection with other instructions, is reversible error.⁵⁰

The rule that the charge is to be taken as a whole does not apply where it has inconsistent and contradictory paragraphs,⁵¹ and error in one instruction is not obviated by the giving of other conflicting instructions.⁵²

v. Barnett, 99 Mich. 477; *Fisher v. People*, 20 Mich. 135.

Minnesota. *Simpson v. Krumdick*, 28 Minn. 352.

Missouri. *Meyer v. Southern Ry. Co. (Mo.)*, 36 S. W. 367; *McGrew v. Missouri Pac. Ry. Co.*, 109 Mo. 582; *Goetz v. Hannibal & St. J. R. Co.*, 50 Mo. 472; *Milligan v. Chicago, B. & Q. R. Co.*, 79 Mo. App. 393, 2 Mo. App. 459; *McNichols v. Nelson*, 45 Mo. App. 446; *Suttie v. Aloe*, 39 Mo. App. 38.

Nebraska. *Bingham v. Hartley*, 44 Neb. 682; *Omaha Fair & Exposition Ass'n v. Missouri Pac. Ry. Co.*, 42 Neb. 105.

Nevada. *State v. Ah Mook*, 12 Nev. 369.

North Carolina. *Marcom v. Raleigh & A. A. L. R. Co.*, 126 N. C. 200.

Texas. *Bell v. Martin (Tex. Civ. App.)* 28 S. W. 108.

Washington. *Engelking v. City of Spokane*, 59 Wash. 446, 1 N. C. C. A. 142, 29 L. R. A. (N. S.) 481n, 110 Pac. 25; *State v. Rosener*, 8 Wash. 42, 35 Pac. 357; *Schmiege v. Wold*, 1 Wash. T. 472.

Wisconsin. *West v. Milwaukee, L. S. & W. Ry. Co.*, 56 Wis. 318.

49—**Alabama.** *Alabama Consol. Coal & Iron Co. v. Heald*, 168 Ala. 626.

California. *Hill v. Finigan*, 77 Cal. 267, 11 Am. St. Rep. 279n, 19 Pac. 494; *Wilson v. Southern Pac. R. Co.*, 62 Cal. 164.

Indiana. *Johnson v. Johnson*, 156 Ind. 592; *Louisville, N. A. & C. Ry. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432; *Cline v. Lindsey*, 110 Ind. 337; *Louisville, N. A. & C. Ry. Co. v. Jones*, 108 Ind. 551; *Brown v. State*, 105 Ind. 385; *Siebert v. State*, 95 Ind. 471; *Stout v. State*, 90 Ind. 1; *Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110.

Iowa. *Harger v. Spofford*, 46 Iowa 11.

Nebraska. *Bingham v. Hartley*, 44 Neb. 682.

United States. *Rogers v. The Marshal*, 1 Wall. 644, 17 L. Ed. 714.

50—*Langstaff-Orm Mfg. Co. v. Wilford*, 160 Ky. 733.

Where an instruction deals with a material proposition or issue of the case and is erroneous, the presumption is that the error was harmful. *Evansville & T. H. R. Co. v. Hoffman*, 56 Ind. App. 530.

51—*St. Louis Southwestern Ry. Co. of Texas v. Green*, — Tex. Civ. App. —, 133 S. W. 241.

52—*West Chicago St. Ry. Co. v. Winters*, 107 Ill. App. 221. See also, *Cromer v. Borders Coal Co.*, 246 Ill. 451.

A correct instruction does not

The giving of an instruction announcing an erroneous rule of law is not cured by another instruction containing a correct statement of the rule.⁵³ A subsequent instruction

cure the error in a conflicting incorrect charge. *McLemore v. State*, 111 Ark. 457; *Patterson v. Evans*, 254 Mo. 293.

"A correct instruction does not necessarily cure an error in another instruction, unless, as a series, the instructions state the law correctly." *Chicago North Shore St. Ry. Co. v. Hebson*, 93 Ill. App. 98.

An erroneous instruction putting the burden of proof as to a particular defense upon the defendant in a criminal case is not cured by a general charge upon the burden of proof and the doctrine of reasonable doubt. *State v. Grinstead*, 10 Kan. App. 74, 61 Pac. 975; *People v. Shanley*, 49 App. Div. (N. Y.) 56.

Contra, *State v. Freeman*, 100 N. C. 429.

Instructions must be construed together where not repugnant. *Grayville Waterworks v. Burdick*, 109 Ill. App. 520; *Thompson v. Koperlski*, 109 Ill. App. 466.

53—**Alabama.** *Schieffelin v. Schieffelin*, 127 Ala. 14.

California.—*People v. Marshall*, 112 Cal. 422, 44 Pac. 718; *Sappenfield v. Main St. & A. P. R. Co.*, 91 Cal. 48, 27 Pac. 590; *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69.

Colorado. *Mackey v. People*, 2 Colo. 13.

District of Columbia. *Boswell v. District of Columbia*, 21 D. C. 526.

Illinois. *Steinmeyer v. People*, 95 Ill. 383; *Wabash R. Co. v. Henks*, 91 Ill. 406; *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Camp Point Mfg. Co. v. Ballow*, 71 Ill. 417; *Quinn v. Dono-*

van, 35 Ill. 194; *Gedney v. Gedney*, 61 Ill. App. 511; *City of Joliet v. Walker*, 7 Ill. App. 267; *Sweet v. Leach*, 6 Ill. App. 212; *Gale v. Rec-tor*, 5 Ill. App. 481; *Ottawa, O. & F. River Val. R. Co. v. McMath*, 4 Ill. App. 356; *Shugart v. Halliday*, 2 Ill. App. 45.

Indiana. *Plummer v. State*, 135 Ind. 308; *McCrory v. Anderson*, 103 Ind. 12; *Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171; *Uhl v. Bingham*, 78 Ind. 365; *Binns v. State*, 66 Ind. 428; *Achey v. State*, 64 Ind. 56; *Gueting v. State*, 63 Ind. 278; *Toledo, W. & W. Ry. Co. v. Shuckman*, 50 Ind. 42.

Kansas. *Horne v. State*, 1 Kan. 42, 81 Am. Dec. 499.

Kentucky. *Clay's Heirs v. Miller*, 3 T. B. Mon. 146.

Louisiana. *State v. Jones*, 36 La. Ann. 204.

Minnesota. *Gorstz v. Pinske*, 82 Minn. 456, 83 Am. St. Rep. 441.

Missouri. *State v. McNally*, 87 Mo. 644; *Glasecock v. Chicago & A. R. Co.*, 69 Mo. 589; *Hickaur v. Griffin*, 6 Mo. 37, 34 Am. Dec. 124; *Baer v. Lisman*, 85 Mo. App. 317; *Billups v. Daggs*, 38 Mo. App. 367; *McBeth v. Craddock*, 28 Mo. App. 380; *Singer Mfg. Co. v. Hudson*, 4 Mo. App. 145; *State v. Laurie*, 1 Mo. App. 371.

Nebraska. *Jensen v. Halstead*, 61 Neb. 249; *Swift & Co. v. Holoubek*, 60 Neb. 784; *Barr v. State*, 45 Neb. 458; *Richardson v. Halstead*, 44 Neb. 606; *Carson v. Stevens*, 40 Neb. 112, 42 Am. St. Rep. 661; *Wasson v. Palmer*, 13 Neb. 376.

Pennsylvania. *Rice v. Olin*, 79 Pa.

will not revoke a previous one by implication,⁵⁴ and an oral statement of a judge has been held not equivalent to an instruction curing an error.⁵⁵

Where an instruction is so far erroneous that another correct instruction is necessarily contradictory, the only way to cure the error is to expressly withdraw the erroneous instruction and substitute therefor the correct instruction.⁵⁶ If the erroneous instruction is not withdrawn, it will be presumed that the jury followed the erroneous instruction, and that injury resulted, unless it affirmatively appears that

St. 391; *Murray v. Com.*, 79 Pa. St. 311.

Texas. *Bruce v. Koch*, 94 Tex. 192; *Mershon v. Bosley* (Tex. Civ. App.) 62 S. W. 799.

Washington. *Miller v. Vermurie*, 7 Wash. 386, 34 Pac. 108.

Wisconsin. *Imhoff v. Chicago & M. Ry. Co.*, 20 Wis. 344.

Whatever is vicious or vaguely worded is not cured by other instructions except in very plain cases,—ones entirely free from doubt. *Quirk v. St. Louis United Elevator Co.*, 126 Mo. 279.

54—*Adams v. Macfarlane*, 65 Me. 143.

55—*Bloomington & N. Ry. Co. v. Gabbert*, 111 Ill. App. 147.

56—**Indiana.** *Plummer v. State*, 135 Ind. 308; *McCrory v. Anderson*, 103 Ind. 12; *Uhl v. Bingaman*, 78 Ind. 365; *Guetig v. State*, 63 Ind. 278; *Howard v. State*, 50 Ind. 190; *Bradley v. State*, 31 Ind. 492; *Torr v. Torr*, 20 Ind. 118; *Terre Haute & I. R. Co. v. Pruitt*, 25 Ind. App. 227.

Kentucky. *Clay's Heirs v. Miller*, 3 T. B. Mon. 149.

Louisiana. *State v. Jones*, 36 La. Ann. 204.

Missouri. *Glascock v. Chicago & A. R. Co.*, 69 Mo. 589.

Nebraska. *Swift & Co. v. Holoubek*, 60 Neb. 784.

New York. *Chapman v. Erie Ry. Co.*, 55 N. Y. 579; *Meyer v. Clark*, 45 N. Y. 285, rev'g 2 Daly 497; *Willard v. Press Pub. Co.*, 52 App. Div. 448.

Pennsylvania. *Sommer v. Gilmore*, 168 Pa. St. 117.

Texas. *Missouri, K. & T. Ry. Co. of Texas v. Rodgers*, 89 Tex. 675.

West Virginia. *McKelvey v. Chesapeake & O. Ry. Co.*, 35 W. Va. 500.

Wisconsin. *Eggett v. Allen*, 106 Wis. 633; *Imhoff v. Chicago & M. Ry. Co.*, 20 Wis. 344.

See also, *State v. Harkin*, 7 Nev. 377.

An error in the charge is not cured by a retraction of it on exception taken, accompanied by the remark of the judge that he had no doubt of its correctness. *Meyer v. Clark*, 45 N. Y. 285, rev'g 2 Daly 497.

It is error in a criminal case for the court to place before the jury the probable result of a verdict of guilty, and this, though the mistake be explicitly rectified. *Com. v. Switzer*, 134 Pa. St. 383, 26 Wkly. Notes Cas. 46.

no injury resulted.⁵⁷ It is always competent for the judge to withdraw an improper instruction and substitute therefor a correct instruction, and, if this is done, the error is cured.⁵⁸ The express retraction of improper remarks cures the error unless it appears affirmatively that the retraction was not accepted by the jury.⁵⁹

“If an instruction contains a complete statement of a proposition of law applicable to the facts in a given case, it will be held good as a part of a series containing the entire law of the case.”⁶⁰ But so far as an instruction undertakes to state a proposition of law, it must do so completely and correctly.⁶¹ Thus, an instruction which attempts to cover

57—Grand Rapids & I. R. Co. v. Monroe, 47 Mich. 152; State v. Ferguson, 9 Nev. 106.

But a verdict rendered according to the correct instruction will be sustained. Avery v. New York Cent. & H. River R. Co., 26 N. Y. St. 279.

58—Georgia. Central of Georgia R. Co. v. Ray, 133 Ga. 126.

Indiana. Fuelling v. Fuesse, 43 Ind. App. 441.

Kansas. State v. Wells, 54 Kan. 161, 37 Pac. 1005.

Maine. Bradstreet v. Rich, 74 Me. 303.

Michigan. Kelly v. Hendrie, 26 Mich. 255.

New York. Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486; City Trust, Safe-Deposit & Surety Co. v. Fidelity & Casualty Co., 58 App. Div. 18; McMahon v. New York News Pub. Co., 51 App. Div. 488; Pollock v. Brooklyn & C. T. R. Co., 60 Hun 584 mem., 15 N. Y. Supp. 189; Zent v. Watts, 1 N. Y. Supp. 702.

North Carolina. State v. May, 15 N. C. 328.

Pennsylvania. Sargeant v. Martin, 133 Pa. St. 122.

South Carolina. Sharp v. Kinsman, 18 S. C. 113.

Tennessee. Green v. State, 97 Tenn. 50.

Texas. Yoakum v. Mettasch (Tex. Civ. App.) 26 S. W. 129.

Where, upon failure of the jury to agree, the special instructions given them are recalled, and, being charged to find for the defendant, they return a verdict accordingly, the special instructions are superseded, and will not be reviewed on error. As the verdict was not found on them they do not prejudice the plaintiff. Kelly v. Hendrie, 26 Mich. 255.

59—Reinhold v. State, 130 Ind. 467; Brooks v. Rochester Ry. Co., 10 Misc. (N. Y.) 88; State v. McNair, 93 N. C. 628.

60—Yundt v. Hartrunft, 41 Ill. 9; Walker v. Collier, 37 Ill. 362; Taylor v. Wootan, 1 Ind. App. 188, 5 Am. St. Rep. 200.

61—Forsyth v. Bower, 54 Cal. 639; Ohio, I. & W. Ry. Co. v. Kleinsmith, 38 Ill. App. 45; Sweet v. Leach, 6

the whole case, and authorizes a finding for one party or the other, according as the jury may determine certain facts, is erroneous if it omits any material issue, and such error is not cured by another instruction, properly submitting the omitted issue.⁶²

An instruction directing a verdict must be considered by itself,⁶³ and such an instruction cannot be aided or cured by other instructions.⁶⁴

Under the rule that a party is not entitled to have even a correct request given in the precise language of the request,⁶⁵ the refusal of an instruction cannot be complained of if the subject of the request is fully covered by the court in its main charge,⁶⁶ and it is immaterial at whose instance

Ill. App. 212; *Gale v. Rector*, 5 Ill. App. 481; *Ottawa, O. & F. River Val. R. Co. v. McMath*, 4 Ill. App. 356. But see, *Schroeder v. Michel*, 98 Mo. 43.

62—**Arizona.** *Territory v. Hancock*, 4 Ariz. 154, 35 Pac. 1060.

Georgia. *Georgia & A. R. Co. v. Rawson*, 112 Ga. 471.

Illinois. *McNulta v. Jenkins*, 91 Ill. App. 309; *Grieb v. Caraker*, 57 Ill. App. 678.

Missouri. *Desnoyers Shoe Co. v. Lisman*, 85 Mo. App. 340; *State v. Davies*, 80 Mo. App. 239; *Hohstadt v. Daggs*, 50 Mo. App. 240.

Nebraska. *Dobson v. State*, 61 Neb. 584; *Burlingim v. Baders*, 45 Neb. 673.

Virginia. *Norfolk & W. R. Co. v. Mann*, 99 Va. 180.

West Virginia. *McVey v. St. Clair Co.*, 49 W. Va. 412.

63—*City of Chicago v. Sutton*, 136 Ill. App. 221.

64—*Wallace v. Strickler*, 95 Ark. 108; *Cromer v. Borders Coal Co.*, 246 Ill. 451; *Jarnecki v. Chicago Consol. Traction Co.*, 175 Ill. App. 424; *Connor v. American Spirits Mfg. Co.*, 175

Ill. App. 159; *Driza v. Jones & Adams Coal Co.*, 171 Ill. App. 139; *St. John v. Illinois Cent. R. Co.*, 168 Ill. App. 599; *Prante v. Hartman*, 168 Ill. App. 393; *Lifschitz v. City of Chicago*, 150 Ill. App. 201.

Error in instruction directing a verdict is not cured by other instructions. *Krieger v. Aurora, E. & C. R. Co.*, 242 Ill. 544, rev'g 148 Ill. App. 613.

65—See § 189, *ante*, "Duty to follow language of request."

66—**California.** *Manning v. Dallas*, 73 Cal. 420, 15 Pac. 34; *Davis v. Perley*, 30 Cal. 630.

Colorado. *Marsh v. Cramer*, 16 Colo. 331, 27 Pac. 169.

Georgia. *Rockmore v. State*, 93 Ga. 123.

Illinois. *State v. Wilson*, 3 Ill. (2 Scam.) 225.

Indiana. *Hipes v. State*, 73 Ind. 39.

Iowa. *State v. La Grange*, 94 Iowa 60.

Massachusetts. *Saunders v. Whitcomb*, 177 Mass. 457.

Michigan. *Brown v. McCord & Bradfield Furniture Co.*, 65 Mich.

the subsequent instruction was given.⁶⁷ Of course, the instruction given must be the substantial equivalent of the instruction refused.⁶⁸ Failure to charge upon a particular subject is cured by subsequently giving an instruction fully covering the ground.⁶⁹ In general, a correct abstract instruction will not cure the error in failing to give a concrete instruction on the same subject, applying the law to the facts of the case,⁷⁰ but where a part of a main charge is inconsistent with a request of a party granted at the close of the main charge, the requested instruction must control.⁷¹

§ 198. Same—Illustrations.

It has been frequently ruled that a defense like contributory negligence or assumption of risk may properly be left to a separate instruction, and an instruction omitting any reference to such defense is not erroneous,⁷² and the fact that some instructions fail to distinguish between the defense of contributory negligence and assumed risk is not prejudicial error where other instructions correctly define contributory negligence.⁷³

An instruction requiring a defendant to "establish" its plea of contributory negligence has been held not mislead-

360; *Grand Rapids & I. R. Co. v. Cameron*, 45 Mich. 451.

New York. *People v. Fanshawe*, 65 Hun 77; *Parker v. Stafford*, 61 Hun 623, 16 N. Y. 756.

Washington. *State v. Murphy*, 13 Wash. 229, 43 Pac. 44.

But see, *People v. Ramirez*, 13 Cal. 173.

67—*Herhold v. City of Chicago*, 108 Ill. 467.

68—*Davis v. Moore*, 22 Ky. L. Rep. 261.

69—*Postal Tel. Cable Co. v. Douglass*, 96 Ga. 816; *Cafnden & R. Water Co. v. Ingraham*, 85 Me. 179; *Lowriamore v. Palmer Mfg. Co.*, 60 S. C. 153; *State v. Lee*, 58 S. C. 335;

Wells v. Houston, 26 Tex. Civ. App. 629; *Lane v. State*, 41 Tex. Cr. App. 558.

70—*Gorstz v. Pinske*, 82 Minn. 456, 83 Am. St. Rep. 441.

71—*Goetz v. Metropolitan St. Ry. Co.*, 54 App. Div. (N. Y.) 365.

72—*Johnson v. Springfield Traction Co.*, 176 Mo. App. 174.

It cannot be contended on appeal, that an instruction as to contributory negligence was indefinite and misleading where that issue was fully covered by other instructions. *St. John v. Cascade Lumber & Shingle Co.*, 53 Wash. 193, 101 Pac. 833.

73—*Miller v. Foundation Co.*, 93 Kan. 38, 143 Pac. 493.

ing when the charge as a whole was considered,⁷⁴ and an instruction omitting the essential element of assumed risk may be cured by subsequent instructions.⁷⁵

Where an instruction as a whole states the true rule as to the liability of a city to a traveler on its streets, the fact that one phrase states that it was the city's duty to keep a walk in a reasonably safe condition does not render the instruction erroneous.⁷⁶

In an action for injuries to a servant in a sawmill, the giving of inaccurate or incomplete instructions that it was the defendant's duty to furnish safe appliances was not prejudicial when in the other charges statements as to the employer's duty were qualified with the words "by the exercise of ordinary care."⁷⁷

The error in giving instructions amounting to a complete statement and almost a quotation of the employers' liability law, which state the law correctly in the abstract, but which might be misleading as applied to a case on trial, is obviated where it appears that the instructions as a whole correctly state the law.⁷⁸

An erroneous instruction as to liability for assault, in an action where a passenger was assaulted by another passenger, has been held not prejudicial when the instructions were considered as a whole.⁷⁹

Where a sentence as a whole states the rule for measuring damages for injury to personal property, an exception to a part of the sentence cannot be sustained.⁸⁰

The omission of the word "express" before "malice" in an instruction defining murder is not error warranting re-

74—Houston & T. C. R. Co. v. Johnson, 103 Tex. 320.

75—Montgomery Coal Co. v. Barlinger, 109 Ill. App. 185, rev'd 218 Ill. 327.

76—Finnane v. City of Perry, 164 Iowa 171, 5 N. C. C. A. 463.

77—Pine Mountain Mfg. Co. v. Bishop, 160 Ky. 575.

78—Schaller v. Pacific Face Brick Co., 70 Ore. 557, 139 Pac. 913.

79—Kelly v. Navy Yard Route, 77 Wash. 148, 137 Pac. 444.

80—Ballanger v. Shumate, 10 Ala. App. 329.

versal when the definition as a whole presents fully what it takes to constitute murder,⁸¹ and an oral charge as to pleas of not guilty and insanity has been held not objectionable when considered as a whole.⁸²

§ 199. Particular words and phrases.

The construction of particular words and phrases has already been referred to in the chapters dealing with the general requisites of instructions,⁸³ and it has also been noted that instructions will be construed according to their essential meaning, and that mere verbal inaccuracies are not sufficient error to warrant reversal unless the charge is rendered misleading.⁸⁴ As to other illustrations of the construction of particular words or phrases, it may be noted that the phrase, "the evidence," has been construed to mean "all the evidence";⁸⁵ that "and thereby" is synonymous with "in consequence thereof";⁸⁶ and that the word "his," referring to men and women, is used in a generic sense.⁸⁷

In an action for personal injury, the use of the word "accident" in an instruction is not erroneous where from the reading of the entire instruction it is apparent that such word was used to designate the occurrence or happening in question, and it must have been so understood by the jury.⁸⁸

81—*Johnson v. State*, 63 Tex. Cr. App. 50.

82—*Harris v. State*, 8 Ala. App. 33.

83—See chs. III, IV, V, *ante*.

84—See ch. V, § 32, *ante*.

85—*Adams v. Pease*, 113 Ill. App. 356.

86—*Pope v. Chicago City Ry. Co.*, 113 Ill. App. 503.

87—*Village of Wilmette v. Brachle*, 110 Ill. App. 356, *aff'd* 209 Ill. 621.

88—*Kaminski v. Chicago City Ry. Co.*, 181 Ill. App. 706.

Use of word "accident" to designate a collision with a street car, held not improper. *Kaminski v. Chicago City Ry. Co.*, 181 Ill. App. 706.

CHAPTER XVII.

SIGNING AND NUMBERING INSTRUCTIONS.

§ 200. Signing by court.

§ 201. Signing by party or counsel.

§ 202. Numbering instructions.

§ 200. Signing by court.

Instructions need not be signed by the trial judge unless statutory provisions exist requiring such signing,¹ and it has been held that where a statute does not in terms require the instructions to be signed, and does not require the paper containing the instructions to be given to the jury, but merely requires the charge to be in writing and to be filed among the papers in the case, the failure of the judge to sign the instruction is not error, especially where no one requests the written instructions to be given to the jury.²

In some states, statutes exist requiring the judge to sign the instructions given, and a noncompliance with the statute has been held to be reversible error, regardless of whether the party appealing was harmed thereby or not.³ But in other states, the judgment will not be reversed for this cause alone, unless it may have resulted in prejudice to the appellant,⁴ except in Texas, where, in cases of felony, a stricter rule is applied, and a failure to sign the instructions is

1—Hunter v. Parsons, 22 Mich. 96.

2—State v. Davis, 48 Kan. 1, 28 Pac. 1092.

3—Tyree v. Parham's Ex'r, 66 Ala. 424; Baker v. State, 17 Fla. 410; Fridenberg v. Robinson, 14 Fla. 130. See also, Muncie & P. Traction

Co. v. Black, 173 Ind. 142; Holcomb v. Norman, 43 Ind. App. 506.

4—State v. Stanley, 48 Iowa 221; State v. McCombs, 13 Iowa 426; Parker v. Chancellor, 78 Tex. 524; Dillingham v. Bryant (Tex. App.) 14 S. W. 1017. And see, Rockwell

reversible error, regardless of actual prejudice.⁵ It has been held a sufficient signing of an instruction to write at the foot of it, "Refused, as it charges on the evidence. E. K. Foster, Judge of the Seventh Judicial Circuit. To which ruling of the court the defendant then and there excepted. E. K. Foster, Judge Seventh Judicial Circuit. [L. S.]"⁶ While it has been held that the failure of the judge to sign a charge is not reversible if the charge is filed at the time of the trial, and thereby made a record in the case, so that its identity is placed beyond doubt,⁷ it has also been held that the omission to sign instructions, as required by statute, cannot be remedied by a *nunc pro tunc* entry, the function of such entry being to make a record of something that was done and not recorded.⁸

§ 201. Signing by party or counsel.

It has already been noted that in some jurisdictions requests for instructions must be signed by the party requesting them, or by his counsel, and requests not so signed may be properly refused.⁹ This rule usually exists by virtue of statutory provisions and under such a statute it is not error to permit the instructions to go to the jury signed by counsel.¹⁰

It is usually held that error cannot be assigned to the giving of an instruction which is not signed by counsel, unless an exception is saved,¹¹ and it has been held not

Bros. & Co. v. Hudgens, 57 Tex. Civ. App. 504.

5—Hubbard v. State, 2 Tex. App. 506; Smith v. State, 1 Tex. App. 416; Longino v. Ward, 1 White & W. Civ. Cas. Ct. App. § 522.

6—Carter v. State, 22 Fla. 553. As to sufficiency of signing, see also, Vandalia Coal Co. v. Yemm, 175 Ind. 524.

7—Parker v. Chancellor, 78 Tex. 528.

8—Under Burns' Ann. St. 1914,

§ 561. Bottorff v. Bottorff, 45 Ind. App. 692.

9—See § 180, *ante*, "Signing by party or counsel." And see, Louisville & S. I. Traction Co. v. Korbe, — Ind. App. —, 90 N. E. 483; Indianapolis Traction & Terminal Co. v. Rowe, 43 Ind. App. 407.

10—Schmidt v. First Nat. Bank of Denver, 10 Colo. App. 261, 50 Pac. 733.

11—Little v. State, 58 Ala. 265.

reversible error to give a requested charge, not signed by counsel, where the judge marks it "Given" and officially signs it.¹²

§ 202. Numbering instructions.

Statutory provisions requiring requests for instructions and instructions given by the court, to be numbered, exist in a few states, the object of the requirement being to promote the convenience of the court and parties in saving exceptions to the instructions.¹³ Under such statutes it has been held that where the instructions are correct and proper, the failure to number them may be harmless error,¹⁴ and the error is waived by a failure to make and save a timely objection and exception,¹⁵ but ordinarily a failure to number requests as required is sufficient ground for refusing them, though otherwise they are correct.¹⁶ As reiteration is a fault to be avoided, it is highly proper that modifications of numbered instructions should be given by instructions of a different number.¹⁷

12—*Monier v. Philadelphia Rapid Transit Co.*, 227 Pa. 273; *Galveston, H. & S. A. Ry. Co. v. Neel* (Tex. Civ. App.) 26 S. W. 788.

13—*Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348; *Kansas Pac. Ry. Co. v. Ward*, 4 Colo. 36; *Supreme Tent Knights of Maccabees of World v. Ethridge*, 43 Ind. App. 475; *Indianapolis Traction & Terminal Co. v. Rowe*, 43 Ind. App. 407.

14—*Miller v. Preston*, 4 N. M. (Johns.) 314, 17 Pac. 565; 4 N. M. (Gild.) 396, 17 Pac. 565.

Where instructions are reduced to writing and clearly and concisely state the law, the mere failure to number them does not constitute reversible error. *Atchison, T. & S. F. R. Co. v. Calhoun*, 18 Okla. 75, 11 Ann. Cas. 681, 89 Pac. 207.

15—See ch. XXXIV, *post*, "Appellate Review of Instructions."

16—*Coryell v. Stone*, 62 Ind. 308.

17—*Columbia & P. S. R. Co. v. Hawthorn* (Wash.), 19 Pac. 25.

CHAPTER XVIII.

PRESENTATION OF INSTRUCTIONS TO AND CONSIDERATION BY JURY.

- § 203. Matters elsewhere considered.
- § 204. Reading instructions to jury.
- § 205. Manner and emphasis of judge in giving instructions.
- § 206. Stating reasons for giving or refusing instructions.
- § 207. Giving undue importance to instructions by words or actions.
- § 208. Unduly emphasizing proposition of law by repetition.
- § 209. Diminishing or weakening effect of instructions by words or actions.
- § 210. Reading from statutes.
- § 211. Reading from text-books.
- § 212. Reading from reported decisions.
- § 213. Time of delivering instructions.
- § 214. Consideration of instructions by jury.

§ 203. Matters elsewhere considered.

The necessity of instructing in writing,¹ and of signing and numbering instructions,² as well as the necessity of marking instructions "Given" or "Refused," and the disposition of requests for instructions generally,³ have already been considered in other chapters of this work.

A few other considerations as to the presentation of the instructions to, and their consideration by, the jury may be conveniently considered in this chapter.

§ 204. Reading instructions to jury.

It is the common practice in giving special written charges to read them to the jury,⁴ and under statutory provisions it has been held that the judge should read the charge to the jury in the precise words in which it is written, both in

1—See ch. VI, *ante*.

3—See ch. XV, § 181, *ante*.

2—See ch. XV, § 182, *ante*.

4—Boyd v. State, 154 Ala. 9.

civil and criminal cases,⁵ but ordinarily the omission to read the instructions merely affects the method pursued, and cannot be complained of where no request to read was made until the jury retired, and where the written charges were handed to the jury.⁶

The judge is the proper person to read the charge and the practice of marking such instructions as should be given and directing the counsel to read them to the jury should not be resorted to.⁷

It is apparent that the statement of law which the trial judge gives to the jury for their guidance should proceed directly from him. In that way and only in that way can there be any assurance that every principle of law given receives due emphasis.⁸

However, it has been held that the practice of permitting the counsel to read the charge is not reversible error where it is consented to by the attorneys in the case.⁹

It has already been noted that requested instructions given are usually considered as the instructions of the court and not of the parties, and accordingly the order in which the instructions are given is immaterial,¹⁰ but in some states statutory provisions exist governing the order in which instructions are to be read.¹¹

5—Coley v. State, — Tex. Cr. App. —, 150 S. W. 789.

Statute (Rev. St. 1911, arts. 1970, 1971) held mandatory. International & G. N. Ry. Co. v. Parke, — Tex. Civ. App. —, 169 S. W. 397.

6—Boyd v. State, 154 Ala. 9.

7—O'Dell v. Goff, 153 Mich. 643.

8—O'Dell v. Goff, 153 Mich. 643.

9—O'Dell v. Goff, 153 Mich. 643.

10—See also, § 189, *ante*. And see, People v. Holt, 22 Cal. App. 697, 136 Pac. 501.

See also, State v. Poyner, 57 Wash. 489, 107 Pac. 181.

Under this rule it is not error to

preface an instruction with the remark, "As requested by the defendant I instruct." State v. Poyner, 57 Wash. 489, 107 Pac. 181.

11—Under Acts W. Va., ch. 38, p. 223, instructions given by the court on its own motion are to be read first, then those of the plaintiff and lastly those of the defendant. Prior to such act it was not error to read the defendant's instructions first. Truex v. South Penn Oil Co., 62 W. Va. 540.

See also, S. D. Comp. L. 1913, vol. 2, p. 366, § 257.

§ 205. Manner and emphasis of judge in giving instructions.

While it has been held that a judge should not intimate, by the earnestness of his charge, his own opinion as to the facts,¹² it is also apparent that no objection to the manner or tone of voice of the trial judge in delivering instructions can be sustained on appeal. The weight of authority is to this effect,¹³ as there is no way by which the manner or tone can be preserved and presented to the court on appeal for review.¹⁴ In one case it was said: "We cannot concern ourselves with the manner of the court in instructing the jury, only so far as we can measure it by the language employed. He may have peculiar methods of emphasis, which may, before a jury, have a prejudicial effect; but this we cannot reach."¹⁵ In another case it was held that courts are "powerless to afford relief for grievances of that kind, by the ordinary method of assignments of error."¹⁶

Where the court charged that counsel had admitted "as from the evidence they were forced to admit," and it was contended that the observation was made in a manner to throw discredit upon the whole defense, the reviewing court said that they could not perceive from the record that any injury had been done, implying that, if the reviewing court could see that harm had been done, the judgment would have been reversed. This decision, perhaps, is not at variance with the other authorities cited.¹⁷

12—*State v. Howell*, 28 S. C. 250. See also, *Wheeler v. Wallace*, 53 Mich. 357.

13—*Rountree v. Gurr*, 68 Ga. 292; *Anderson v. Tribble*, 66 Ga. 588; *Gibbs v. Johnson*, 63 Mich. 671; *Merchants' Bank of Canada v. Ortmann*, 48 Mich. 419; *Horton v. Chevington & B. Coal Co.*, 2 Penny. (Pa.) 49; *Page v. Town of Sumpter*, 53 Wis. 656.

See also, *Bishop v. Journal News-*

paper Co., 168 Mass. 327; *Beal v. Lowell & D. St. Ry. Co.*, 157 Mass. 444; *Maloney v. Roberts*, 32 Tex. 136.

14—*Rountree v. Gurr*, 68 Ga. 292; *Gibbs v. Johnson*, 63 Mich. 671.

15—*Gibbs v. Johnson*, 63 Mich. 674.

16—*Horton v. Chevington & B. Coal Co.*, 2 Penny. (Pa.) 1, 50.

17—*Ernull v. Whitford*, 48 N. C. 474.

It has also been said that if the manner and emphasis with which a charge is delivered to the jury can be assigned as error at all, it must first be made the ground of a motion for a new trial, supported by affidavits.¹⁸

§ 206. Stating reasons for giving or refusing instructions.

The duty of the court to refrain from misleading remarks in passing upon requested instructions has already been considered.¹⁹

It may be added that if the action of the court in giving or refusing instructions is correct, it is immaterial whether the reasons advanced by the court for such action were correct or not,²⁰ unless it appears that such statement operated to mislead the jury, or to affect the verdict to the prejudice of the complaining party.²¹

§ 207. Giving undue importance to instructions by words or actions.

Instructions should not give undue prominence to the evidence,²² and remarks or actions which tend to cause the jury to attach undue importance to any particular instruction or to a part of an instruction are also considered improper.^{22a} Accordingly the practice of underscoring words in the instructions is very generally condemned, as it has a tendency to give undue weight and force to the words and sentences underscored, thereby preventing the jury from

18—Murphy v. Whitlow, 1 Ariz. 340, 25 Pac. 532.

19—See § 181, *ante*.

20—Kentucky. Dale v. Arnold, 2 Bibb 606.

Maryland. Budd v. Brooke, 3 Gill. 198, 43 Am. Dec. 321n.

Nebraska. Marion v. State, 20 Neb. 233, 57 Am. Rep. 825.

New Hampshire. Blodgett v. Berlin Mills Co., 52 N. H. 215.

North Carolina. Posey v. Patton, 109 N. C. 455.

Pennsylvania. Rupp v. Orr, 31 Pa. St. 517.

Virginia. Easley v. Craddock, 4 Rand. 423.

21—Carpenter v. Pierce, 13 N. H. 403.

22—See ch. XIV, *ante*.

22a—Monier v. Philadelphia Rapid Transit Co., 227 Pa. 273.

giving proper weight and consideration to other portions of the charge.²³

Instructions containing words which are underscored may properly be refused; ²⁴ but the giving of such an instruction is not a ground for reversal, unless prejudicial to the party complaining.²⁵ It has been held, however, that an instruction in which the words underscored are usually italicized in legal treatises and judicial opinions does not fall within this rule.²⁶

An instruction that it is the duty of the jury to carefully consider the written charges given on request, and that they should apply the law as laid down in the written charge, as well as that in the oral charge, is properly refused, as tending to exaggerate the importance of the written charge. However, it has been held within the discretion of the court to give such an instruction.²⁷

A prosecuting attorney has a right to request instructions. Instructions given on such request are to be given the same consideration as instructions given by the court on its own motion.²⁸

There is some conflict of authority as to the propriety of making marginal citations of reports or text-books, on instructions taken out by the jury. One court sees nothing improper in this practice,²⁹ but others have disapproved it. They hold, however, that, in the absence of special circumstances, the error is without prejudice, and that a judgment should not be reversed for such a reason unless prejudice be made to appear affirmatively.³⁰

23—Wright v. Brosseau, 73 Ill. 381; McCormick Harvesting Mach. Co. v. Sendzikowski, 72 Ill. App. 402; Heyer v. Salsbury, 7 Ill. App. 93; State v. Cater, 100 Iowa 501.

24—McCormick Harvesting Mach. Co. v. Sendzikowski, 72 Ill. App. 402. The instructions condemned in this case were printed,—some of the words being in large type, and the others in type half as large.

25—Wright v. Brosseau, 73 Ill. 381.

26—Philpot v. Lucas, 101 Iowa 478. In this case it appears that the words "prima facie" were underscored in an instruction.

27—Martin v. State, 104 Ala. 71.

28—Dixon v. State, 46 Neb. 298.

29—Wright v. Brosseau, 73 Ill. 381.

30—Williams v. St. Louis & S. F. Ry. Co., 123 Mo. 573; Herzog v. Campbell, 47 Neb. 370; Sioux City &

§ 208. Unduly emphasizing proposition of law by repetition.

While the repetition of instructions may tend to cause confusion and mislead the jury,³¹ it is ordinarily held that the mere repetition of a correct proposition of law several times in the instructions is not error, for the jury cannot be too strongly impressed with the correct rule of law applicable to the case.³² In one case where the trial court repeated seven times to the jury the proposition that evidence to "impeach a written instrument on the ground of fraud, accident, or mistake must be clear, precise and indubitable," the reviewing court said that, as it was good law, "seventy times seven would not have been too often."³³ Other decisions are not wholly in accord with the ones just cited. In one there is a dictum to the effect that "it is undoubtedly improper for a court to place, by frequent repetitions, too prominently before a jury any principle of law involved in the case."³⁴ In another it was said: "Especially is it important that this rule be observed in criminal cases, in order to guard against creating an impression upon the minds of the jury as to what may be the opinion of the court with regard to the facts to which the principle applies." Whether the court would have reversed for this error cannot be determined, as there were other errors in the record sufficient to reverse.³⁵

§ 209. Diminishing or weakening effect of instructions by words or actions.

It is improper for the court in giving an instruction to

P. R. Co. v. Finlayson, 16 Neb. 578, 49 Am. Rep. 724n.

31—See ch. IV, § 17, *ante*.

32—Coffman v. Reeves, 62 Ind. 334; Gran v. Houston, 45 Neb. 813; Murray v. New York, L. & W. R. Co., 103 Pa. St. 37. See also, Jacksonville Elec. Co. v. Hellenthal, 56 Fla. 443; McMahon v. Chicago City Ry. Co., 143 Ill. App. 608.

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33—Murray v. New York, L. & W. R. Co., 103 Pa. St. 37.

34—Traylor v. Townsend, 61 Tex. 147. And see, Jacksonville Elec. Co. v. Hellenthal, 56 Fla. 443; Beatty v. Metropolitan West Side El. R. Co., 141 Ill. App. 92; Jones v. Monson, 137 Wis. 478, 129 Am. St. Rep. 1082.

35—Irvine v. State, 20 Tex. App. 12.

do anything by word or action which will have a tendency to cause the jury not to give such instruction the consideration and credit to which it is entitled.³⁶

In submitting special questions by request it has been held error to state: "I want the jury to understand that these questions are got up to befuddle and mislead the jury, so that there will be error in the trial of this case, so that the verdict may be set aside,"³⁷ and, where the court gave a requested instruction, and accompanied it with the following remark, "Yes, if the defendant's papers are all right, and the plaintiff's all wrong, then this is so, and I so charge the jury," it was held prejudicial error.³⁸

It is also improper for the court to criticise the justice of the law as laid down in the instructions,³⁹ and in giving requested instructions it is said to be better practice not to state at whose request they were given, but to give all proper instructions as emanating from the court itself,⁴⁰ although these errors, if such they may be termed, will not be sufficient ground for reversal if no injury is shown.⁴¹

Where the court lays down the law applicable to a set of facts, and then states that the rule of law is given with some hesitation because of the doubt the court has as to the

36—**Georgia.** *Head v. Bridges*, 67 Ga. 227.

Illinois. *Watson v. Union Iron & Steel Co.*, 15 Ill. App. 509.

Iowa. *Greenway v. Taylor County*, 144 Iowa 332.

Michigan. *Stebbins v. Keene Tp.*, 55 Mich. 552.

Minnesota. *Horton v. Williams*, 21 Minn. 187.

New York. *Sieling v. Clark*, 18 Misc. 464.

37—*Cone v. Citizens' Bank*, 4 Kan. App. 470, 46 Pac. 414.

38—*Horton v. Williams*, 21 Minn. 187.

39—*Stebbins v. Keene Tp.*, 55 Mich. 552.

40—*Terre Haute Traction & Light Co. v. Payne*, 45 Ind. App. 132; *Stevenson v. Chicago & N. W. Ry. Co.*, 94 Iowa 719. See also, *State v. Pitts*, 11 Iowa 343, and *Maxwell v. Town of Wellington*, 138 Wis. 607.

It is better not to state at whose request instructions were reduced to writing. *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269; *Head v. Bridges*, 67 Ga. 235.

See also, §§ 181, *et seq.*, *ante*.

41—*Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269; *Stevenson v. Chicago & N. W. Ry. Co.*, 94 Iowa 719; *Maxwell v. Town of Wellington*, 138 Wis. 607.

effect of an additional fact not enumerated in the hypothesis, but again reiterates the rule of law, there is no error.⁴²

It has likewise been held that, when requested instructions are already covered by the general charge, "the court may properly say to the jury that such requests are the law, but no more so than when given in the general charge," and that error cannot be predicated of this remark, "especially when the same remark was made in respect to like requests made by the defendant."⁴³

In one case it was held not improper for the judge to inform the jury that he charged them on the prisoner's statement because the law compelled him to do so.⁴⁴

§ 210. Reading from statutes.

"As a general rule it is excellent practice to follow the statute in framing instructions, taking care that the language is adapted to the needs of the given case."⁴⁵

The trial judge may read or copy into its charge, as a part thereof, such sections of the statutes as apply to the facts,⁴⁶ and it has even been held that the reading of a part of a statute which is not relevant is not reversible error unless it appears that some substantial right of the party complaining has been affected.⁴⁷

42—*Evans v. Foss*, 49 N. H. 490.

43—*Roberts v. Neal*, 62 Ga. 163.

44—*McCord v. State*, 83 Ga. 521.

45—*Michalsky v. Centennial Brewing Co.*, 48 Mont. 1, 134 Pac. 307.

46—*California*. *People v. Henderson*, 28 Cal. 465; *People v. Galvin*, 9 Cal. 115.

Colorado. *Keefer v. Amicone*, 45 Colo. 110.

Florida. *Florida R. Co. v. Dorsey*, 59 Fla. 260.

Illinois. *Wells v. Baltimore & O. S. W. R. Co.*, 153 Ill. App. 23. But see, *Haywood v. Dering Coal Co.*, 145 Ill. App. 506.

Maine. *State v. Stickney*, 111 Me. 590.

Michigan. *Johnson v. Schultz*, 74 Mich. 75.

Montana. *Territory v. Mahaffey*, 3 Mont. 116.

Pennsylvania. *Com. v. Harris*, 168 Pa. St. 619.

Texas. *Simons v. State* (Tex. Cr. App.), 34 S. W. 619.

Virginia. *Miller v. Com.* (Va.), 21 S. E. 499.

47—*People v. Burns*, 63 Cal. 614.

When it becomes proper to refer to a statute, the provisions thereof should be stated and the jury informed what bearing the same has upon the case.⁴⁸

In criminal cases, it is not error to read a section of the criminal code under which a defendant is prosecuted.⁴⁹

This principle is well illustrated in the following case: On a prosecution "for robbery, an instruction was given, in the language of the statute, defining the offense, and prescribing the punishment. It further gave the jury, in the language of the statute, the more severe punishment if the defendant was armed with a dangerous weapon, with intent, if resisted, to kill or maim, or, being so armed, should wound or strike the person robbed, or if he had any confederate present, so armed, to aid or abet him. There was evidence that one of the parties robbing struck the person robbed with a pistol. The jury found the defendant guilty, and fixed his punishment at the lowest term they could, without regard to the use of any dangerous weapon." The objection was made that the instruction was not applicable to the facts, but the court held that there was no error prejudicial to the defendant.⁵⁰

It has been said that an instruction is not necessarily correct because it uses the words of a statute, if the use of those words, without explanation, has a tendency to mislead;⁵¹ but if a construction of the language used is desired, a request therefor must be made.⁵²

§ 211. Reading from text books.

It is not error to refuse to embody the language of a text writer in a charge to the jury, as the court is vested with the discretion of using language of its own choosing.⁵³ This is especially true where the requested instruction merely

48—International & G. N. Ry. Co. v. Bandy, — Tex. Civ. App. —, 163 S. W. 341.

49—Frazer v. State, 159 Ala. 1.

50—Needham v. People, 98 Ill. 275.

51—State v. Laurie, 1 Mo. App. 371.

52—Town of Fox v. Town of Kendall, 97 Ill. 72.

53—People v. Wayman, 128 N. Y.

contains philosophical remarks copied from text-books, and it makes no difference how wise or true they may be in the abstract, or how high the reputation of the author.⁵⁴ But, it is also held that the court may read an extract from a text-book as a part of its charge and that this is not an improper method of expounding the law of a case.⁵⁵

§ 212. Reading from reported decisions.

The practice of stating the governing principles of law to a jury in the exact language of a decided case is well established in some states,⁵⁶ and it is accordingly proper for the court to read or embody in the written charge such extracts from reported cases as are correct and applicable.⁵⁷ In one case, however, the practice of reading opinions in other cases as a part of the charge of the court in a criminal case was advised against as dangerous.⁵⁸ But it has also been held not error to read a case from the reports as an illustration.⁵⁹

Statements in an opinion on a former appeal are not necessarily proper as instructions.⁶⁰ In such case the evidence given in the pending cause must be substantially the same as that given on the former trial to make it proper to quote

585. See generally, §§ 189 *et seq.*, *ante*.

54—Walker v. Johnson, 96 U. S. (6 Otto) 424, 24 L. Ed. 834.

55—Bronnenburg v. Charman, 80 Ind. 475; People v. Niles, 44 Mich. 606.

56—Com. v. Dow, 217 Mass. 473.

57—California. In re Spencer, 96 Cal. 448, 31 Pac. 453.

District of Columbia. Johnson v. Baltimore & P. R. Co., 6 Mackey 232. Illinois. Kirby v. Wilson, 98 Ill. 240.

Michigan. Power v. Harlow, 57 Mich. 107.

New York. People v. Minnaugh,

131 N. Y. 563; Anderson v. McAleenan, 15 Daly 444; Panama R. Co. v. Johnson, 63 Hun 629; Cordell v. New York Cent. & H. R. R. Co., 6 Hun 461.

Pennsylvania. Henry v. Klopfer, 147 Pa. St. 178; Hood v. Hood, 25 Pa. St. 417.

Wisconsin. See Anderson v. Horlick's Malted Milk Co., 137 Wis. 569.

58—People v. McNabb, 79 Cal. 419, 21 Pac. 843.

59—State v. Chiles, 58 S. C. 47.

60—Centralia & C. R. Co. v. Rixman, 121 Ill. 214.

the opinion of the reviewing court as the law of the case.⁶¹ And it will be error to read only a part of the opinion as the law of the case, when, if the context is considered, it will be found that a very different rule of law was laid down by the reviewing court. The quotation from the opinion of such court must be sufficiently full to show its exact thought, and to avoid all possibility of misleading the jury.⁶² So it frequently happens that "the language of an opinion rendered in the decision of a case is to be taken concretely with its context, * * * and a portion of its language cannot properly be made the foundation of an abstract instruction, to be applied to a different case, to which it is not applicable." ⁶³

It is error to read a decision, and then state that the case at bar is a similar case, as this amounts to the expression of an opinion on the evidence.⁶⁴ However, in some cases it is said to be proper to read that part of the opinion rendered on a previous appeal laying down the law applicable to the case, if care is taken not to state the result of the former trial.⁶⁵ The court may, of course, add such further instructions or explanations as are necessary to apply the opinions read to the case at bar.⁶⁶

§ 213. Time of delivering instructions.

Statutory provisions usually govern as to the time when the court is required to charge the jury, and in some states the instructions should be given before the beginning of the argument.⁶⁷ However, it has been held that notwithstanding such a statute, the court may, in his discretion, after the

61—*Power v. Harlow*, 57 Mich. 107.

62—*Laidlaw v. Sage*, 80 Hun (N. Y.) 550. See also, *Cordell v. New York Cent. & H. R. R. Co.*, 6 Hun (N. Y.) 461.

63—*Etchepare v. Aguirre*, 91 Cal. 288, 25 Am. St. Rep. 180, 27 Pac. 668, 929.

64—*Frank v. Williams*, 36 Fla. 136.

65—*Power v. Harlow*, 57 Mich. 107; *Panama R. Co. v. Johnson*, 63 Hun (N. Y.) 629.

66—*Freeman v. Weeks*, 48 Mich. 255.

67—*Kellogg v. Lewis*, 28 Kan. 535.

argument, "correct or qualify any statement of counsel that is liable to mislead the jury."⁶⁸

But additional instructions after the argument should not go beyond what is fairly called for by the nature of the argument, or by some other good reason.⁶⁹

It has also been said that the giving of instructions after the conclusion of the argument to the jury should not be approved as a practice, but it is not reversible error.⁷⁰

In some states the statute requires the instructions to be given after the arguments of counsel are concluded.⁷¹ "The court does not err in reading to the jury and passing on the points of defendant, before giving the general charge to the jury."⁷²

Instructions given by the presiding judge in a criminal case, in the presence of the other judges, immediately after the proclamation of adjournment, but intended as the act of the court, are to be regarded as the act of the court.⁷³

However, where a charge in writing is requested, the

68—*Kellogg v. Lewis*, 28 Kan. 535. As to rule in Indiana, see *Supreme Tent Knights of Maccabees of World v. Ethridge*, 43 Ind. App. 475.

It is not error for the trial court to give additional instructions, or to modify those already given, after the beginning of the argument. *Wood v. State*, 64 Miss. 761. And see, *Missouri, K. & T. R. Co. of Texas v. Harrison*, 56 Tex. Civ. App. 17.

The giving of an instruction after the close of the argument before the jury, although irregular, is not sufficient ground for reversal where the giving of the instruction could work no harm. *Cluskey v. City of St. Louis*, 50 Mo. 89.

69—*Foster v. Turner*, 31 Kan. 58, 1 Pac. 145.

70—*Mann's Adm'r v. Reynolds*, — Ky. App. —, 150 S. W. 329.

71—In Ohio, under Rev. St. § 7300, subd. 5 (see *Page & Adams Ann. Ohio Gen. Code* § 11447), the court is not required, in a criminal case, to give defendant's request before the argument begins. *Umbenhauer v. State*, 4 Ohio Cir. Ct. R. 378, disapproving *McGuire v. State*, 3 Ohio Cir. Ct. R. 551.

See also, *Cleveland & E. Electric R. Co. v. Hawkins*, 64 Ohio St. 391, holding that Rev. St. Ohio, § 5190 (see *Page & Adams Ann. Ohio Gen. Code* § 11447), does not leave it discretionary with the court to give instructions after the evidence is closed. As to recalling jury, see *Missouri, K. & T. R. Co. of Texas v. Harrison*, 56 Tex. Civ. App. 17.

72—*Walton v. Hinnan*, 146 Pa. St. 396.

73—*State v. Engle*, 13 Ohio 490.

judge is not bound to give it at once, but may adjourn over to another day to prepare it.⁷⁴

Charging the jury is a high judicial function and it cannot be lawfully exercised on Sunday.⁷⁵

§ 214. Consideration of instructions by jury.

In a number of states, statutory provisions exist permitting or requiring the jury to take the instructions with them in their retirement.⁷⁷

"The whole doctrine of the qualification of one instruction in a series by another instruction in the same series, or as to the curing of a slightly defective instruction in another instruction which is not defective, is without value or force if the jury have not the right among themselves to read and compare the instructions to see whether or not any one instruction of a series is qualified or cured in its defective character by another instruction in the series."⁷⁸

Refused instructions should not be given to the jury, and it has been held reversible error to allow a refused instruction to go to the jury room even though partially correct.⁷⁹

74—Head v. Bridges, 67 Ga. 227. And see, Millspaugh v. Missouri Pac. R. Co., 138 Mo. App. 31, as to a request after adjournment.

76—Moss v. State, — Tenn. —, 173 S. W. 859.

In this case the arguments of counsel continued until 11:30 p. m. on a Saturday when the court took a recess and the charge was delivered to the jury at 11:00 a. m. on Sunday. For such error, the court after reviewing similar cases wherein the jury had been instructed on Sunday, either by inadvertence or otherwise, reversed and remanded the case.

77—California Penal Code, § 1137. Jones & Addington's Ill. St. Ann., ¶ 8612. Mont. Rev. Codes, 1907 § 9313 N. C. Rev. 1905, § 537. Tex. Civ. St. 1911, p. 434, ch. 13, art.

1975. Tex. Code Cr. Proc. Tit. 8, ch. 5, art. 742.

78—Chicago Union Traction Co. v. Hanthorn, 211 Ill. 367.

79—Refused charges should not be given to the jury with other papers under such a statute; and where "defendant handed the court two special requested charges, Nos. 1 and 2, both written on the same piece of paper," and "the court gave No. 1, and refused No. 2, and so indorsed them, but handed both to the jury," and "when he read No. 1 he 'called the attention of the jury especially to the one 'refused,' as refused, and told them that they should not consider it,'" and some of the matter contained in the refused instruction was correct, it was reversible error to allow the jury to take to their

But where a special charge is requested, approved and read to the jury, it is not reversible error that the jury inadvertently fails to take such charge to the jury room.⁸⁰

room the instruction so marked "Re- 80—Thomason v. State, 71 Tex.
fused." Trinity County Lumber Co. Cr. App. 439.
v. Denham, 85 Tex. 56.

CHAPTER XIX.

ADDITIONAL INSTRUCTIONS AFTER RETIREMENT OF JURY.

I. RIGHT AND DUTY TO GIVE ADDITIONAL INSTRUCTIONS.

- § 215. Power of court to give additional instructions.
- § 216. Request of jury.
- § 217. Request of parties.
- § 218. Consent of counsel.
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II. MANNER OF GIVING ADDITIONAL INSTRUCTIONS.

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I. RIGHT AND DUTY TO GIVE ADDITIONAL INSTRUCTIONS.

§ 215. Power of court to give additional instructions.

Except in one state,¹ it is a rule of almost universal application that the trial court may, of its own motion, recall the jury after they have retired to deliberate on their verdict, to give them further instructions,² especially after they

1—See this section, *post*.

Dakota. People v. Odell, 1 Dak.

2—**Alabama.** Morris v. State, 25

197.

Ala. 57.

Georgia. Jeter v. Jones, 135 Ga.

Arkansas. National Lumber Co. v. Snell, 47 Ark. 407; McDaniel v. Crosby, 19 Ark. 533.

22; Pritchett v. State, 92 Ga. 65; White v. Fulton, 68 Ga. 511; Wood v. Isom, 68 Ga. 417.

California. People v. Mayes, 113 Cal. 618, 45 Pac. 860; People v. Perry, 65 Cal. 568, 4 Pac. 572.

Illinois. Shaw v. Camp, 160 Ill. 425; City of Joliet v. Looney, 159 Ill. 471, aff'g 56 Ill. App. 502.

Colorado. Hayes v. Williams, 17 Colo. 465, 30 Pac. 352.

Indiana. In re Darrow, 175 Ind. 44; Breedlove v. Bundy, 96 Ind. 319;

have considered a case submitted to them for some length of time,³ or where they report that they are unable to agree on a verdict.⁴

In a number of states this matter of further instructing the jury after their retirement has been made the subject of statutory regulations, but it is believed that no court in which one of these statutes has been construed has ever held that the court cannot, of its own motion, give further instructions when the exigencies of the case demand such action. It has been held that even after the jury have an-

Hartman v. Flaherty, 80 Ind. 472;
Hall v. State, 8 Ind. 439; **Broad-**
street v. McKamey, 41 Ind. App.
272.

Iowa. **Burton v. Neill**, 140 Iowa
141, 17 Ann. Cas. 532.

Maryland. **United Railways &**
Electric Co. v. Carneal, 110 Md. 211.

Massachusetts. **Nichols v. Mun-**
sel, 115 Mass. 567; **Florence Sew.**
Mach. Co. v. Grover & Baker Sew.
Mach. Co., 110 Mass. 70, 14 Am. Rep.
579.

Minnesota. **Holland v. Sheehan**,
106 Minn. 545.

Missouri. **Scott v. Haynes**, 12 Mo.
App. 597.

Nebraska. **First Nat. Bank v.**
Hedgecock, 87 Neb. 220; **McClary v.**
Stull, 44 Neb. 191.

New York. **Phillips v. New York**
Cent. & H. River R. Co., 127 N. Y.
657.

North Carolina. **Biggs v. Gur-**
ganus, 152 N. C. 173.

Pennsylvania. **Cox v. Highley**,
100 Pa. St. 252.

South Carolina. **Dover v. Lock-**
hart Mills, 86 S. C. 229; **State v.**
Lightsey, 43 S. C. 114; **Jones v.**
Swearingen, 42 S. C. 58.

Texas. **Benavides v. State**, 31
Tex. Cr. App. 173, 37 Am. St. Rep.
799.

3—**State v. Rollins**, 77 Me. 380;
Dover v. Lockhart Mills, 86 S. C.
229; **Allis v. United States**, 155 U. S.
117, 39 L. Ed. 91.

4—**Arkansas.** **McDaniel v. Crosby**,
19 Ark. 533. But see, **St. Louis, I. M.**
& S. R. Co. v. Reed, 88 Ark. 458.

Indiana. **Hogg v. State**, 7 Ind.
551.

Iowa. **State v. Pitts**, 11 Iowa 343.

Kansas. **State v. Chandler**, 31
Kan. 201, 1 Pac. 787.

Maine. **Edmunds v. Wiggin**, 24
Me. 505.

Massachusetts. **Com. v. Snelling**,
15 Pick. 334.

Missouri. **Dowzelot v. Rawlings**,
58 Mo. 75.

Ohio. **Salomon v. Reis**, 5 Ohio Cir.
Ct. R. 375.

Rhode Island. **Alexander v. Gard-**
iner, 14 R. I. 15.

Texas. **Turner v. Lambeth**, 2 Tex.
365.

Wisconsin. **Hannon v. State**, 70
Wis. 448.

On learning of a jury's disagree-
ment, "it is competent for the court,
of its own motion, to give them any
additional instruction, proper in it-
self, which may be necessary to meet
the difficulty in their minds." **State**
v. Chandler, 31 Kan. 201, 1 Pac. 787.

nounced their verdict, but before its acceptance, the court may correct any erroneous instruction that has been given, and send them back again to deliberate.⁵

The trial court has a large discretion in recalling juries and submitting amended or additional legal propositions by way of instructions, and unless it fairly appears that such discretion has been abused to prejudice of the party complaining, there is no ground for reversal.⁶

It is within the discretion of the judge to have the jury brought in at any time to give them additional instructions, or to restate the evidence and principles of law applicable to the case, and the jury cannot forestall the action of the court by saying that they do not desire additional instructions.⁷

The discretion with which the court is thus vested is based on the soundest reasons. In the hurry of the trial, the court may have overlooked some instruction vitally important to a correct determination of the case.⁸

It may also be that the instructions which it has given are vague and obscure, and have a tendency to mislead, which may be removed by a little explanation.⁹

So, the court may have given some instructions which are, in point of law, erroneous.¹⁰

5—*Jack v. Territory*, 2 Wash. T. 101, 3 Pac. 832. See also, dictum in *Florence Sew. Mach. Co. v. Grover & Baker Sew. Mach. Co.*, 110 Mass. 70, 14 Am. Rep. 579. Compare *State v. Johnson*, 30 La. Ann. 921, where it was held "not within the province of the judge presiding at a criminal trial to give such instructions to the jury" as would lead to a modification or change of the verdict.

6—*Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352. See *In re Darrow*, 175 Ind. 44.

7—*Nichols v. Munsel*, 115 Mass. 567.

8—*City of Joliet v. Looney*, 159 Ill. 471; *United Railways & Electric Co. v. Carneal*, 110 Md. 211; *Cox v. Highley*, 100 Pa. St. 252.

9—*Morris v. State*, 25 Ala. 57; *Florence Sew. Mach. Co. v. Grover & Baker Sew. Mach. Co.*, 110 Mass. 70, 14 Am. Rep. 579.

10—*State v. Lightsey*, 43 S. C. 114. And such erroneous instruction may be withdrawn. *Broadstreet v. McKamey*, 41 Ind. App. 272; *Hill v. Hayes*, 199 Mass. 411, 18 L. R. A. (N. S.) 375.

It can hardly be contended that it would be preferable to leave the court no discretion in the matter of giving further instructions in any of these contingencies, and to run the risk of an erroneous verdict and the expense of a new trial.¹¹

In Mississippi, a statute exists prohibiting the giving of any instructions to the jury unless the parties make a request therefor,¹² and this prohibition makes it erroneous for the court, of its own motion, or at the request of the jury, to give the jury further instructions after they have retired to consider their verdict.¹³

§ 216. Request of jury.

In a number of states statutory provisions exist, providing that the jury, after their retirement, may be conducted into the court for additional or further instructions, if they so request. In such case the additional instructions must be given in the presence of or after notice to the parties or their counsel.¹⁴

This practice of giving the jury additional instructions at their request is common and is approved by all authorities,¹⁵

11—In *Com. v. Snelling*, 15 Pick. (Mass.) 334, the court said that the propriety of recalling the jury and explaining the matter further is hardly open to reasonable doubt. And see *In re Darrow*, 175 Ind. 44.

12—*Lavenburg v. Harper*, 27 Miss. 299. See also, § 156, *ante*.

13—*Duncan v. State*, 49 Miss. 331; *Randolph v. Govan*, 14 Smedes & M. (Miss.) 9; *Taylor v. Manley*, 6 Smedes & M. (Miss.) 305, holding that a violation of the statute is a mere irregularity, and not ground for reversal where the instruction given is correct.

14—Ark. Dig. St. 1904, §§ 2395, 6200; *Pomeroy's Cal. Code Civ. Proc.*, § 614; *Mills' Colo. Code Proc.*, § 192; *Mont. Rev. Code* 1907, § 6751;

Ohio Gen. Code 1910, § 11452; *Okl. Rev. L. Ann.* 1910, § 5913; *Shannon's Tenn. Code* 1896, § 7186; *Utah Comp. L.* 1907, § 3156.

15—*Bank of Kentucky v. McWilliams*, 2 J. J. Marsh. (Ky.) 263; *Woodruff v. King*, 47 Wis. 261.

It is well settled that the court may properly recall the jury if they request it, and give them additional instructions.

Arkansas. *St. Louis, I. M. & S. R. Co. v. Reed*, 88 Ark. 458.

Georgia. *Jeter v. Jones*, 135 Ga. 22.

Illinois. *Shaw v. Camp*, 160 Ill. 425; *Lee v. Quirk*, 20 Ill. 392; *Arnold v. Phillips*, 59 Ill. App. 213.

Indiana. *Sage v. Evansville & T. H. R. Co.*, 134 Ind. 100; *Gaff v.*

except in Mississippi, where the court can only give instructions on the request of the parties.¹⁶

A rule of court that requests for instructions will not be considered "unless presented before the commencement of the final argument" has been held not to apply to requests by a juror for further instructions.¹⁷

Some decisions go a step further, and hold that it is not only proper, but the duty of the court, to comply with a request from the jury for further instructions.¹⁸

§ 217. Request of parties.

The decisions are not entirely harmonious as to the right of the parties to further instructions when the court gives additional instructions of its own motion. But the weight

Greer, 88 Ind. 122, 45 Am. Rep. 449;
Farley v. State, 57 Ind. 331.

Missouri. Wilkinson v. St. Louis
Sectional Dock Co., 102 Mo. 130;
State v. Williams, 69 Mo. 110.

Nebraska. First Nat. Bank v.
Hedgecock, 87 Neb. 220.

North Carolina. Biggs v. Gur-
ganus, 152 N. C. 173.

Ohio. Hulse v. State, 35 Ohio St.
421.

Oregon. Shields v. Southern Pac.
Co., 57 Ore. 347, 112 Pac. 4.

South Carolina. Auten v. Catawba
Power Co., 84 S. C. 399.

Texas. Turner v. Lambeth, 2 Tex.
365; Wilson v. State, 37 Tex. Cr.
App. 156.

Utah. State v. Kessler, 15 Utah
142, 62 Am. St. Rep. 911, 49 Pac. 293.

Virginia. Richlands Iron Co. v.
Elkins, 90 Va. 249; Williams v. Com.,
85 Va. 607.

Wisconsin. Woodruff v. King, 47
Wis. 261.

United States. United States v.
White, 5 Cranch, C. C. 116, Fed. Cas.
No. 16,677; Turner v. Foxall, 2
Cranch, C. C. 324, Fed. Cas. No.

14,255; Forrest v. Hanson, 1 Cranch,
C. C. 63, Fed. Cas. No. 4,943.

16—Lavenburg v. Harper, 27 Miss.
299. In this case it was held error
to recall the jury and give them fur-
ther instructions at their request,
but without the consent of parties.
It was further held that if the in-
structions given were in conformity
to law, the cause would not be re-
versed. See also, Randolph v. Go-
van, 14 Smedes & M. (Miss.) 9; Tay-
lor v. Manley, 6 Smedes & M. (Miss.)
305.

17—Arnold v. Phillips, 59 Ill. App.
213.

18—King v. State, 86 Ga. 355;
Phelps v. State, 75 Ga. 571;
O'Shields v. State, 55 Ga. 696; Bank
of Kentucky v. McWilliams, 2 J. J.
Marsh. (Ky.) 263; Stevenson v.
New York Contracting Co.—Pennsyl-
vania Terminal, 137 App. Div. (N.
Y.) 742.

"There may be instances when it
will become the imperative duty of a
court to rectify some omission, or
cure some oversight, by giving to a
jury * * * an additional in-

of authority is to the effect that such further instructions are proper, where each party has an equal opportunity to be heard and where the further instructions are by way of explanation or modification of the instructions given.¹⁹

In one state, when the court gives further instructions of its own motion, or at the request of the jury, no right of the parties to any further instructions is recognized,²⁰ and in other states it has been held that where the court gives additional instructions at the request of the jury, a refusal to give further instructions at the request of the parties is not reversible error.²¹

It has also been held that a mere repetition of instructions already given does not give parties the right to ask a new and substantial charge,²² or for any additional instruc-

struction." *Dowzelot v. Rawlings*, 58 Mo. 75. And see, *Auten v. Catawba Power Co.*, 84 S. C. 399.

19—The parties are entitled to further instructions by way of explanation or modification of additional instructions given by the court of its own motion, or at the request of the jury.

Alabama. *Harper v. State*, 109 Ala. 66; *Kuhl v. Long*, 102 Ala. 569; *Prosser v. Henderson*, 11 Ala. 484.

Illinois. *Shaw v. Camp*, 160 Ill. 430; *Fisher v. People*, 23 Ill. 283.

Iowa. *O'Connor v. Guthrie*, 11 Iowa 80.

Minnesota. *Hudson v. Minneapolis, L. & M. Ry. Co.*, 44 Minn. 55.

Missouri. *Chouteau v. Jupiter Iron Works*, 94 Mo. 388.

New Hampshire. *Page v. Kinsman*, 43 N. H. 328.

New Jersey. *Cook v. Green*, 6 N. J. L. 109.

Texas. *Keeble v. Black*, 4 Tex. 69.

Additional instructions after retirement of the jury are proper

where each party has equal opportunity to submit further instructions. *Shaw v. Camp*, 160 Ill. 425, aff'g 61 Ill. App. 62; *City of Joliet v. Looney*, 159 Ill. 471, aff'g 56 Ill. App. 502.

See also, *Yeldell v. Shinholster*, 15 Ga. 189, in which it was held that where, after failure to agree, the jury return into court for further instructions, and a party requests an instruction on a point omitted in the charge, and to which omission the party had called the court's attention at the time, it is error to refuse the instruction.

As to refusal of instructions covered by those given, see § 197, *ante*.

20—*Nelson v. Dodge*, 116 Mass. 367; *Kellogg v. French*, 15 Gray (Mass.) 354.

21—*State v. Maxent*, 10 La. Ann. 743; *Williams v. Com.*, 85 Va. 607.

22—*Prosser v. Henderson*, 11 Ala. 484, where it was said: "If this can be done, we see no reason why the jury should not be required to be brought again into court at any time

tions whatever, though it would seem that it is within the court's discretion to comply with a request for additional instructions in such case.²³

It has already been noted that the court is not bound to give requested instructions unless the request is made within the proper time, but that it is within the sound discretion of the court to do so if it sees fit.²⁴

Accordingly, it has been held proper for the trial court to refuse requests for instructions, made after the retirement of the jury,²⁵ or after they have announced their inability to agree on a verdict,²⁶ it being considered that when the jury have retired under instructions to which there was no exception, it is within the unreviewable discretion of the court whether they shall be recalled for further instructions.²⁷

Even if the court should choose to exercise its discretion by recalling the jury for further instructions at the request of the parties, it should not do so without good grounds. The indiscriminate exercise of such discretion might place it in the power of counsel to have emphasized by the court any proposition he might choose to submit, and have the jury believe the court attached great weight to the matter about which it had been recalled for instructions.²⁸

before they have rendered their verdict, and additional charges required to be given by the court."

23—*Harvey v. Graham*, 46 N. H. 175.

24—See § 174, *ante*, "Necessity for request in apt and proper time."

See also, *Buck v. Buck*, 4 Baxt. (Tenn.) 392, where it was held that after the jury have failed to agree they may be recalled at the instance of a party and given further and fuller instructions.

25—*Norton v. McNutt*, 55 Ark. 59; *State v. Rowe*, 98 N. C. 629; *Lafoon*

v. Shearin, 95 N. C. 391; *State v. Barbee*, 92 N. C. 820; *Scott v. Green*, 89 N. C. 278; *Williams v. Com.*, 85 Va. 609; *Turner v. Foxall*, 2 Cranch, C. C. 324, Fed. Cas. No. 14,255; *Forrest v. Hanson*, 1 Cranch, C. C. 63, Fed. Cas. No. 4,943.

26—*Cady v. Owen*, 34 Vt. 598.

27—*Lafoon v. Shearin*, 95 N. C. 391.

28—*Bowling v. Memphis & C. R. Co.*, 15 Lea (Tenn.) 122. See also, *St. Louis, I. M. & S. R. Co. v. Reed*, 88 Ark. 458.

§ 218. Consent of counsel.

It is no error for the judge, by consent of counsel on both sides, to indorse on instructions already given additional instructions to the jury.²⁹

§ 219. Extent of power—What further instructions are proper.

There is no error in the judges re-reading an instruction at the jury's request,³⁰ as when the jury request that the instructions be re-read in order to satisfy them as to the true state of the law upon the issue before them,³¹ or when they say that they do not understand the instructions given.³²

In such case the court may correct an erroneous instruction given,³³ give additional instructions,³⁴ or withdraw instructions already given.³⁵

In some jurisdictions the court may restate the evidence, or a portion of it,³⁶ although this is not proper in most jurisdictions, as judges are expressly prohibited from charging in respect to matters of fact.³⁷

29—*Noffsinger v. Bailey*, 72 Mo. 216.

30—*Gracy v. Atlantic Coast Line R. Co.*, 53 Fla. 350. And see, *St. Louis, I. M. & S. R. Co. v. Reed*, 88 Ark. 458.

31—*Woodruff v. King*, 47 Wis. 261.

32—*St. Louis, I. M. & S. R. Co. v. Reed*, 88 Ark. 458; *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449; *Salomon v. Reis*, 5 Ohio Cir. Ct. R. 375. See also, *Nichols v. Munsel*, 115 Mass. 567.

33—*Sage v. Evansville & T. H. R. Co.*, 134 Ind. 100; *McClelland v. Louisville, N. A. & C. Ry. Co.*, 94 Ind. 276; *Holland v. Sheehan*, 106 Minn. 545.

34—*Hamilton v. State*, 62 Ark. 543.

35—*Sage v. Evansville & T. H. R. Co.*, 134 Ind. 100; *United Railways & Electric Co. v. Carneal*, 110 Md. 211.

36—*Maine*. *Edmunds v. Wiggin*, 24 Me. 505.

Massachusetts. *Nichols v. Munsel*, 115 Mass. 567.

New York. *Drew v. Andrews*, 8 Hun 23.

North Carolina. See *Biggs v. Gurganus*, 152 N. C. 173.

Ohio. *Hulse v. State*, 35 Ohio St. 421.

Wisconsin. *Hannon v. State*, 70 Wis. 448; *Byrne v. Smith*, 24 Wis. 68.

United States. *Allis v. United States*, 155 U. S. 117, 39 L. Ed. 91.

37—See *State v. Maxwell*, 42 Iowa 208. See also, §§ 116, *et seq.*, *ante*.

The court may, at their request, give the jury any further instruction on any question of law arising on the facts proven, on which they say that they are in doubt,³⁸ although it has been held that the court is not justified, in any case, in giving another full, complete and different charge to the jury upon nearly all, or even some, of the material questions involved in the case.³⁹

A Texas statute, providing that where the jury, after retirement, ask further instructions, no charge shall be given except upon the particular point on which it is asked, has been strictly enforced in a number of cases.⁴⁰

The wisdom of such a statute is questionable, and the general rule is that, "in answering questions asked by the jury when they come in for further instructions, the court is not restricted to categorical answers," but may and should give any further instructions necessary.⁴¹

As already shown, the discretion of the court in recalling the jury for further instructions is practically unlimited, and, this being so, there can be no reason why it should be restricted to answering the precise point presented by the jury. On principle, there can be no difference in the extent to which it may go in giving further instructions, whether it take the initiative, and gives further instructions of its own motion, or merely at the request of the jury.

38—O'Shields v. State, 55 Ga. 696; State v. Chandler, 31 Kan. 201, 1 Pac. 787; Wilkinson v. St. Louis Sectional Dock Co., 102 Mo. 130.

39—Foster v. Turner, 31 Kan. 58, 1 Pac. 145.

40—See Vernon's Sayles' Texas Civ. St. 1914, art. 1962, and Willson's Tex. Cr. St., Code Cr. Proc. art. 734; Wharton v. State, 45 Tex. 2; Hannahan v. State, 7 Tex. App. 610; Garza v. State, 3 Tex. App. 287; Chamberlain v. State, 2 Tex. App. 451.

41—Arkansas. Hamilton v. State, 62 Ark. 543.

Georgia. Jeter v. Jones, 135 Ga. 22.

Indiana. Sage v. Evansville & T. H. R. Co., 134 Ind. 100; McClelland v. Louisville, N. A. & C. Ry. Co., 94 Ind. 276.

Maine. Edmunds v. Wiggin, 24 Me. 509.

New York. Stevenson v. New York Contracting Co., 137 App. Div. 742.

Vermont. Paine v. Hutchins, 49 Vt. 314. And see, generally, the cases cited this section, *ante*.

After the retirement of the jury, the court may, of its own motion, recall them and give instructions inadvertently omitted,⁴² or which have been erroneously refused,⁴³ or instructions explanatory of those already given,⁴⁴ or withdrawing or modifying an erroneous instruction given;⁴⁵ or, where the parties have consented that the jury shall take the minutes of the testimony to the jury room, the court may recall the jury to read to them a portion of a deposition admitted on the trial, but which, through inadvertence, had not been given to the jury,⁴⁶ or to restate the court's opinion as to the credibility of a witness (the court having stated such opinion in the original charge, at the instance of counsel);⁴⁷ or to define the punishment for the different degrees of crime;⁴⁸ or to admonish the jury of the impropriety of a juror going into the jury box with a predetermination as to the result which he will favor, and to cause a disagreement if the verdict cannot be rendered as he wants it.⁴⁹

§ 220. Same—Necessity of repeating entire charge.

Where the court is asked by the jury to repeat a portion of the charge, or to give a new instruction on a particular point, it is not, according to some decisions, bound to repeat

42—Pritchett v. State, 92 Ga. 65; Com. v. Snelling, 15 Pick. (Mass.) 334; Dowzelot v. Rawlings, 58 Mo. 75; Cox v. Highley, 100 Pa. St. 252.

43—Phillips v. New York Cent. & H. River R. Co., 127 N. Y. 657.

44—Florence Sew. Mach. Co. v. Grover & Baker Sew. Mach. Co., 110 Mass. 70, 14 Am. Rep. 579; Com. v. Snelling, 15 Pick. (Mass.) 334; Holland v. Sheehan, 106 Minn. 545.

45—Indiana. Sage v. Evansville & T. H. R. Co., 134 Ind. 100; Hartman v. Flaherty, 80 Ind. 472; Hall v. State, 8 Ind. 439.

Maryland. United Railways & Electric Co. v. Carneal, 110 Md. 211.

Massachusetts. Hill v. Hayes, 199 Mass. 411, 18 L. R. A. (N. S.) 375.

Missouri. Scott v. Haynes, 12 Mo. App. 597.

South Carolina. State v. Lightsey, 43 S. C. 114.

Washington. Jack v. Territory, 2 Wash. T. 101, 3 Pac. 832.

46—Coit v. Waples, 1 Minn. 134 (Gil. 110).

47—State v. Summers, 4 La. Ann. 27.

48—State v. Kessler, 15 Utah 142, 62 Am. St. Rep. 911, 49 Pac. 293.

49—State v. Lawrence, 38 Iowa 51. See also, State v. Blackwell, 9 Ala. 79.

the whole charge,⁵⁰ as this practice might lead to confusion, and tend to protract proceedings needlessly.⁵¹

However, in one case, it has been held that if the jury merely disagree as to the result, after considering the evidence and instructions, it is erroneous for the court to repeat or recharge disputed portions of the charge, and the reason assigned was that the jury would probably conclude that the matter thus recharged was controlling in the case.⁵²

In another case, which assumed to follow this decision, it was held that it was reversible error to recall the jury and repeat a portion of the charge, in the absence of a request by the jury, and against the objection of the appellant.⁵³

A refusal to accede to a request of a party to re-read a portion of the instructions touching a special point is not error where the court offers to re-read the entire charge if the jury desire it, and the foreman states that the jury do not desire such reading.⁵⁴

In jurisdictions where it is permissible for the court to state the evidence in charging the jury, the court is not bound to repeat all the evidence when asked by the jury to restate a portion of it.⁵⁵

Though it is better practice, on restating the evidence upon a particular point, to restate all of it, yet, under a statute authorizing the court to state anew the evidence or any part of it, the court may merely state the evidence in favor of one party.⁵⁶ But where a part only of the evidence is restated, it is well to caution the jury that the other evidence in the case must be equally considered.⁵⁷

50—*St. Louis, I. M. & S. R. Co. v. Reed*, 88 Ark. 458; *Gravett v. State*, 74 Ga. 196; *Wilson v. State*, 68 Ga. 827; *O'Shields v. State*, 55 Ga. 696; *Hatcher v. State*, 18 Ga. 460.

51—*Gravett v. State*, 74 Ga. 196.

52—*Swaggerty v. Caton*, 1 Heisk. (Tenn.) 202.

53—*Granberry v. Frierson*, 2 Baxt. (Tenn.) 326.

54—*Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318.

55—*Byrne v. Smith*, 24 Wis. 68; *Allis v. United States*, 155 U. S. 117.

56—*Byrne v. Smith*, 24 Wis. 69.

57—*Allis v. United States*, 155 U. S. 123, 39 L. Ed. 94. See also, *Biggs v. Gurganus*, 152 N. C. 173. Where an admonition to consider all the evidence was held proper.

§ 221. Exceptions to additional instructions.

When further instructions are given after the retirement of the jury, parties have the same right to except to such instructions as to those originally given,⁵⁸ and may also except to a refusal of further instructions asked by them in cases where they are entitled to ask for further instructions.⁵⁹

II. MANNER OF GIVING ADDITIONAL INSTRUCTIONS.

§ 222. Delivery in open court.

Charging the jury is a high judicial function, and after the jury have retired the court should not send additional instructions to them by an officer, or go in person to the jury room to communicate with them. All communications should be made in open court.⁶⁰

58—**Alabama.** Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180; Kuhl v. Long, 102 Ala. 563.

Illinois. Crabtree v. Hagenbaugh, 23 Ill. 349, 76 Am. Dec. 694.

Indiana. Fish v. Smith, 12 Ind. 563.

Iowa. O'Connor v. Guthrie, 11 Iowa 81.

Louisiana. State v. Frisby, 19 La. Ann. 143.

Massachusetts. Nelson v. Dodge, 116 Mass. 367; Kellogg v. French, 15 Gray 357; Com. v. Snelling, 15 Pick. 334.

New Jersey. Cook v. Green, 6 N. J. L. 109.

Tennessee. Wade v. Ordway, 1 Baxt. 229.

59—Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180; Prosser v. Henderson, 11 Ala. 484.

60—**Alabama.** Johnson v. State, 100 Ala. 55; Cooper v. State, 79 Ala. 54.

Illinois. Chicago & A. R. Co. v. Robbins, 159 Ill. 598; Crabtree v. Hagenbaugh, 23 Ill. 349, 76 Am. Dec. 694; Fisher v. People, 23 Ill. 283.

Indiana. Quinn v. State, 130 Ind. 340; Low v. Freeman, 117 Ind. 341; Blacketer v. House, 67 Ind. 414; Smith v. McMillen, 19 Ind. 391; Fish v. Smith, 12 Ind. 563; Hall v. State, 8 Ind. 444.

Iowa. See Burton v. Neill, 140 Iowa 141, 17 Ann. Cas. 532.

Kentucky. Goode v. Campbell, 14 Bush 75.

Massachusetts. Read v. City of Cambridge, 124 Mass. 567, 26 Am. Rep. 690; Sargent v. Roberts, 1 Pick. 337; 11 Am. Dec. 185.

Michigan. Hopkins v. Bishop, 91 Mich. 328, 30 Am. St. Rep. 480; Fox v. Peninsular White Lead & Color Works, 84 Mich. 676; Snyder v. Wilson, 65 Mich. 336.

Minnesota. Hoberg v. State, 3 Minn. 262 (Gil. 181).

Missouri. State v. Miller, 100 Mo. 606; Chouteau v. Jupiter Iron Works, 94 Mo. 388; State v. Alexander, 66 Mo. 148; Norton v. Dorsey, 65 Mo. 376.

New York. Watertown Bank & Loan Co. v. Mix, 51 N. Y. 561; Wiggins v. Downer, 67 How. Pr. 68;

The judge has no more right in the jury room while the jury are deliberating than any other person, even though he holds no communication with them,⁶¹ and, if he does so, the honesty of his intentions in no way lessens the impropriety of such action.⁶²

This rule is applicable, though the court has temporarily adjourned. "The judge carries no power with him to his lodgings, and has no more authority over the jury than any other person, and any direction to them from him, either verbal or in writing, is improper."⁶³

If the jury desire any further instructions they should send a request to the court through the officers in attendance, that they may, in a body, be brought into court.⁶⁴

In one case a judgment was reversed because the judge went to the jury room and stood in the doorway, which was partially open. It was held that the party in whose favor the decision was rendered could not be permitted to show that the judge said nothing to the jury.⁶⁵

In another case it was said that the affidavits of jurors cannot be read to impeach their verdict after it has been rendered, so that it may be impossible to show in any given case whether or not an intruder in the jury room did con-

Plunkett v. Appleton, 51 How. Pr. 469; **Kehrley v. Shafer**, 92 Hun 196; **High v. Chick**, 81 Hun 100; **Mahoney v. Decker**, 18 Hun 365; **Taylor v. Betsford**, 13 Johns. 487.

Ohio. **Kirk v. State**, 14 Ohio 511; **Campbell v. Beckett**, 8 Ohio 211.

Pennsylvania. **Sommer v. Huber**, 183 Pa. St. 162.

Rhode Island. **State v. Smith**, 6 R. I. 33.

Texas. **Texas Midland R. Co. v. Byrd**, 102 Tex. 263, 20 L. R. A. (N. S.) 429, 20 Ann. Cas. 137.

Vermont. **State v. Patterson**, 45 Vt. 308, 12 Am. Rep. 200n.

Virginia. **Traders' & Truckers' Bank v. Black**, 108 Va. 59.

Washington. **State v. Wroth**, 15 Wash. 621, 47 Pac. 106.

61—**Hoberg v. State**, 3 Minn. 262 (Gil. 181); **Gibbons v. Van Alstyne**, 29 N. Y. St. 463.

62—**Fish v. Smith**, 12 Ind. 563; **Hoberg v. State**, 3 Minn. 262 (Gil. 181); **Valentine v. Kelley**, 54 Hun (N. Y.) 79.

63—**Sargent v. Roberts**, 1 Pick. (Mass.) 337, 11 Am. Dec. 185. As to recalling jury, see **Missouri, K. & T. R. Co. of Texas v. Harrison**, 56- Tex. Civ. App. 17.

64—**Fisher v. People**, 23 Ill. 283.

65—**State v. Wroth**, 15 Wash. 621, 47 Pac. 106.

verse with the jury, or what he said, and that if it were assumed that the judge said nothing, but merely remained in the jury room listening to their discussions, it could not be said that his presence did not affect their decision.⁶⁶

In New Hampshire, the rule that no communications between the court and jury should be had except in open court does not obtain,⁶⁷ and in South Carolina, a similar decision was made in an early case.⁶⁸

§ 223. Effect of violation of rule—Waiver of objections.

Ordinarily, the violation of the rule requiring instructions to be delivered in open courts is error, warranting reversal of the judgment,⁶⁹ since it will be conclusively presumed that injury resulted. Accordingly, the party complaining need not show that he was prejudiced, in order to be entitled to a new trial,⁷⁰ and the court will not inquire whether the instruction given was material, or had any influence upon the verdict,⁷¹ or was prejudicial to either party.⁷²

In some cases, however, it has been held that no prejudice

66—*Gibbons v. Van Alstyne*, 29 N. Y. St. 461.

67—*Allen v. Aldrich*, 29 N. H. 63; *Bassett v. Salisbury Mfg. Co.*, 28 N. H. 438; *School Dist. No. 1 in Milton v. Bragdon*, 23 N. H. 517; *Shapley v. White*, 6 N. H. 172.

68—*Goldsmith v. Solomons*, 2 Strob. (S. C.) 296.

69—*Illinois*. *Chicago & A. R. Co. v. Robbins*, 159 Ill. 598.

Indiana. *Quinn v. State*, 130 Ind. 340; *Fish v. Smith*, 12 Ind. 563; *Hall v. State*, 8 Ind. 439.

Massachusetts. *Sargent v. Roberts*, 1 Pick. 337, 11 Am. Dec. 185.

Michigan. *Hopkins v. Bishop*, 91 Mich. 328, 30 Am. St. Rep. 480.

Minnesota. *Hoberg v. State*, 3 Minn. 262 (Gil. 181).

Missouri. *Chouteau v. Jupiter Iron Works*, 94 Mo. 388; *State v. Alexander*, 66 Mo. 148; *Norton v. Dorsey*, 65 Mo. 376.

New York. See *Plunkett v. Appleton*, 51 How. Pr. 469; *High v. Chick*, 81 Hun 100; *Gibbons v. Van Alstyne*, 29 N. Y. St. 461.

Pennsylvania. *Somner v. Huber*, 183 Pa. St. 162.

70—*People v. Linzey*, 79 Hun (N. Y.) 23.

71—*Kehrley v. Shafer*, 92 Hun (N. Y.) 196; *Gibbons v. Van Alstyne*, 29 N. Y. St. 461.

72—*Read v. City of Cambridge*, 124 Mass. 567, 26 Am. Rep. 690.

resulted and that the judgment would not be reversed because the rule was violated.⁷³

It is proper for the trial judge to give additional instructions otherwise than in open court, if the parties waive the rule so requiring and consent to such action of the judge.⁷⁴

In such case, it is necessary that the consent of both parties be obtained,⁷⁵ and it is usually held that such consent must be expressly given,⁷⁶ although there are some decisions which hold that where irregular communications are made to the jury, either in the absence of counsel or by sending to the jury room, and counsel are afterwards apprised of the communication, and make no objection, a new trial will not be granted.⁷⁷

But ordinarily, if counsel are aware that the judge is going into the jury room, and make no objection, this does not amount to a consent to instructions given while in the jury room.⁷⁸

Even when consent is obtained for the trial judge to go to the jury room, he should confine his visit strictly to the purpose for which permission was granted, and should not give any instructions without the knowledge of counsel.⁷⁹

§ 224. Necessity of presence of counsel.

There is some conflict in the decisions as to the necessity of counsel being present when additional instructions are

73—*Moseley v. Washburn*, 165 Mass. 417; *Galloway v. Corbitt*, 52 Mich. 461.

74—*City of Joliet v. Looney*, 159 Ill. 471; *McCrory v. Anderson*, 103 Ind. 12; *Smoke v. Jones*, 35 Mich. 408. See also, *Hopkins v. Bishop*, 91 Mich. 328, 30 Am. St. Rep. 480; *Benson v. Clark*, 1 Cow. (N. Y.) 258; *Plunkett v. Appleton*, 51 How. Pr. (N. Y.) 469; *Taylor v. Betsford*, 13 Johns. (N. Y.) 487; *Neil v. Abel*, 24 Wend. (N. Y.) 185.

75—*Smith v. McMillen*, 19 Ind. 391.

76—*Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 561; *Moody v. Pomeroy*, 4 Denio (N. Y.) 115; *Bunn v. Crowl*, 10 Johns. (N. Y.) 239.

77—*Mahoney v. Decker*, 18 Hun (N. Y.) 365; *Zust v. Smitheimer*, 34 N. Y. St. 583; *Thorp v. Riley*, 29 N. Y. St. 520.

78—*Moody v. Pomeroy*, 4 Denio (N. Y.) 115.

79—*Seeley v. Bisgrove*, 83 Hun (N. Y.) 293.

given to the jury, either at their own request or on the court's own motion, although this conflict is due in some cases to the effect of statutory provisions governing the matter.

In some states it is held that the trial court should refrain from instructing the jury in the absence of counsel, if it can conveniently do so, but that the act is not reversible error, even though counsel are not notified if the instructions are given at a regular session when the attorneys might reasonably have been expected to be in attendance.⁸⁰

The matter of notifying counsel is regarded rather as a matter of courtesy than of legal right,⁸¹ since it is the duty of counsel to be present in court,⁸² and since otherwise

80—**Arizona.** Torque v. Carrillo, 1 Ariz. 336, 25 Pac. 526.

Kansas. Karner v. Kansas City Elevated R. Co., 82 Kan. 842, 109 Pac. 676.

Maine. State v. Pike, 65 Me. 111.

Massachusetts. Kullberg v. O'Donnell, 158 Mass. 405, 35 Am. St. Rep. 507 (explaining Sargent v. Roberts, 1 Pick. 337, 11 Am. Dec. 185).

Minnesota. Reilly v. Bader, 46 Minn. 212; Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 52.

New Hampshire. Ahearn v. Mann, 60 N. H. 472; Leighton v. Sargent, 31 N. H. 119, 64 Am. Dec. 323; Allen v. Aldrich, 29 N. H. 63; Bassett v. Salisbury Mfg. Co., 28 N. H. 438; Milton School Dist. v. Bragdon, 23 N. H. 507.

New Jersey. Cooper v. Morris, 48 N. J. L. 607.

North Carolina. Biggs v. Gurganus, 152 N. C. 173.

Rhode Island. Alexander v. Gardner, 14 R. I. 15.

Wisconsin. Meier v. Morgan, 82 Wis. 289, 33 Am. St. Rep. 39; Chap-

man v. Chicago & N. W. Ry. Co., 26 Wis. 295, 7 Am. Rep. 81.

United States. Aerheart v. St. Louis, I. M. & S. R. Co., 40 C. C. A. 171, 99 Fed. 907.

81—State v. Pike, 65 Me. 111; Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 52; Chapman v. Chicago & N. W. R. Co., 26 Wis. 295, 7 Am. Rep. 81.

The giving of notice to counsel is a matter of grace or favor, and, while the custom of giving notice is not inherently vicious, the court must have power to proceed without such notice; otherwise, the transaction of business would be dependent upon the favor of counsel or litigants. Chapman v. Chicago & N. W. Ry. Co., 26 Wis. 295, 7 Am. Rep. 81.

82—"Counsel, by purposely or inadvertently withdrawing from the court, cannot take away the power, or suspend the right to exercise it until they can be found and brought in, if willing to come. It is the duty of counsel engaged in the trial of a case to remain in or be represented at the court during its sessions until

counsel could, by withdrawing from the court room, suspend the court's power.⁸³

However, in some cases it is said that it would be better to attempt to notify counsel,⁸⁴ and the power to reinstruct a jury in the absence of counsel, like other powers, may be abused, and in such case the remedy is by motion for a new trial.⁸⁵

In some states, usually under statutory provisions, additional instructions must be given, either in the presence of counsel, or after an attempt has been made to notify them that further instructions will be given.⁸⁶

the jury having the case in charge is discharged. * * * The failure of counsel to perform their duty does not deprive the court of its power to discharge its duty. The court is not required to send out its officers to invite counsel to attend to their duties, and hear additional instructions which the court proposes to give to the jury." *Cornish v. Graff*, 36 Hun (N. Y.) 160. To the same effect is *Hudson v. Minneapolis, L. & M. Ry. Co.*, 44 Minn. 52. And see, *Holland v. Sheehan*, 106 Minn. 545.

"In contemplation of law, the parties and their counsel remain in court until a verdict has been rendered, or the jury discharged from rendering one." *Cooper v. Morris*, 48 N. J. L. 607.

83—"The court may proceed without it [notice], subject to the power of opening the proceedings, where sufficient cause of absence is shown, and it appears that injustice has been done. The idea that the court cannot proceed without causing notice to be given, or that it is error to do so, and that it must await the motion and presence of counsel or their clients, would be intolerable, for then no business could be done

and no proceedings taken except by the favor of counsel or of litigants." *Chapman v. Chicago & N. W. Ry. Co.*, 26 Wis. 306.

84—*Torque v. Carrillo*, 1 Ariz. 336, 25 Pac. 526; *Hudson v. Minneapolis, L. & M. Ry. Co.*, 44 Minn. 52; *Traders' & Truckers' Bank v. Black*, 108 Va. 59; *Meier v. Morgan*, 82 Wis. 289, 33 Am. St. Rep. 39.

85—*Cornish v. Graff*, 36 Hun (N. Y.) 160.

86—*Alabama*. *Kuhl v. Long*, 102 Ala. 569; *Johnson v. State*, 100 Ala. 55; *McNeil v. State*, 47 Ala. 498.

California. *People v. Mayes*, 113 Cal. 618, 45 Pac. 860; *People v. Trim*, 37 Cal. 274; *Redman v. Gulnac*, 5 Cal. 148.

Georgia. *Martin v. State*, 51 Ga. 569.

Illinois. *Chicago & Alton R. Co. v. Robbins*, 159 Ill. 598, rev'g 54 Ill. App. 611; *Illinois Cent. R. Co. v. Ferrell*, 108 Ill. App. 659.

Indiana. *Blacketer v. House*, 67 Ind. 414; *Jones v. Johnson*, 61 Ind. 257; *Fish v. Smith*, 12 Ind. 563.

Iowa. *Burton v. Neill*, 140 Iowa 141, 17 Ann. Cas. 532.

Kentucky. *Pierce v. Com.* (Ky.)

In such states, the objection that counsel could stop the trial by absenting himself from the courthouse has been dis-

42 S. W. 107; *Goode v. Campbell*, 14 Bush 75.

Louisiana. *State v. Davenport*, 33 La. Ann. 231; *State v. Frisby*, 19 La. Ann. 143.

Minnesota. *Holland v. Sheehan*, 106 Minn. 545.

Missouri. *State v. Miller*, 100 Mo. 606; *Chinn v. Davis*, 21 Mo. App. 363.

New York. *Wheeler v. Sweet*, 137 N. Y. 438; *Kehrley v. Shafer*, 92 Hun 196; *People v. Cassiano*, 30 Hun 388.

Tennessee. *Wade v. Ordway*; 1 Baxt. 229.

Contra, *Wiggins v. Downer*, 67 How. Pr. (N. Y.) 69. And see, *Burton v. Neill*, 140 Iowa 141, 17 Ann. Cas. 532, where the presence of counsel was considered unnecessary when the court merely admonished the jury to agree.

It is error to give an additional instruction after retirement in the absence of counsel. *Chicago & A. R. Co. v. Robbins*, 159 Ill. 598, rev'g 54 Ill. App. 611.

Additional instructions may be submitted without notice to counsel. *Illinois Cent. R. Co. v. Ferrell*, 108 Ill. App. 659.

Rule in Ohio. In Ohio there is a statutory provision as follows: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court, where the information upon the point of law shall be given; and the court may give its recollec-

tion as to the testimony on the point in dispute, in the presence of, or after notice to, the parties or their counsel" Code, section 270. (See *Page & Adams*, Ann. Ohio Gen. Code § 11452.) The decisions under this statute are conflicting. In *Campbell v. Beckett*, 8 Ohio 211, it was held reversible error for the judge, during recess of court, in the absence of parties and counsel, and without notice to them, to give further instructions on a point of law. In *Milius v. Marsh*, 1 Disn. (Ohio) 512, and *Chambers' Adm'r v. Ohio Life Insurance & Trust Co.*, 1 Disn. (Ohio) 327, it was held that the provision requiring the presence of or notice to counsel when the court states its recollection of the evidence to the jury does not apply to instructions on matters of law. "There is a clear distinction under section 270 of the Code, between further instructions in matter of law and a statement by the court of the evidence on a point." So, in *Seagrave v. Hall*, 10 Ohio Cir. Ct. R. 395, it was held that a verdict should be set aside where the jury were recalled and given further instructions, not upon questions of law, without any attempt to notify the parties or their counsel, none of whom were present. On the other hand, it was held in *Moravce v. Buckley*, 11 Wkly. Law Bul. (Ohio) 225, that an instruction by the court as to the form of the verdict, given on the jury's request after they had retired to deliberate upon their verdict, was an instruction on the law of the case, and, if given in the absence of counsel, was error. In

posed of as follows: "Courts are armed with plenary authority to enforce the discharge of duty on the part of all their officers; and, besides a fitting and proper penalty on derelict counsel in the case supposed, they could, in cases when the necessity arose, require the defendant to procure other counsel, or make the appointment for him. If the absence of counsel resulted from a cause which would be a good ground for continuance, and it would not be proper to substitute other counsel, it were better that there should be a continuance, or at least a temporary postponement, than that one not skilled in the law, and who was largely ignorant of his legal rights, and perhaps totally ignorant of the practice on which those rights rested, should lose a privilege, the value of which cannot be estimated."⁸⁷

Instructions to the jury after they have retired, in the absence of counsel, are objectionable, though no harm is done, for the reason that all proceedings of the court should be open and notorious, so that if a party is not satisfied with them he may take exceptions.⁸⁸

This objection, of course, does not apply in jurisdictions where instructions given after the jury retire are returned into court with the verdict, and are then allowed to be excepted to.⁸⁹

Where the jury have been charged, and have retired, counsel may presume that no other instructions will be given without notice or an attempt to notify, and can reasonably

Emery v. Whitaker, 2 Cin. Super. Ct. R. 36, it was held that where the jury come out and ask further instructions on the law, in the absence of counsel, though no call for counsel is made at the courthouse door, if the counsel is sent for into every court room and office in the courthouse, it is sufficient, though it seems that even this is not necessary when the court is in session.

87—*Martin v. State*, 51 Ga. 569.

88—*Feibelman v. Manchester Fire*

Assur. Co., 108 Ala. 180; *Crabtree v. Hagenbaugh*, 23 Ill. 349, 76 Am. Dec. 694; *Wade v. Ordway*, 1 Baxt. (Tenn.) 229. In *Wade v. Ordway*, *ante*, however, it was held that if the upper court could see that no harm had been done, the trial court would not be reversed for its departure from propriety.

89—*Allen v. Aldrich*, 29 N. H. 63; *School Dist. No. 1 v. Bragdon*, 23 N. H. 507; *Shapleigh v. White*, 6 N. H. 172.

object to instructions given in their absence, as they thereby lose the opportunity of asking for explanatory charges, if deemed necessary,⁹⁰ and of excepting to their refusal if the court declines to give them.⁹¹

The impropriety of giving further instructions in the absence of counsel, and without an attempt to notify them, is increased when the court is convened and the instructions given on a day during which no court business is usually transacted. "When a court meets at a time so unusual, and without notice to parties, it is manifestly improper, and might work oppressively, to proceed in so important a matter as that of charging a jury without the knowledge or presence of a party or of his counsel."⁹²

It must depend largely on circumstances as to what notice will be sufficient, and much must be left to the discretion of the trial judge. It has been held a sufficient notice to call the attorneys at the courthouse door, or at any place where witnesses are usually called.⁹³

Where, before giving additional instructions, the court sends officers to look for counsel, the court may proceed in their absence,⁹⁴ particularly if the party represented by the absent counsel is present.⁹⁵

And it is, of course, proper to give further instructions to the jury at their request, in the absence of counsel, where they have been duly notified that further instructions will be given, and neglect or refuse to attend.⁹⁶

90—Kuhl v. Long, 102 Ala. 569; Wade v. Ordway, 1 Baxt. (Tenn.) 229.

91—Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180.

92—Davis v. Fish, 1 G. Greene (Iowa) 410. The additional instructions in this case were given on Sunday.

93—McNeil v. State, 47 Ala. 498; Dobson v. State, 5 Lea (Tenn.) 277.

94—Alabama. McNeil v. State,

47 Ala. 498; Collins v. State, 33 Ala. 434, 73 Am. Dec. 426.

California. People v. Mayes, 113 Cal. 618, 45 Pac. 860.

Louisiana. State v. Dudoussat, 47 La. Ann. 996.

Ohio. Preston v. Bowers, 13 Ohio St. 1, 82 Am. Dec. 430.

Tennessee. Dobson v. State, 5 Lea 277.

95—People v. Mayes, 113 Cal. 618, 45 Pac. 860.

96—Cook v. Green, 6 N. J. L. 109.

It has also been held, that re-reading a portion of the charge already given in the absence of counsel is not within the rule, and that error cannot be assigned thereto.⁹⁷

In some cases the giving of additional instructions in the absence of counsel, and without attempting to notify them, has not been held error warranting reversal, if it was apparent that no prejudice resulted.⁹⁸

But usually in both civil and criminal cases the giving of such additional instructions is considered reversible error,⁹⁹ and it has been said that additional instructions, given in the absence of counsel, and at the request of the jury, will be presumed important, if the contrary is not shown, from the fact that the jury have asked for them.¹

It has also been held that a constitutional provision guaranteeing the right to prosecute a cause by counsel is violated by the giving of instructions in the absence of counsel and the reviewing court cannot "inquire, in such a case, what instructions were given by the court to the jury,—whether they were correct or incorrect, prejudicial or otherwise. We cannot be informed of their nature or effect by lawful and constitutional methods. The counsel not being present to observe the proceedings of the court, and learn for themselves what transpired, and, by their advice and counsel, it may be, give shape to the action of the court, the plaintiff can have no just and fair representation—indeed, no constitutional representation by counsel—in making up the record for the presentation of the illegal proceedings to this court for review."²

97—*People v. La Munion*, 64 Mich. 709.

98—*Karner v. Kansas City Elevated R. Co.*, 82 Kan. 842, 109 Pac. 676; *Smith v. Kelly*, 43 Mich. 390; *Biggs v. Gurganus*, 152 N. C. 173; *Wade v. Ordway*, 1 Baxt. (Tenn.) 229.

99—*Feibelman v. Manchester Fire Assur. Co.*, 108 Ala. 180; *Kuhl v.*

Long, 102 Ala. 569; *McNeil v. State*, 47 Ala. 498; *People v. Trim*, 37 Cal. 274; *Reidman v. Gulnac*, 5 Cal. 148; *People v. Cassiano*, 30 Hun (N. Y.) 388; *State v. Davenport*, 33 La. Ann. 231; *State v. Frisby*, 19 La. Ann. 143.

1—*Redman v. Gulnac*, 5 Cal. 148.

2—*Feibelman v. Manchester Fire Assur. Co.*, 108 Ala. 180.

§ 225. Presence of accused in criminal cases.

It is a familiar rule that in all criminal cases the defendant has the right to be present in person throughout every stage of the trial.³

The court cannot give further instructions to the jury after their retirement, except in the presence of the defendant,⁴ unless he has absconded.⁵

It is the duty of the court to see that defendant is present when any instructions are delivered to the jury,⁶ the rule being that prejudice will be presumed without inquiring into the correctness of the instructions,⁷ and it has almost invariably been held a ground for reversal to deliver any further instructions in the absence of the defendant,⁸ although there are decisions to the contrary.⁹

If the judge recharges the jury without verifying for himself the defendant's presence, and it afterwards appears that the prisoner was not present, but was in an adjoining room, in custody of an officer, and did not know that the jury were being recharged, and knowledge did not come to

3—*Bonner v. State*, 67 Ga. 510; *State v. Dry*, 152 N. C. 813. As to exception on trial for misdemeanor see *State v. Waymire*, 52 Ore. 281, 21 L. R. A. (N. S.) 56n, 132 Am. St. Rep. 699, 97 Pac. 46; *State v. Rabens*, 79 S. C. 542.

4—*Alabama*. *Johnson v. State*, 100 Ala. 58; *Cooper v. State*, 79 Ala. 54.

Colorado. *Dekelt v. People*, 44 Colo. 525, 99 Pac. 330.

Georgia. *Wilson v. State*, 87 Ga. 583; *Bonner v. State*, 67 Ga. 510; *Wade v. State*, 12 Ga. 25.

Illinois. *Rafferty v. People*, 72 Ill. 37.

Missouri. *State v. Miller*, 100 Mo. 606.

New York. *Maurer v. People*, 43 N. Y. 1.

Ohio. *Hulse v. State*, 35 Ohio St. 429; *Jones v. State*, 26 Ohio St. 208; *Kirk v. State*, 14 Ohio 512.

Texas. *Benavides v. State*, 31 Tex. Cr. App. 173, 37 Am. St. Rep. 799. But see, *Washington v. State*, 56 Tex. Cr. App. 195.

5—*Hulse v. State*, 35 Ohio St. 429.

6—*Wilson v. State*, 87 Ga. 583. See *Dekelt v. People*, 44 Colo. 525, 99 Pac. 330.

7—*Jones v. State*, 26 Ohio St. 208.

8—See cases already cited in this section.

9—*Rafferty v. People*, 72 Ill. 37; *Washington v. State*, 56 Tex. Cr. App. 195. But see *State v. Stevenson*, 64 W. Va. 392, 19 L. R. A. (N. S.) 713.

him until after such recharge was concluded, it is cause for a new trial.¹⁰

On a trial for murder, where the jury returned into court and asked questions as to what had been the evidence on a particular point, it was held reversible error to give the requested information in the absence of the accused.¹¹

It seems, however, that the defendant may waive his right to be present when additional instructions are given,¹² but the presence of counsel at time of giving instructions, and his failure to object, will not waive the absence of the accused.¹³

It has also been held that the irregularity of charging in the defendant's absence is not cured by the presence of his counsel at the giving of such additional instructions, and his failure to make objections.¹⁴

10—Wilson v. State, 87 Ga. 583.

Maurer v. People, 43 N. Y. 1; Jones v. State, 26 Ohio St. 208.

11—Maurer v. People, 43 N. Y. 1.

12—Benavides v. State, 31 Tex.

14—Jones v. State, 26 Ohio St.

Cr. App. 173, 37 Am. St. Rep. 799.

208.

13—Bonner v. State, 67 Ga. 510;

CHAPTER XX.

WITHDRAWAL OR MODIFICATION OF INSTRUCTIONS.

§ 226. Right to withdraw or modify instructions.

§ 227. Time of withdrawal or modification.

§ 228. Sufficiency and effect.

§ 229. At request of parties.

§ 226. Right to withdraw or modify instructions.

The modification of requested instructions has already been considered.¹

In addition it may be stated that where erroneous instructions have been given to the jury, it is well settled that the court may, at any time before verdict, either of its own motion or at the request of parties, withdraw or amend and correct such instructions.²

The court is not bound to modify, limit or qualify erroneous instructions,³ but it has the power to do so.⁴

1—See §§ 190 *et seq.*, *ante*.

2—**Alabama.** Smith v. Maxwell, 1 Stew. & P. 221.

Georgia. Pelham Mfg. Co. v. Powell, 6 Ga. App. 308.

Indiana. Chesapeake Stevedoring Co. v. Hufnagel, 120 Ind. 53; Hall v. State, 8 Ind. 439; Broadstreet v. McKamey, 41 Ind. App. 272.

Iowa. Renner v. Thornburg, 111 Iowa 515.

Maryland. United Rys. & Elec. Co. v. Carneal, 110 Md. 211; Sittig v. Birkestack, 38 Md. 158; Goldsborough v. Cradie, 28 Md. 477.

Minnesota. Holland v. Sheehan, 106 Minn. 545.

New York. Greenfield v. People, 85 N. Y. 91; Eggler v. People, 56 N. Y. 642.

3—Cunningham v. State, — Tex. Cr. App. —, 166 S. W. 519; Ramm v. Hewitt-Lea Lumber Co., 49 Wash. 263, 94 Pac. 1081.

4—Cunningham v. State, — Tex. Cr. App. —, 166 S. W. 519.

The court may cure an error by withdrawing, explaining, or correcting an instruction. United Rys. & Elec. Co. v. Carneal, 110 Md. 211; State v. Hood, 63 W. Va. 182, 15 L. R. A. (N. S.) 448, 129 Am. St. Rep. 964.

Jurymen are intelligent men and can understand directions of the judge and have capacity not to be influenced by an instruction afterwards eliminated from the case.⁵

A modification in accordance with the ordinary precaution of trial courts to avoid any invasion of the province of the jury cannot be complained of⁶ and where an instruction is good as an abstract proposition of law, but as applied to the concrete case may tend to mislead the jury, it is not error to so modify the language as to make it cover the case presented.⁷

The court may recall the jury and withdraw an instruction, though a part of it is proper, if that part of it which is proper has been embraced in an instruction given,⁸ and there is no serious error where an improper instruction is read to the jury but subsequently withdrawn.⁹

§ 227. Time of withdrawal or modification.

Ordinarily the judge has authority at any time before the jury is discharged, to withdraw erroneous instructions,¹⁰ and it has been held that the trial court may amend instructions during the progress of arguments of counsel, if abundant time remains for the discussion to the jury of the effect of such amendments.¹¹

§ 228. Sufficiency and effect.

A judge, other than the judge who presided at the trial,

5—State v. Hood, 63 W. Va. 182, 15 L. R. A. (N. S.) 448, 129 Am. St. Rep. 964.

6—Scott v. Sovereign Camp Woodmen of the World, 149 Iowa 562.

7—Greer v. Arrington, 72 W. Va. 693.

8—Lautman v. Pepin, 26 Ind. App. 427.

To tell the jury that they must find a "binding contract" without defining it would be error, and a requested instruction is properly modified by stating what constitutes such

binding contract. St. Louis Maple & Oak Flooring Co. v. Knost, 148 Mo. App. 563.

9—Mengelkamp v. Consolidated Coal Co., 173 Ill. App. 370.

Withdrawal of instructions with directions to disregard held not prejudicial. Mengelkamp v. Consolidated Coal Co., 259 Ill. 305.

10—Broadstreet v. McKamey, 41 Ind. App. 272; United Rys. & Elec. Co. v. Carneal, 110 Md. 211.

11—Powers v. Com., 110 Ky. 386, 53 L. R. A. 245.

and who gave the instructions, may recall the jury, and withdraw certain erroneous instructions, if he does so at the request of the judge who gave them, and if he has jurisdiction.¹²

The giving of a fatally erroneous instruction can only be cured by a plain withdrawal of the instruction¹³ since, unless the jury are made to understand clearly that the instruction is not to be considered, the error is not obviated.¹⁴

But, ordinarily the court may orally withdraw instructions,¹⁵ and it is proper to withdraw an instruction by re-reading it and telling the jury not to follow it.¹⁶

Where, in a criminal case, an instruction goes too far in making inferences from facts which the jury may find to have been proven, but the court withdraws the instruction, and limits his statement to the proposition that the supposed

12—*Renner v. Thornburg*, 111 Iowa 515. In this case, however, some stress was laid upon the fact that the manner of withdrawal did not result in any prejudice, and that the objection was not raised in the lower court.

13—*Central of Georgia R. Co. v. Ray*, 133 Ga. 126; *Pelham Mfg. Co. v. Powell*, 6 Ga. App. 308; *Lower v. Franks*, 115 Ind. 334. Generally, as to the sufficiency of the withdrawal of instructions, see *Eldridge v. Hawley*, 115 Mass. 410; *New Albany Woolen Mills v. Meyers*, 43 Mo. App. 124; *Galino v. Fleischmann Realty & Construction Co.*, 130 App. Div. (N. Y.) 605.

14—*Wenning v. Teeple*, 143 Ind. 189; *McCrary v. Anderson*, 103 Ind. 12; *Eldridge v. Hawley*, 115 Mass. 410; *Schattler v. Daily Herald Co.*, 162 Mich. 115; *New Albany Woolen Mills v. Meyers*, 43 Mo. App. 124; *Driggs v. Phillips*, 103 N. Y. 77; *Greenfield v. People*, 85 N. Y. 91; *Leonard v. Collins*, 70 N. Y. 90;

Chapman v. Erie Ry. Co., 55 N. Y. 579.

15—*Bochat v. Knisely*, 144 Ill. App. 551; *Chicago & E. I. R. Co. v. Zapp*, 110 Ill. App. 553, *aff'd* 209 Ill. 339.

An oral withdrawal of an instruction that has been considered by the jury has the effect of instructing that it does not state the law. *Daily v. Boudreau*, 231 Ill. 228.

It is not necessary in withdrawing an instruction that the court should reduce to writing his statement in regard to the same. *Robinson v. State*, — Ind. —, 106 N. E. 533.

Orally withdrawing all instructions and directing the jury to find a defendant not guilty is a violation of a statute requiring modifications in writing, but such error does not warrant reversal if the verdict and judgment are correct. *Daily v. Boudreau*, 231 Ill. 228.

16—*Skulimowski v. Deahl*, 169 Ill. App. 355.

facts, if proved, will be sufficient to warrant a finding of guilty, the error in the first instruction is cured;¹⁷ and a verbal withdrawal of a written instruction improperly stating the elements of damage will cure the error therein contained.¹⁸

Where the court gives the jury an instruction which is entirely abstract or irrelevant, it is not error afterwards, on request, to state to the jury the character of the instruction. The error, if any, would be in giving the instruction in the first instance, and not in withdrawing it.¹⁹

Though there may be cases in which the withdrawal of an erroneous instruction and telling the jury to disregard it will not remove the wrong impression on the minds of the jury, it will be presumed that a correction by the trial court, in its charge, of a proposition laid down in a former part of the charge, has been accepted by the jury as the law of the case.²⁰

Where erroneous instructions are given, the mere giving of other instructions, explanatory or contradictory thereof, does not cure the error.²¹

Thus, if the court erroneously instructs the jury, as a "matter of law, that a certain material fact is as contended by plaintiff, * * * a subsequent charge * * * that the burden of proof is on plaintiff to show the said fact to be as claimed by him, and that on the evidence in the case it is a question for the jury whether it is so or not," does not cure the error.²²

17—*Com. v. Clifford*, 145 Mass. 97.
See also, *Sergeant v. Martin*, 133 Pa. 122.

18—*Yoakum v. Mettash* (Tex. Civ. App.) 26 S. W. 129.

19—*Carlock v. Spencer*, 7 Ark. 12.

20—*Goodsell v. Taylor*, 41 Minn. 207, 4 L. R. A. 673, 16 Am. St. Rep. 700.

21—*Alabama Consol. Coal & Iron Co. v. Heald*, 168 Ala. 626; *Jones v. Talbot*, 4 Mo. 279; *Anderson v. Electric Park Amusement Co.*, 141 Mo. App. 576. See also, § 24, *ante*.

22—*Canfield v. Baltimore & O. R. Co.*, 46 N. Y. Super. Ct. 238.

§ 229. At request of parties.

A party to an action who has presented declarations of law may be allowed to withdraw them, where the other party submits no declarations.²³

It is also held that, "The court may withdraw a charge at the instance of a party in whose favor it is made." The other party can, if he sees proper, request the charge to be given to the jury at his instance.²⁴

The theory of the statute requiring the judge to write "Refused" upon instructions refused is that frequently it is important for the jury to understand both what is and what is not the law of the case, and the judge cannot allow a party "to withdraw charges requested after the judge has declared his determination to refuse them. To allow a party to withdraw such refused charges would be to afford an opportunity to experiment with the court, and to deny the adversary party the benefit of having the jury take and consider them on their retirement, against the spirit and policy of the statute."²⁵

23—Smith v. Mayfield, 60 Ill. App. 266.

24—Harrison v. Powell, 24 Ga. 530.

25—Redus v. State, 82 Ala. 53.

CHAPTER XXI.

INSTRUCTIONS AS TO DUTY OF JURORS TO AGREE UPON VERDICT.

- § 230. Propriety of instructions as to duty of jurors to agree.
- § 231. Instructions urging jurors to agree.
- § 232. Instructions tending to coerce jury into agreement.
- § 233. Instructions requiring jurors to reconcile differences of opinion.
- § 234. Statements as to length of time jury will be kept together.
- § 235. Instructions tending to encourage disagreement.
- § 236. Directing jury to compromise.

§ 230. Propriety of instructions as to duty of jurors to agree.

It is clearly the duty of the jury to arrive at a verdict and to counsel together in an effort to do so, and an admonitory instruction upon such duty is proper.¹

A charge that there must be unanimity as the basis for the rendition of a verdict is correct,² and it is not improper to impress upon the jury that the law does not require that they be absolutely certain of the correctness of their verdict, so that they can guaranty such correctness.³

In case of an announcement by the jury that they are unable to agree on a verdict, the trial court is vested with a large discretion in the matter of instructions to the jury on the subject of agreement, and, unless this discretion is abused, the reviewing court will not interfere.⁴

§ 231. Instructions urging jurors to agree.

As a general rule, it is proper for the trial judge to urge the jury to reach a verdict if nothing like coercion takes

1—People v. Whitlow, 24 Cal. App. 1, 139 Pac. 826.	port v. Citizens' Nat. Bank, 101 Iowa 530, 63 Am. St. Rep. 399;
2—Hooten v. State, 9 Ala. App. 9.	Dover v. Lockhart Mills, 86 S. C. 229; Giese v. Schultz, 69 Wis. 526.
3—State v. Tedder, 83 S. C. 437.	
4—German Sav. Bank of Daven-	

place,⁵ and the judge may express his desire that they will be able to agree on further consideration of the case,⁶ or state that it is the duty of the jury to agree upon a verdict, if that is possible.⁷

The trial judge may detail to the jury the ills attendant on a disagreement and the importance of coming to an agreement,⁸ and he may state the reasons why it is important that they shall reach an agreement, as, for instance, that the case had been long pending, exhaustively tried,⁹ and that a

5—*Dover v. Lockhart Mills*, 86 S. C. 229; *State v. Jones*, 86 S. C. 17.

6—*Karner v. Kansas City El. R. Co.*, 82 Kan. 842, 109 Pac. 676; *Com. v. Kelley*, 165 Mass. 175; *Kelly v. Emery*, 75 Mich. 147.

7—*Highland Foundry Co. v. New York, N. H. & H. R. Co.*, 199 Mass. 403; *Jackson v. State*, 91 Wis. 253.

8—*St. Louis, I. M. & S. R. Co. v. Carter*, 111 Ark. 272, 6 N. C. C. A. 776.

The trial judge may admonish the jury of the importance and necessity of agreeing, and urge them to make an attempt to arrive at a verdict.

Arkansas. *Jackson v. State*, 94 Ark. 169.

Connecticut. *Wheeler v. Thomas*, 67 Conn. 577; *State v. Smith*, 49 Conn. 376.

Georgia. *Allen v. Woodson*, 50 Ga. 53.

Indiana. *Krack v. Wolf*, 39 Ind. 88.

Iowa. *Niles v. Sprague*, 13 Iowa 198.

Kansas. *Karner v. Kansas City El. R. Co.*, 82 Kan. 842, 109 Pac. 676; *McDonald v. Richolson*, 3 Kan. App. 235, 45 Pac. 95.

Maine. *Cowan v. Umbagog Pulp Co.*, 91 Me. 26; *State v. Rollins*, 77 Me. 381.

Michigan. *Kelly v. Emery*, 75 Mich. 147.

Missouri. *State v. Pierce*, 136 Mo. 34.

North Carolina. *Warlick v. Plonk*, 103 N. C. 81.

Oregon. *State v. Hawkins*, 18 Ore. 476, 23 Pac. 475.

South Carolina. *Dover v. Lockhart Mills*, 86 S. C. 229.

Tennessee. *East Tennessee & W. N. C. R. Co. v. Winters*, 85 Tenn. 240; *Taylor v. Jones*, 2 Head 565.

Texas. *Muckleroy v. State* (Tex. Cr. App.) 42 S. W. 383.

Vermont. *State v. Gorham*, 67 Vt. 371.

Wisconsin. *Jackson v. State*, 91 Wis. 267; *Giese v. Schultz*, 69 Wis. 526.

Statements as to the importance of a case, its expense, and the duty of jurors to agree held no more than an admonition to return a verdict, as the court did not express any opinion as to the weight of the evidence, nor change the instructions given, nor urge the jurors to yield their individual convictions as to the result of the case. *Jackson v. State*, 94 Ark. 169.

9—**Connecticut.** *Clinton v. Howard*, 42 Conn. 310.

Georgia. *Allen v. Woodson*, 50 Ga. 53.

new trial would entail a large additional expense; or that there had already been two trials;¹⁰ or that "the case has already been tried once, and the amount involved is not very large, and the parties cannot afford to litigate it forever, and the county cannot afford to have them do it. You see, it takes some time to try the case, and I hope you will be able to arrive at a conclusion, and settle the facts in the case, at least."¹¹

But an instruction telling the jurors, in effect, that they are on oath bound to reach some sort of a verdict, and that to vote time after time in accordance with the first ballot cast is reprehensible, is improper.¹²

The judge should not by word or act intimate that they should arrive at a verdict which is not the result of their free and voluntary opinion, and which is not consistent with their conscience.¹³

§ 232. Instructions tending to coerce jury into agreement.

The trial judge should not by threat or entreaty attempt to influence the jury to reach a verdict.¹⁴

Any statement by the court which has a tendency to coerce the jury into an agreement, or which may impress the jury with the belief that the judge wants the case decided for a

Iowa. Frandsen v. Chicago, R. I. & P. R. Co., 36 Iowa 376; Niles v. Sprague, 13 Iowa 198.

Kansas. Karner v. Kansas City El. R. Co., 82 Kan. 842, 109 Pac. 676.

Michigan. Stoudt v. Shepherd, 73 Mich. 588; Pierce v. Reh fuss, 35 Mich. 53.

Wisconsin. Hannon v. State, 70 Wis. 448.

10—Niles v. Sprague, 13 Iowa 198.

11—Kelly v. Emery, 75 Mich. 147.

12—People v. Watson, 165 Cal. 645, 133 Pac. 298. See also, Highland Foundry Co. v. New York, N. H. & H. R. Co., 199 Mass. 403.

13—St. Louis, I. M. & S. R. Co. v. Carter, 111 Ark. 272, 6 N. C. C. A. 776.

It is proper to instruct that the jurors should not yield any conscientious views founded on the evidence. Warlick v. Plonk, 103 N. C. 81.

14—St. Louis, I. M. & S. R. Co. v. Carter, 111 Ark. 272, 6 N. C. C. A. 776; Highland Foundry Co. v. New York, N. H. & H. R. Co., 199 Mass. 403; Mar v. Shew Fan Qui, 108 Minn. 441, 133 Am. St. Rep. 460; State v. Jones, 86 S. C. 17; State v. Tarlton, 22 S. D. 495.

particular party to the suit, cannot be sustained, and will, in general, be reversible error.¹⁵

It is therefore error to give an instruction censuring jurors for not yielding to the majority.¹⁶

It is also error to tell the jury that the case had become "an incubus upon the business of the court," that "they must decide it," and that "it is no credit to a man, merely because he has an opinion, to stubbornly stick to it."¹⁷

So it has been held that where the judge declares that he must have a verdict in the case, on the jury's stating the third time their inability to agree, and that he has reasons to believe that some of the jury have been tampered with, such remarks will be considered sufficient ground for new trial.¹⁸

The words "you dare not go beyond that jury box in considering the testimony offered" have been held not objectionable, it being the intention of the trial judge to call attention to the jury's duty,¹⁹ and an instruction in a murder case as to the guilt of the accused, containing the words

15—See *Georgia R. Co. v. Cole*, 77 Ga. 77; *German Sav. Bank of Davenport v. Citizens' Nat. Bank*, 101 Iowa 530, 63 Am. St. Rep. 399. In the former case, which was an action for personal injuries, the jury disagreed, and, in answer to a question of the court, stated that they differed about the amount of damages. The court said: "Gentlemen, I cannot aid you in that, as I know of, in any way further than to say that, upon that matter, the jury ought to make a very earnest effort to agree,—to reconcile conflicting opinions as to amounts. I merely give you that as advice of the court. You must make an effort to agree upon the amount. Of course, a juror ought not to give up his convictions if they are so strong, but there ought to be an effort to come to an agreement. You

can retire and see if you cannot agree upon the amount." This was held error warranting a new trial on a recovery by plaintiff, on the ground that the jury might have understood the court as favoring a finding for plaintiff, and because his remark might have induced some of them to give up opinions which they might have entertained in favor of the defendant.

16—*Mahoney v. San Francisco & S. M. Ry. Co.*, 110 Cal. 471, 42 Pac. 968, 43 Pac. 518; *Highland Foundry Co. v. New York, N. H. & H. R. Co.*, 199 Mass. 403; *Stoudt v. Shepherd*, 73 Mich. 588.

17—*Randolph v. Lampkin*, 90 Ky. 551, 10 L. R. A. 87.

18—*State v. Ladd*, 10 La. Ann. 271.

19—*State v. Mills*, 79 S. C. 187.

“it would be your duty to have the manhood to say so,” if the accused was guilty, held not objectionable as the trial judge was merely endeavoring to have the jury do their duty.²⁰

Where the evidence is of so conclusive a character that the court may direct a verdict for one of the parties, it is not error for the court to tell one of the jurors that it is his duty to agree with the other jurors in finding a verdict for such party.²¹

§ 233. Instructions requiring jurors to reconcile differences of opinion.

The judge may warn the jury not to be stubborn, to lay aside all pride of opinion, and to consult with each other and give due regard and weight to the opinion of their fellow-jurors.²²

Thus, it is proper to instruct that the jury should reason together and talk over the existing differences, if any, and harmonize them, if possible,²³ and examine such differences in a spirit of fairness and candor;²⁴ that they should lay aside all pride of judgment,²⁵ and not stand out in an unruly and obstinate way through mere stubbornness;²⁶ or that the jury are, in the eye of the law, as capable as any jury will ever be of reaching a verdict, or to direct them to return to

20—State v. Gallman, 79 S. C. 229.

21—W. B. Grimes Dry-Goods Co. v. Malcolm, 7 C. C. A. 670, 58 Fed. 670.

22—St. Louis, I. M. & S. R. Co. v. Carter, 111 Ark. 272, 6 N. C. C. A. 776. And see, Caldwell v. Duncan, 87 S. C. 331.

An instruction may be given that it is the duty of each jurymen to give careful consideration to the views of his fellow-jurors, and that he should not shut his ears and stubbornly stand upon the position which he may have first assumed, re-

gardless of anything that may be said by the other jurymen. Jackson v. State, 91 Wis. 257. See also, Whitman v. Morey, 63 N. H. 458; Ahearn v. Mann, 60 N. H. 472.

23—Odette v. State, 90 Wis. 258.

24—Frandsen v. Chicago, R. I. & P. R. Co., 36 Iowa 372.

25—Frandsen v. Chicago, R. I. & P. R. Co., 36 Iowa 372; Warlick v. Plonk, 103 N. C. 81; Odette v. State, 90 Wis. 258.

26—Jackson v. State, 91 Wis. 253; Odette v. State, 90 Wis. 258.

their room and make an honest effort to agree, and to tell them that it is the opinion of the court that, if they will follow the rules laid down by the court, they will have no trouble in agreeing; ²⁷ or that "this case is submitted to you for decision, and not for disagreement. I think I will let you give it a further trial." ²⁸

In a leading case on this subject, an instruction which, in effect, told the jury that if any of the jury differed in their views of the evidence from a large number of their fellows, such difference of opinion should induce the minority to doubt the correctness of their own judgments and lead them to a re-examination and closer scrutiny of the facts in the case, for the purpose of revising and reconsidering their preconceived opinion, was held not improper, and that such instruction was not calculated to mislead the jury. ²⁹

Where the court stated that he had no knowledge as to how the jury stood; that it might be a proper thing for a minority to consider with seriousness whether they might be wrong and a majority right; that it is probable sometimes a minority was right and a majority wrong; that no juror should yield his well-grounded convictions or violate his oath; that if upon further consideration a juror cannot conscientiously yield, of course he ought not to do so, and expressed the hope that under the views suggested a verdict would be reached agreeable to all of them, the state-

27—*Parker v. Georgia Pac. Ry. Co.*, 83 Ga. 539.

28—*German Sav. Bank of Davenport v. Citizens' Nat. Bank*, 101 Iowa 530, 63 Am. St. Rep. 399.

29—*Com. v. Tuey*, 8 Cush. (Mass.) 1, approved in *State v. Smith*, 49 Conn. 376; *Gibson v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 55 Minn. 177, 43 Am. St. Rep. 482; *Allen v. United States*, 164 U. S. 492, 41 L.

Ed. 528. See also, *State v. Egland*, 23 S. D. 323, 139 Am. St. Rep. 1066.

In *Highland Foundry Co. v. New York, N. H. & H. R. Co.*, 199 Mass. 403, the court said that the *Tuey* case, *ante*, was regarded by the profession as going to nearly if not quite the extreme limit, and sustained an exception to an instruction which the court held went further than the instruction in the *Tuey* case.

ments were not objectionable as a criticism of the jury and an expectation that a verdict would be readily rendered.³⁰

§ 234. Statements as to length of time jury will be kept together.

According to some decisions, it is error to tell the jury that the court will not discharge them until they agree upon a verdict, or until the end of the term, unless they sooner agree,³¹ but other cases have taken the opposite view.³²

In one case it was held reversible error to tell the jury that the court would keep them together for four days unless they agreed;³³ and in another, that if the jury agreed by a certain time, they would be discharged; if not, they would be kept together until they did agree.³⁴

So it was held error for the trial judge to say to the jury, "If you cannot agree one way or another in as plain a state of facts as this is,—I don't say which way,—it is useless to try causes in courts of justice," and added that "he would not discharge them if they stayed till Saturday night."³⁵

It is not improper, after telling the jury that common-law juries were kept together until they agreed, and that such rule has been mitigated in the United States, to tell the jury that they would have to remain together and could not separate until they agreed on a verdict. Such statement

30—*People v. Coulon*, 151 Mich. 200. Citing *Tuey case*, *ante*, n 29.

31—*Mar v. Shew Fan Qui*, 108 Minn. 441, 133 Am. St. Rep. 460; *Chesapeake, O. & S. W. R. Co. v. Barlow*, 86 Tenn. 537; *Taylor v. Jones*, 2 Head (Tenn.) 565; *North Dallas Circuit Ry. Co. v. McCue* (Tex. Civ. App.) 35 S. W. 1080. See also, *Perkins v. State*, 50 Ala. 154. In this case the court told the jury that he would keep the court open until they reached an agreement, but he further told them that they had nothing to do but to find defendant

guilty; that they were bound to do so under the instruction of the court, and that, if they did not, they would be guilty of moral perjury.

32—*State v. Green*, 7 La. Ann. 518; *Hannon v. Grizzard*, 89 N. C. 115. To the same effect, see *Osborne v. Wilkes*, 108 N. C. 651.

33—*Terre Haute & I. R. Co. v. Jackson*, 81 Ind. 19. See also, *Ingersoll v. Town of Lansing*, 51 Hun (N. Y.) 101.

34—*State v. Hill*, 91 Mo. 423.

35—*Nash v. Morton*, 48 N. C. 3.

does not indicate a determination on the part of the court to keep the jury indefinitely until they should agree.³⁶

§ 235. Instructions tending to encourage disagreement.

It is not proper to give an instruction which has a tendency to restrain jurors from agreeing upon a verdict, and a request for such an instruction may be properly refused.³⁷

Accordingly an appeal to a jury not to surrender conscientious convictions in order to arrive at a verdict has been held vicious,³⁸ and an instruction that no juror should consent to a verdict not meeting with his approval is improper.³⁹

A requested instruction that "no juror should consent to a verdict which does not meet with the approval of his own judgment and conscience after due deliberation with his fellow-jurors after fairly considering all the evidence admitted by the court and the law as given in the instructions," is properly refused as tending to encourage and invite a disagreement.⁴⁰

§ 236. Directing jury to compromise.

While it is not improper to impress upon the jury that they need not be so certain of their verdict that they can guaranty its correctness,⁴¹ the court should not direct the jury, either expressly or by implication, that they may render a compromise verdict.⁴²

36—*State v. Saunders*, 14 Ore. 300, 12 Pac. 441.

37—*San Antonio & A. P. Ry. Co. v. Choate*, 22 Tex. Civ. App. 618. See also, *Horton v. United States*, 15 App. Cas. (D. C.) 310.

Instructions tending to encourage disagreement should not be given. *Chicago & E. I. R. Co. v. Rains*, 203 Ill. 417, aff'g 106 Ill. 539; *Chicago City Ry. Co. v. Phillips*, 138 Ill. App. 438.

38—*Souleyret v. O'Gara Coal Co.*, 161 Ill. App. 60.

39—*Casey v. Kelley-Atkinson Const. Co.*, 240 Ill. 416, aff'g 146 Ill. App. 551; *City of Evanston v. Richards*, 224 Ill. 444.

40—*Mandel v. Bloomington & N. Railway & Light Co.*, 188 Ill. App. 228.

41—See § 231, *ante*.

42—*Arkansas. Southern Ins. Co. v. White*, 58 Ark. 277.

Indiana. Richardson v. Coleman,

The law contemplates that they shall, by their decisions, harmonize their vote, if possible, but not that they shall compromise, divide or yield for the mere purpose of agreement.⁴³

Accordingly, it is error to instruct "that the law which requires unanimity on the part of the jury to render a verdict expects and will tolerate reasonable compromise and fair concessions;"⁴⁴ or "that many things juries were authorized to compromise, such as amounts; that very seldom twelve men went into the jury room with the same notions as to amounts, and compromises were necessary;"⁴⁵ or that "no number of minds can agree upon a multitude of facts, such as this case presents, without some yielding of the judgment of individuals upon the evidence, some deference to the opinion of others,—without what some might call a compromise of different views;"⁴⁶ or that "I can't take any such statement as that, gentlemen; you must get together upon a matter of this kind. No juror ought to remain entirely firm in his own conviction, one way or another, until he has made up his mind, beyond all question, that he is necessarily right, and the others are necessarily wrong,"⁴⁷ or that, "if you can't each get exactly what you want, get the next best thing to it."⁴⁸

131 Ind. 210, 31 Am. St. Rep. 429;
Clem v. State, 42 Ind. 420, 13 Am.
Rep. 369.

Massachusetts. Highland Foundry Co. v. New York, N. H. & H. R. Co., 199 Mass. 403.

Michigan. Goodsell v. Seeley, 46 Mich. 623, 41 Am. Rep. 183.

Missouri. Edens v. Hannibal & St. J. R. Co., 72 Mo. 212.

New York. Cranston v. New York Cent. & H. River R. Co., 103 N. Y. 614.

Pennsylvania. Boden v. Irwin, 92 Pa. St. 345.

43—Goodsell v. Seeley, 46 Mich. 623, 41 Am. Rep. 183.

44—Richardson v. Coleman, 131 Ind. 210, 31 Am. St. Rep. 429.

45—Edens v. Hannibal & St. J. R. Co., 72 Mo. 212.

46—Clem v. State, 42 Ind. 420, 13 Am. Rep. 369.

47—Cranston v. New York Cent. & H. River R. Co., 103 N. Y. 614.

48—Southern Ins. Co. v. White, 58 Ark. 277.

CHAPTER XXII.

INSTRUCTIONS AS TO VERDICT; SPECIAL VERDICT OR FINDINGS, AND INTERROGATORIES.

§ 237. Form of verdict.

§ 238. Instructions which are proper where special verdict is directed.

§ 239. * Unnecessary or improper instructions where special verdict or interrogatories are submitted.

§ 237. Form of verdict.

Oral directions as to the form of a verdict have been held not within the rule requiring written instructions,¹ and a jury may be orally instructed to find damages where they return a verdict without such finding.²

On a prosecution for incest, where there is no evidence which would warrant a finding by the jury of any verdict other than guilty or not guilty, the court need not submit forms of verdicts as to other offenses.³

An instruction as to the form of a verdict in a homicide case, stating that if the accused shall be found guilty he shall be imprisoned in a certain penitentiary, is erroneous in stating the place of imprisonment but such words may be regarded as mere surplusage, and the error is harmless.⁴

1—Illinois Cent. R. Co. v. Wheeler, 149 Ill. 525, aff'g 50 Ill. App. 205; Economy Light & Power Co. v. Hiller, 113 Ill. App. 103, aff'd 211 Ill. 568.

As to the propriety of a court's instruction as to the form of the verdict, see Covington v. Clemmons, 61 Fla. 151.

2—Chapman v. J. E. Salfisberg & Co., 104 Ill. App. 445.

3—State v. Aker, 54 Wash. 342, 18 Ann. Cas. 972, 103 Pac. 420.

4—People v. Stein, 23 Cal. App. 108, 137 Pac. 271.

§ 238. Instructions which are proper where special verdict is directed.

Where special interrogatories are submitted, the court should instruct that it is the duty of the jury to answer them,⁵ and to do so in accordance with the burden of proof and preponderance of the evidence.⁶

The court may and should state "the matter put in issue by the pleadings, * * * the rules for weighing or reconciling conflicting testimony, with whatever else may be necessary to enable the jury clearly to comprehend the subjects" to be comprehended by their special verdict,⁷ and the court may also state the form of the verdict to be rendered, and the general duties of the jurors.⁸

§ 239. Unnecessary or improper instructions where special verdict or interrogatories are submitted.

When the jury are required to find simply the facts, entirely independent of their legal bearings, the court need not give general instructions as to the law of the case, nor state the rules of law by which certain facts are to be weighed.⁹

"There is * * * neither propriety nor fitness that the court should, either upon its own motion or at the request of either party, give any general instructions as to the

5—*Woollen v. Whitacre*, 91 Ind. 502; *Redford v. Spokane St. Ry. Co.*, 9 Wash. 55, 36 Pac. 1085.

6—*Kansas Pac. Ry. Co. v. Peavey*, 34 Kan. 472, 8 Pac. 780; *Harriman v. Queen Ins. Co.*, 49 Wis. 71.

7—*Woollen v. Wire*, 110 Ind. 251; *Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 28; *Louisville, N. A. & C. Ry. Co. v. Balch*, 105 Ind. 93; *Toler v. Keiher*, 81 Ind. 388.

8—*Covington v. Clemmons*, 61 Fla. 151; *Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 28; *Toler v. Keiher*, 81 Ind. 383.

9—*Louisville, N. A. & C. Ry. Co. v. Buck*, 116 Ind. 566, 2 L. R. A. 520n, 9 Am. St. Rep. 883; *Johnson v. Culver*, 116 Ind. 278; *Woollen v. Wire*, 110 Ind. 253; *Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 18; *Indianapolis, P. & C. Ry. Co. v. Bush*, 101 Ind. 582; *Toler v. Keiher*, 81 Ind. 383; *Sprinkle v. Taylor*, 1 Ind. App. 74; *Ward v. Cochran*, 18 C. C. A. 1, 71 Fed. 127. A similar situation arises in the case of issues out of chancery. See ch. XXIII, *post*.

law of the case. The jury should be left entirely free to find the facts material to the several issues, without instruction as to whether the law will declare one way or the other, upon any fact or state of facts which may be found."¹⁰

The law must be applied by the court to the facts after they are found by the jury.¹¹

It is, of course, proper to refuse requests for such instructions,¹² but the giving of them will not be reversible error;¹³ and it makes no difference that they state the law incorrectly, provided the trial court correctly applies the law to the facts.¹⁴

Where special interrogatories are submitted to be answered by the jury in connection with their general verdict, it is error to instruct the jury that their answers should be consistent with the general verdict,¹⁵ or each other,¹⁶ since

10—*Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 28. An instruction that the special verdict must state whether plaintiff contributed to the injury by a slight want of ordinary care, which would be negligence on plaintiff's part, is not open to the objection that it tells the jury the effect of their answer on plaintiff's right of recovery. *Brunette v. Town of Gagen*, 106 Wis. 618.

11—*Johnson v. Culver*, 116 Ind. 278.

12—*Stayner v. Joyce*, 120 Ind. 99; *Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 18; *Indianapolis, P. & C. Ry. Co. v. Bush*, 101 Ind. 582. Compare *Western U. Tel. Co. v. Newhouse*, 6 Ind. App. 422, where it was held error "for the court to refuse proper instructions as to the measure of damages, where it is the duty of the jury to assess damages, even though a special verdict is asked for, provided all the legal rules relative

to the request for and submission of such instructions are complied with." See also, *Burns v. North Chicago Rolling Mill Co.*, 60 Wis. 544. An instruction that if a certain fact is found to exist, the jury should find for the contestant in a will contest case, is properly refused. *Tarbell v. Forbes*, 177 Mass. 238.

13—*Louisville, N. A. & C. Ry. Co. v. Buck*, 116 Ind. 566, 2 L. R. A. 520n, 9 Am. St. Rep. 883; *Johnson v. Culver*, 116 Ind. 278; *Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 18. But see, *Rhyner v. City of Menasha*, 107 Wis. 201.

14—*Woollen v. Wire*, 110 Ind. 253.

15—*Coffeyville Vitrified Brick Co. v. Zimmerman*, 61 Kan. 750, 60 Pac. 1064; *Mechanics' Bank of Detroit v. Barnes*, 86 Mich. 632.

But see, *Acton v. Fargo & M. St. R. Co.*, 20 N. D. 434.

16—*St. Louis & S. F. R. Co. v. Burrows*, 62 Kan. 89, 61 Pac. 439.

it is the duty of the jury to answer each question in accordance with the preponderance of the evidence bearing thereon.¹⁷

The court should not direct the jury how to answer the questions submitted under any given circumstances, since the object of submitting interrogatories would be thereby defeated.¹⁸

Contra, Hoppe v. Chicago, M. & St.
P. Ry. Co., 61 Wis. 357.

17—St. Louis & S. F. R. Co. v.
Burrows, 62 Kan. 89, 61 Pac. 439.

18—Beecher v. Galvin, 71 Mich.
391; Maclean v. Scripps, 52 Mich.

214; Cole v. Boyd, 47 Mich. 98.

CHAPTER XXIII.

ISSUES OUT OF CHANCERY.

§ 240. Submission of issues in general.

§ 241. Necessity and propriety of giving instructions.

§ 242. Rules governing instructions given.

§ 240. Submission of issues in general.

The submission of issues to the jury out of chancery is discretionary,¹ and the chancellor may direct a verdict or dismiss the jury if satisfied to rest his decree upon the facts developed.²

But, if an issue is directed out of chancery, the province of the jury is to weigh and consider the evidence and find according to its preponderance.³

Any doubtful issue may be referred to the jury on a feigned issue,⁴ but it is improper to refer an entire case, even when the parties desire it.⁵

Issues of law may be submitted⁶ and it has also been held that the question of mental capacity may be submitted.⁷

Where the issue is not required to be submitted, the verdict is merely advisory.⁸

The trial of a feigned issue is not equivalent to a trial by

1—Koch v. Story, 47 Colo. 335, 107 Pac. 1093; Heron v. Weston, 44 Colo. 379, 100 Pac. 1130; Keith v. Henkleman, 173 Ill. 137, aff'g 68 Ill. App. 623; Kozacek v. Kozacek, 105 Ill. App. 180; Lawrence v. Lawrence, 82 S. C. 150.

2—DeGraff v. Manz, 251 Ill. 531. See also, Larson v. Glos, 235 Ill. 584; Blood v. Sovereign Camp Woodmen of World, 140 Mo. App. 526.

3—Smith v. Newton, 84 Ill. 14.

4—Fanning v. Russell, 94 Ill. 386, rev'g 2 Ill. App. 632.

5—Milk v. Moore, 39 Ill. 584.

6—Gunning v. Sorg, 113 Ill. App. 332, aff'd 214 Ill. 616.

7—Brown v. Miner, Frost & Hubbard, 128 Ill. 148, aff'g 21 Ill. App. 60.

8—Larson v. Glos, 235 Ill. 584; Biggerstaff v. Biggerstaff, 180 Ill. 407; Worthing v. Hall, 153 Ill. App. 587; Murray v. Snowden, 25 Okla. 421, 106 Pac. 645; Carter v. Jeffries, 110 Va. 735; Pealer v. Grays Harbor

jury at law,⁹ and the verdict on a feigned issue is merely advisory¹⁰ and may be disregarded.¹¹

When an issue is submitted and the jury disagrees, the chancellor may enter a decree without a re-reference.¹²

§ 241. Necessity and propriety of giving instructions.

Since the verdict is merely advisory and the court is not controlled by it,¹³ neither party has a right to insist that the court shall instruct the jury when an issue is submitted.¹⁴

Error in giving or refusing instructions is immaterial, where the court adopts the findings of the jury and finds on all the issues, as the correctness of the finding may be tested by the evidence, and, if erroneous conclusions are drawn, the question may be presented on appeal.¹⁵

In some jurisdictions, however, it seems to be the practice to instruct the jury, and certainly the court may, if it sees fit, give the jury instructions properly applicable to the issue submitted to them to be tried.¹⁶

Boom Co., 54 Wash. 415, 103 Pac. 451.

9—Turnes v. Brenckle, 249 Ill. 394.

10—Riehl v. Riehl, 247 Ill. 475;

Larson v. Glos, 235 Ill. 584; Blood v. Sovereign Camp Woodmen of World, 140 Mo. App. 526.

11—Hardy v. Dyas, 203 Ill. 211.

12—Hardy v. Dyas, 203 Ill. 211.

13—See § 240, *ante*.

14—Branger v. Chevalier, 9 Cal. 353; Danielson v. Gude, 11 Colo. 87, 17 Pac. 283; Freeman v. Wilkerson, 50 Mo. 554; Conran v. Sellev, 28 Mo. 322; Blood v. Sovereign Camp Woodmen of World, 140 Mo. App. 526; Luce v. Barnum, 19 Mo. App. 359; Van Vleet v. Olin, 4 Nev. 95, 97 Am. Dec. 513. "Where the action is tried as an action at law, and so treated by the court and parties, it should, at least, be fairly submitted to the jury, and the law correctly stated to them." Van Vleet

v. Olin, 4 Nev. 98, 97 Am. Dec. 513.

In equity it is not proper practice for courts to give instructions on the law. Dominguez v. Dominguez, 7 Cal. 424; Swales v. Grubbs, 126 Ind. 107; Farmers' Bank v. Butterfield, 100 Ind. 230; White v. Black, 115 Mo. App. 28.

15—Riley v. Martinelli, 97 Cal. 575, 21 L. R. A. 33n, 33 Am. St. Rep. 209, 32 Pac. 579; Hewlett v. Pilcher, 85 Cal. 542, 24 Pac. 781; Sweetser v. Dobbins, 65 Cal. 529, 4 Pac. 540. In Kellogg v. Krauser, 14 Serg. & R. (Pa.) 137, 16 Am. Dec. 480, the court said:

"Should there be a mistake in the admission or rejection of evidence, or in charging a jury, on a feigned issue, a writ of error lies." Quoted with approval in Brown v. Parkinson, 56 Pa. 341.

16—Barth v. Rosenfeld, 36 Md.

In Georgia, under a statute, parties are entitled to a jury in equity cases to the same extent as in an action at law, and accordingly the instructions in equity cases are subject to the same considerations as in actions at law, and the parties are entitled to them as of right.¹⁷

§ 242. Rules governing instructions given.

Instructions upon the law of the whole case need not be given, for the jury do not find a general verdict and it is the province of the court to apply the law to the facts found.¹⁸

Also, the instructions should not be general, as in an action at law, but should relate only to the determination of the questions of facts submitted.¹⁹

No instructions should be given except those pertinent to the issue, no matter how pertinent they may be to other questions in the case, not covered by the issues submitted,²⁰ and the instructions given should not change the issues submitted.²¹

The verdict of the jury being merely advisory, the court may direct a verdict, even though the evidence is conflicting.²²

Errors in instructions which could not have affected the result are not ground for reversal.²³

604; *Snouffer's Adm'r v. Hansbrough*, 79 Va. 177. See also, the following section.

17—*Adkins v. Hutchings*, 79 Ga. 260; *Doggett v. Simms*, 79 Ga. 253; *Neal v. Patten*, 40 Ga. 363; *Brown v. Burke*, 22 Ga. 574; *Shiels v. Stark*, 14 Ga. 429; *Webb v. Robinson*, 14 Ga. 216; *Mounce v. Byars*, 11 Ga. 180; *Beall v. Beall*, 10 Ga. 342.

18—*Dominguez v. Dominguez*, 7 Cal. 424; *Swales v. Grubbs*, 126 Ind. 107; *Stickel v. Bender*, 37 Kan. 457, 15 Pac. 580.

19—*Farmers' Bank v. Butterfield*, 100 Ind. 229.

20—*Carlisle v. Foster*, 10 Ohio 198.

21—*Hoobler v. Hoobler*, 128 Ill. 645.

22—**California.** *Galvin v. Palmer*, 113 Cal. 46, 45 Pac. 172.

Missouri. *Robinson v. Dryden*, 118 Mo. 534; *Hess v. Miles*, 70 Mo. 203.

North Carolina. *Ely v. Early*, 94 N. C. 1.

Pennsylvania. *Baldwin v. Taylor*, 166 Pa. St. 507.

Wisconsin. *Pier v. Prouty*, 67 Wis. 218.

23—*Snouffer's Adm'r v. Hansbrough*, 79 Va. 177.

CHAPTER XXIV.

INSTRUCTIONS PERMITTING JURORS TO USE PERSONAL KNOWLEDGE AS EVIDENCE.

§ 243. Rule in general.

§ 244. Instructions as to juror's personal knowledge.

§ 245. View by jury of locus in quo.

§ 243. Rule in general.

The jury has the right to weigh the testimony and draw all reasonable deductions from it, warranted by their common knowledge and experience with human affairs;¹ but the verdict rendered must be based on the evidence introduced at the trial, and the jury cannot take into consideration facts known to them personally but outside the evidence produced before them in court.²

This rule is well established, although at common law the rule was otherwise.³

If a party would avail himself of facts known to a juror, he must have him sworn and examined as other witnesses, so that his evidence, like that of other witnesses, may be first scrutinized as to its competency and bearing upon the issue, and for the further reason that the court and parties may know upon what evidence the verdict was rendered.⁴

1—Graysonia-Nashville Lumber Co. v. Carroll, 102 Ark. 460.

2—Close v. Samm, 27 Iowa 503.

3—3 Bl. Comm. 374; 5 Bacon, Abr. 351; Oreutt v. Nelson, 1 Gray (Mass.) 536.

4—Chattanooga, R. & C. R. Co. v.

Owen, 90 Ga. 265; Oreutt v. Nelson, 1 Gray (Mass.) 536; 1 Starkie, Ev. 449. See also, Murdock v. Sumner, 22 Pick. (Mass.) 156; Patterson v. City of Boston, 20 Pick. (Mass.) 166; Wharton v. State, 45 Tex. 2.

§ 244. Instructions as to juror's personal knowledge.

An instruction permitting jurors, in weighing the evidence, to apply the knowledge and experience which they possess as intelligent men, is proper, since it does not permit them to use any peculiar or personal knowledge they may possess.⁵

Accordingly, in a criminal prosecution, an instruction that "you will bring to bear upon the consideration of the evidence of this case, in addition, all that common knowledge of men and affairs which you as reasonable men have and exercise in the every day affairs of life," is not erroneous.⁶

And, an instruction that in considering damages, the jury may consider the facts proved in connection with their own knowledge and experience is not objectionable in not limiting the jury to such knowledge as men ordinarily possess.⁷

But, it is error to give instructions directing or permitting jurors to apply their own personal knowledge of the facts,⁸ or of the character of the witnesses, in determining their verdict.⁹

5—Jenney Electric Co. v. Branham, 145 Ind. 314, 33 L. R. A. 395; Sanford v. Gates, 38 Kan. 405, 16 Pac. 807. See also, Morrison v. State, 42 Fla. 149.

Where a broken plank, which caused the injury, was introduced in evidence, an instruction that the jury were not restricted to the opinions of expert witnesses, but had the right to use their own intelligence, and the knowledge and experience of lumber which they brought with them into the jury box, in connection with their inspection of the exhibit, was held not erroneous. Lafayette Bridge Co. v. Olsen, 47 C. C. A. 367, 108 Fed. 335, 54 L. R. A. 33n.

6—Marshall v. State, 54 Fla. 66.

7—Illinois Cent. R. Co. v. Warlinger, 229 Ill. 91, aff'g 132 Ill. App. 301.

8—Gibson v. Carreker, 91 Ga. 617; Chattanooga, R. & C. R. Co. v. Owen, 90 Ga. 265; Junction City v. Blades, 1 Kan. App. 85, 41 Pac. 677; Douglass v. Trask, 77 Me. 35; Burrows v. Delta Transp. Co., 106 Mich. 582, 29 L. R. A. 468.

9—Pettyjohn v. Liebscher, 92 Ga. 149; Chattanooga, R. & C. R. Co. v. Owen, 90 Ga. 265, overruling Head v. Bridges, 67 Ga. 236; Howard v. State, 73 Ga. 84; Anderson v. Tribble, 66 Ga. 584, criticising *dictum* in Rogers v. King, 12 Ga. 229; Patterson v. City of Boston, 20 Pick. (Mass.) 166.

Compare State v. Jacob, 30 S. C.

When a juror asks whether he may consider his own personal knowledge of certain facts, the court should instruct that the case must be tried upon the evidence given at the trial, and not upon information that any one or more of their number may have outside of the record.¹⁰

So, if a juror ask whether the jury can "judge a witness just by what he says on the stand, and not by what they know of him privately," it is error for the court to ignore such question, and instruct the jury as to the rules governing juries in weighing testimony. In such case it is not authorized to do more than answer the question, and inform them that they should decide the case upon the evidence adduced at the trial.¹¹

The court may instruct "that a juror can neither consider any fact which comes within his personal knowledge, nor can he communicate it to the other jurors," where it appears that one of the jurors knew some fact material to the defense.¹²

It is error "to instruct the jury: 'You may even consider their [the witnesses'] character for truth and veracity, if it be known to you.' " ¹³

In an action for breach of a bond to convey real estate, an instruction "that, in ascertaining the value of the lands at the time of the breach of the bonds, they [the jury] might consider, not only the evidence, but their own knowledge, as to the value of the land," is erroneous,¹⁴ as is also an instruction that, in estimating damages, they are to use their own judgment, as well as the judgment of the witnesses.¹⁵

131, 14 Am. St. Rep. 897, where it was held not improper to instruct that the jury are presumed to know the character of the witnesses, having been drawn from the vicinage for that reason.

10—*Citizens' St. R. Co. v. Burke*, 98 Tenn. 650.

11—*Wharton v. State*, 45 Tex. 2.

12—*State v. Jones*, 29 S. C. 201.

13—*Pettyjohn v. Liebscher*, 92 Ga. 149.

14—*Gibson v. Carreker*, 91 Ga. 617.

15—*Brakken v. Minneapolis & St. L. Ry. Co.*, 29 Minn. 41. See also, *Heady v. Vevay, Mt. S. & V. Turnpike Co.*, 52 Ind. 117.

§ 245. View by jury of locus in quo.

The probable weight of authority is to the effect that a view by the jury is not allowed for the purpose of furnishing evidence upon which to base a verdict, but for the purpose of enabling the jury to better understand the evidence introduced at the trial,¹⁶ and that instructions authorizing the jury to treat their own personal observations as evidence in the case are erroneous.¹⁷

There is some conflict of opinion upon this subject however, and there are decisions in support of the view that the jury may be instructed upon the theory that what they have learned from the view is evidence in the case.¹⁸

In support of the general rule it has been urged, that, if the rule were otherwise, the jury might base its verdict wholly on the knowledge thus acquired, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without a remedy by motion for new trial; that it would be impossible to determine how much weight was due to such knowledge, as contrasted with the opposing evidence, or, treating such knowledge as evidence, whether it was sufficient to raise a substantial conflict in the evidence and that "the cause would be determined, not upon evidence given in court, to be discussed by counsel and considered by the court in deciding a motion for a new trial, but upon the opinions of the jurors, founded on a personal inspection, the value or the accuracy of which there would be no method of ascertaining."¹⁹

16—*Stanford v. Felt*, 71 Cal. 249, 16 Pac. 900; *Heady v. Vevay*, Mt. S. & V. Turnpike Co., 52 Ind. 118; *Keller v. Harrison*, 151 Iowa 320, Ann. Cas. 1913 A 300n; *Close v. Samm*, 27 Iowa 503; *Schultz v. Bower*, 57 Minn. 493, 47 Am. St. Rep. 630; *Brakken v. Minneapolis & St. L. Ry. Co.*, 29 Minn. 43; *Chute v. State*, 19 Minn. 271 (Gil. 230).

17—*Wright v. Carpenter*, 49 Cal.

609; *Brakken v. Minneapolis & St. L. Ry. Co.*, 29 Minn. 43.

18—*City of Topeka v. Martineau*, 42 Kan. 387, 5 L. R. A. 775, 22 Pac. 419; *Toledo, A. A. & G. T. Ry. Co. v. Dunlap*, 47 Mich. 466; *Washburn v. Milwaukee & L. W. R. Co.*, 59 Wis. 364.

19—*Wright v. Carpenter*, 49 Cal. 609.

“An instruction to a jury sent out to view land in controversy, ‘that they examine the land, examine the quality of the soil, and the growth upon it,’ and that ‘you avoid forming an opinion as to its quality until you have finally heard all the evidence,’ does not authorize them to take into consideration the result of their own examination, as independent evidence.”²⁰

20—Wright v. Carpenter, 50 Cal.
556.

CHAPTER XXV.

CAUTIONARY INSTRUCTIONS IN GENERAL.

- § 246. Right and duty to give cautionary instructions.
- § 247. Limiting consideration of evidence to purpose for which admitted and directing disregard of evidence in civil cases.
- § 248. Same—Criminal cases.
- § 249. Caution against sympathy or prejudice.
- § 250. Same—What instructions may be given.
- § 251. Same—Actions against corporations.
- § 252. Cautions as to argument of counsel.
- § 253. Same—Correcting erroneous or improper argument.
- § 254. Same—At what stage of trial correction made.
- § 255. Instructions to disregard comments of judge.
- § 256. Duty and conduct of jury.

§ 246. Right and duty to give cautionary instructions.

The giving of cautionary instructions is necessarily a matter very much within the discretion of the trial court,¹ but it is usually held that cautionary remarks having the effect of holding the jury to a consideration only of the law and evidence of the case in hand and to free them of any possible prejudice from outside sources are proper,² though not always necessary.³

1—Day v. State, 54 Fla. 25; State v. Barton, 70 Ore. 470, 142 Pac. 348; City of Tacoma v. Wetherby, 57 Wash. 295, 106 Pac. 903.

The giving of cautionary instructions is discretionary. Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 9 Am. St. 598, aff'g 27 Ill. App. 17; Marchese v. Aurora, E. & C. R. Co., 156 Ill. App. 267; Olsen v. Chicago City Ry. Co., 153 Ill. App. 75; Pen-

ney v. Johnston, 142 Ill. App. 634; Springfield Electric Light & Power Co. v. Mott, 120 Ill. App. 39.

2—St. Louis, I. M. & S. R. Co. v. Thurman, 110 Ark. 188.

3—An instruction as to the duty of the jury to regard the law and the evidence may be properly refused as unnecessary. Chicago, R. I. & P. R. Co. v. Clark, 134 Ill. App. 161, aff'd 231 Ill. 548.

Accordingly it has been held proper to instruct that the jury are to accept the law as given by the court,⁴ that they are to confine their investigation to the issues made by the pleadings,⁵ that they must accept the instructions given as the law,⁶ or that they may consider the extent to which any instruction given may be qualified by others of the series.⁷

Where a defendant requested that the court charge the jury that they must be governed by the law as given by the court in its charge, "and that they would not be justified in finding a verdict contrary to the law as laid down in the instruction," and the court's charge contained no similar instruction, it was error to refuse the request.⁸

An instruction that the jury are not to consider the result of a former trial of the case is clearly correct,⁹ and the court may rightfully instruct the jury to take the law from the court, and to disregard a case read in their hearing by counsel.¹⁰

The giving of an instruction requiring the jury to disregard newspaper statements, is discretionary,¹¹ and an oral instruction cautioning the jury not to visit the location of an accident unless counsel agree that they go in a body is not erroneous.¹²

4—It is not error to inform the jury that they are to accept the law as given by the court. *People v. Crane*, 4 Cal. App. 142, 87 Pac. 239. And see, *City of St. Paul v. Hyslop*, 98 C. C. A. 609, 174 Fed. 391.

5—An instruction given out of an abundance of caution to confine the jury in their investigation to the issues made by the pleadings is not reversible error. *Gracy v. Atlantic Coast Line R. Co.*, 53 Fla. 350. See also, §§ 77 *et seq.*, *ante*.

6—An instruction requiring the jury to accept the instructions given as the law governing the case, is correct. *Chicago & E. I. R. Co. v.*

Burridge, 211 Ill. 9, rev'g 107 Ill. App. 23; *People v. Beecher*, 154 Ill. App. 229.

7—*Chicago Union Traction Co. v. Hanthorn*, 211 Ill. 367.

8—*Chicago & E. I. R. Co. v. Stonecipher*, 90 Ill. App. 511.

9—*Travelers' Ins. Co. v. Parker*, 92 Md. 22.

10—*Hyde v. Town of Swanton*, 72 Vt. 242.

11—*Springfield Electric Light & Power Co. v. Mott*, 120 Ill. App. 39.

12—*Pioneer Fireproof Const. v. Sunderland*, 188 Ill. 341, aff'g 87 Ill. App. 213.

In an action for personal injuries, an instruction "that you [the jury] must not compromise between the questions of liability and amount of damages; that is, if, after due consideration of the evidence and instructions, * * * based upon a view as to the preponderance of the evidence, some of you should believe the defendant not guilty, and others * * * believe the defendant guilty, and plaintiff entitled to substantial damages, you must not, in such event, merely as a matter of compromise, * * * bring in a verdict for some unsubstantial amount,"—being, in effect, that the verdict must be either not guilty, or for substantial damages,—was erroneous.¹³

Where the evidence tends to show the commission of a crime on a particular date, it is proper for the court to charge that every circumstance pointing to motive and intent may be considered with relation to any particular date on which an alleged crime may have been committed, on the assumption that the jury may find the crime to have been committed on a different date.¹⁴

§ 247. Limiting consideration of evidence to purpose for which admitted and directing disregard of evidence in civil cases.

Evidence should not be excluded when admissible for some purposes, but not for others,¹⁵ and when evidence of this nature is admitted it is proper to explain the purpose for which it was admitted and direct the jury not to consider it for any other purpose,¹⁶ but the decisions are not harmonious as to the necessity of an instruction of this nature, in the absence of a request.

13—*Guaranty Const. Co. v. Broeker*, 93 Ill. App. 272.

14—*State v. Cunningham*, 111 Iowa 233.

15—*Farwell v. Warren*, 51 Ill. 467.

16—*Giddings v. Baker*, 80 Tex. 308; *Missouri Pac. Ry. Co. v. Johnson*, 72 Tex. 95.

Evidence admissible for a certain purpose may be limited to its proper office by an instruction. *People v. Hagenow*, 236 Ill. 514.

Evidence incompetent for one purpose is properly limited to a competent purpose. *Lowe v. Alton Baking & Catering Co.*, 158 Ill. App. 458.

In some cases it is held that a party desiring to have the effect of evidence limited, should request an instruction on such subject,¹⁷ but in other cases it has been held error not to give such instructions,¹⁸ although the reports do not disclose whether any requests for instructions limiting the effect of evidence had been made.

Where evidence is admitted which is competent only upon one issue in the case, it is error to refuse a request for an instruction so limiting the consideration of such evidence.¹⁹

Where a fact is testified to by plaintiff's witnesses on rebuttal which is properly a fact in chief, but the court admits the testimony on the ground that it contradicts a witness for defendant, and affects his credibility, the court should instruct the jury clearly as to what use to make of it.²⁰

An instruction that conclusions as to negligence in an impeaching statement are not evidence and limiting the effect of such statement is proper,²¹ and an error in permitting lands to be described in the condition in which they existed before a drainage district was organized, may be cured by an instruction to disregard such evidence.²²

In a negligence case, it has been held fatal error to refuse an instruction that evidence of precautions taken after the accident cannot be considered as evidence of negligence.²³

Where evidence is only admissible as bearing upon the

17—**Illinois.** Farwell v. Warren, 51 Ill. 467; Harmon v. Peoria Ry. Co., 160 Ill. App. 458.

Indiana. Lipprant v. Lipprant, 52 Ind. 273.

Iowa. Puth v. Zimbleman, 99 Iowa 641.

Missouri. Babb v. Ellis, 76 Mo. 459; Schlicker v. Gordon, 19 Mo. App. 479.

Texas. Missouri Pac. R. Co. v. Johnson, 72 Tex. 95.

18—McDermott v. Hannibal & St.

J. R. Co., 87 Mo. 285; Weir v. McGee, 25 Tex. Supp. 20; Marks v. Culmer, 6 Utah 419, 24 Pac. 528.

19—Triolo v. Foster, (Tex. Civ. App.) 57 S. W. 698.

20—Barlow Bros. Co. v. Parsons, 73 Conn. 696.

21—Nelson v. Northwestern El. R. Co., 170 Ill. App. 119.

22—Inlet Swamp Drain. Dist. v. Anderson, 257 Ill. 214.

23—Anson v. Evans, 19 Colo. 274, 35 Pac. 47.

credibility of the testimony of a witness, but the court charges that whatever weight is to be given to the evidence upon any point the jury will have a right to consider, there is error.²⁴

The refusal of an instruction requiring the jury to disregard matter to which an objection has been sustained is proper;²⁵ and it has been held error to instruct on inadmissible evidence where proper objections are made.²⁶

Where a party fails to make proper objections to improper testimony he has no right to have such testimony excluded from the consideration of the jury.²⁷

§ 248. Same—Criminal cases.

As a general rule, in criminal cases, when evidence competent for one purpose is admitted, the court should limit the jury's consideration of such evidence to that purpose alone for which it was admitted, whether requested to do so or not.²⁸

24—*Worthing v. Worthing*, 64 Me. 335.

25—*Chicago Consol. Traction Co. v. Gervens*, 113 Ill. App. 275.

An instruction that particular evidence which has been excluded must be disregarded is properly refused. *Yezner v. Roberts, Johnson & Rand Shoe Co.*, 140 Ill. App. 61.

26—*Republic Iron & Steel Co. v. Radis*, 106 Ill. App. 530.

27—*Lepman & Heggie v. Wabash R. Co.*, 185 Ill. App. 583.

28—*Alabama*. *James v. State*, 167 Ala. 14; *McGuire v. State*, 2 Ala. App. 218.

California. *People v. Gray*, 66 Cal. 271, 5 Pac. 240.

Indiana. *Porter v. State*, 173 Ind. 694.

Iowa. *State v. Lavin*, 80 Iowa 555.

Kansas. *State v. Marshall*, 2 Kan. App. 792, 44 Pac. 49.

Kentucky. *Tapscott v. Commonwealth*, 140 Ky. 573; *Gills v. Com. (Ky.)* 37 S. W. 269.

Maine. *State v. Lull*, 37 Me. 246.

Missouri. *State v. Bobbitt*, 228 Mo. 252.

North Carolina. *State v. Collins*, 121 N. C. 667.

Ohio. *Harrington v. State*, 19 Ohio St. 264.

Oklahoma. *Smith v. State*, 3 Okla. Cr. 629, 108 Pac. 418.

Pennsylvania. *Com. v. Tadrick*, 1 Pa. Super. Ct. 555.

Texas. *Rogers v. State*, 26 Tex. App. 404; *McCall v. State*, 14 Tex. App. 353; *Long v. State*, 11 Tex. App. 381; *Elliott v. State*, 58 Tex. Cr. App. 200; *Winfrey v. State*, 41 Tex. Cr. App. 538; *Proctor v. State*,

There are some *contra* decisions as to this proposition,²⁹ and some exceptions and limitations, but the general rule is well established.³⁰

And in Texas it has been held that exceptions are unnecessary to obtain a review of the error,³¹ although the rule seems to have been changed by statute.³²

And in this state a failure to limit the effect of evidence not proper for consideration on some points of the case is not error in trials for misdemeanors, as distinguished from felony cases, unless a request for such an instruction has been made.³³

In giving instructions limiting the effect of evidence, care should be exercised so as not to withdraw the evidence from the consideration of the jury, nor to restrain them from giving it, in connection with the other evidence in the case, such weight in respect to the matter which proves, in the light of reason and good sense, they may as thus advised believe it deserves.³⁴

Whenever extraneous matter is admitted in evidence for

37 Tex. Cr. App. 366; Golin v. State, 37 Tex. Cr. App. 90; Martin v. State, 36 Tex. Cr. App. 125; Paris v. State, 35 Tex. Cr. App. 82; Thornley v. State (Tex. Cr. App.) 35 S. W. 982; Short v. State (Tex. Cr. App.) 29 S. W. 1072; Engers v. State (Tex. Cr. App.) 26 S. W. 987.

Wisconsin. Fossdahl v. State, 89 Wis. 482; Kollock v. State, 88 Wis. 663.

When evidence is admissible for only one purpose, it should be restricted to the purpose for which it is admitted. McGuire v. State, 2 Ala. App. 218.

It is proper for the court to explain to the jury the purpose for which evidence was admitted, and direct them not to consider it for any other purpose. People v. Gray,

66 Cal. 271, 5 Pac. 240; Harrington v. State, 19 Ohio St. 264; Winfrey v. State, 41 Tex. Cr. App. 538; Short v. State (Tex. Cr. App.) 29 S. W. 1072; Engers v. State (Tex. Cr. App.) 26 S. W. 987.

29—People v. Gray, 66 Cal. 271, 5 Pac. 240; Long v. State, 95 Ind. 481.

30—See decisions in note 28, *ante*.

31—Burks v. State, 24 Tex. App. 326; Paris v. State, 35 Tex. Cr. App. 82; Thornley v. State (Tex. Cr. App.) 35 S. W. 982.

32—Magee v. State (Tex. Cr. App.) 43 S. W. 512.

33—Duke v. State, 35 Tex. Cr. App. 283; Paris v. State, 35 Tex. Cr. App. 82.

34—Harrington v. State, 19 Ohio St. 264.

a specific purpose incidental to, but which is not admissible directly to prove, the main issue, and which might tend, if not explained, to exercise a wrong, undue, or improper influence upon the jury as to the main issue, the court should so limit and restrict it that such unwarranted results cannot ensue.³⁵

When a document is read to a jury for a specific, lawful purpose, which is also evidence of facts not admissible, it is the duty of the court to instruct them to disregard every other consideration than the one for which it was admitted.³⁶

On the trial of an accomplice, the court should instruct that the jury must limit its consideration of the confessions of the principal to the question of his guilt.³⁷

Where the declarations or admissions of one of two defendants are admitted in evidence, the jury should be told that such declarations or admissions are evidence only against the defendant who made them,³⁸ although in one case, it has been held that where evidence is admissible as an admission against the defendant making it, if it is desired to limit such evidence against such defendant, the other defendants should request an instruction to that effect.³⁹

Where evidence is adduced of other crimes committed by defendant, in order to show motive or guilty intent, the court should properly instruct the jury with reference to the purpose and object of such testimony.⁴⁰

35—Davidson v. State, 22 Tex. App. 372.

36—State v. Lull, 37 Me. 246.

37—Thomas v. State, 43 Tex. Cr. App. 20, 96 Am. St. Rep. 834.

38—State v. Collins, 121 N. C. 667; Short v. State (Tex. Cr. App.) 29 S. W. 1072; Kollock v. State, 88 Wis. 663. In this last case, two defendants were tried together for unlawfully killing the hogs of another, and it was shown that one defendant, in the absence of the other, had said that he intended to kill the hogs, and

there was no evidence of any conspiracy between the defendants at the time of the making of the declaration. It was held that a failure to charge that such declaration should not be permitted to affect the absent defendant was error.

39—People v. Darr, 262 Ill. 202.

40—Smith v. State, 3 Okla. Cr. 629, 108 Pac. 418; Com. v. Tadrick, 1 Pa. Super. Ct. 555; Barton v. State, 28 Tex. App. 483; Mayfield v. State, 23 Tex. App. 645; Wheeler v. State, 23 Tex. App. 598; Taylor v. State, 22

The jury should be instructed to consider evidence introduced to affect the credibility of the defendant for that specific purpose alone,⁴¹ as, for instance, evidence that defendant has been charged with other crimes,⁴² or that he has been convicted of other crimes,⁴³ or evidence that defendant had attempted to suborn a witness,⁴⁴ or evidence tending to show that he is guilty of the crime of which he is charged.⁴⁵

Where there is evidence that the accused has made contradictory and incriminating statements with respect to matters bearing on the crime, it is proper to refuse to instruct "that they could only be considered in so far as they affected the credibility of the defendant; but this was not a request to instruct that evidence of defendant's bad character went only to his credibility as a witness, and was not evidence of his guilt, * * * because any and all statements shown to have been made by defendant tending to show his connection with the homicide were admissible, however inconsistent they may have been, and regardless of any tendency that they may have had to discredit him as a witness before the jury."⁴⁶

Where evidence is admissible solely to contradict or impeach a witness, it is not error to so limit the effect of the evidence by the charge to the jury.⁴⁷

Tex. App. 529, 58 Am. Rep. 656n; Davidson v. State, 22 Tex. App. 382; McCall v. State, 14 Tex. App. 358; Long v. State, 11 Tex. App. 381; Francis v. State, 7 Tex. App. 501; Mask v. State, 34 Tex. Cr. App. 136; Thornley v. State (Tex. Cr. App.) 35 S. W. 981; Martin v. State (Tex. Cr. App.) 35 S. W. 976; Kollock v. State, 88 Wis. 663. Compare Shipp v. Com., 101 Ky. 518.

41—Hardin v. State, 57 Tex. Cr. App. 401; Golin v. State, 37 Tex. Cr. App. 90; Coker v. State, 35 Tex. Cr. App. 57; Engers v. State (Tex.

Cr. App.) 26 S. W. 987; Jenkins v. State, 1 Tex. App. 346.

42—Oliver v. State, 33 Tex. Cr. App. 541.

43—Mahoney v. State, 33 Tex. Cr. App. 388; Hutton v. State (Tex. Cr. App.) 33 S. W. 969; Fossdahl v. State, 89 Wis. 482.

44—Owens v. State, 35 Tex. Cr. App. 345.

45—Paris v. State, 35 Tex. Cr. App. 82.

46—State v. Furgerson, 162 Mo. 668.

47—Rowan v. State, 57 Tex. Cr.

And generally, where testimony is introduced for the purpose of discrediting a witness, the omission to instruct the jury not to consider the evidence for any other purpose than that for which it was admitted is error.⁴⁸

A failure to limit the effect of the testimony of a witness for the prosecution in contradiction of a witness for defendant is not error, where the contradiction is more apparent than real.⁴⁹

It is not necessary to instruct that evidence of contradictory statements of a witness can be considered only for the purpose of affecting the credibility of the witness, where such evidence did not tend to establish the guilt of defendant.⁵⁰

It may be stated generally that, unless testimony impeaching witnesses for defendant can be used for some purpose injurious to defendant, it is not necessary to limit its effect by an instruction.⁵¹

It is proper to charge that, "where a witness testifies for one side, it is competent for the other side to introduce another witness to swear that on a particular occasion, that witness made statements different from the statements that he made on the stand, * * * and that is done for the purpose of tending to show (and it is for you to give the evidence such weight as it is entitled to), he is not worthy of credit, and that is the purpose for which it was introduced." That, however, does not show that the contradictory statements of the witness made to the impeaching witness are true or untrue, but such statements are declarations made out of court, and not original evidence.⁵²

App. 625, 136 Am. St. Rep. 1005;
Goss v. State, 57 Tex. Cr. App. 557;
Winfrey v. State, 41 Tex. Cr. App.
538.

48—Gills v. Com. (Ky.) 37 S. W.
269; Rogers v. State, 26 Tex. App.
404.

49—Massingill v. State (Tex. Cr.
App.) 63 S. W. 315.

50—Ross v. Com. (Ky.) 59 S. W.
28.

51—Blanco v. State (Tex. Cr.
App.) 57 S. W. 828.

52—Bondurant v. State, 125 Ala.
31.

If the purpose of admitting the evidence objected to is clearly apparent,⁵³ or the jury "could not possibly have concluded it was [admitted] for any other purpose" than the one for which it was admitted, the failure of the court to restrict the effect of such evidence is not error.⁵⁴

Thus, where witnesses admit that they have been previously indicted for various felonies, a failure of the court to limit the effect of such admissions to questions affecting their credibility is not error, in view of the fact that such admissions cannot be considered for any other purpose.⁵⁵

So, failure to limit testimony as to the good reputation of the prosecuting witness for truth and veracity is not error, if the testimony shows that the jury could not have considered it for any other purpose than to affect the credibility of said witnesses. It is only where testimony might be used for some other purpose than to discredit the witness that it is necessary for the court to limit the same for the purposes for which it was introduced.⁵⁶

§ 249. Caution against sympathy or prejudice.

It is well settled that the trial judge may caution the jury not to allow sympathy or prejudice to influence them in making up their verdict.⁵⁷

53—*State v. Gaston*, 96 Iowa 505; *Moseley v. State*, 36 Tex. Cr. App. 578.

54—*Holly v. Com.* (Ky.) 36 S. W. 532; *Magee v. State* (Tex. Cr. App.) 43 S. W. 512.

55—*Gann v. State* (Tex. Cr. App.) 59 S. W. 896.

56—*Ogle v. State* (Tex. Cr. App.) 58 S. W. 1004.

57—*Illinois*. *Jones & Adams Co. v. George*, 227 Ill. 64, 10 Ann. Cas. 285, rev'g 125 Ill. App. 503; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598.

Indiana. *Blizzard v. Applegate*, 77 Ind. 526.

Mississippi. *Wood v. State*, 64 Miss. 776.

Nebraska. *Smith v. State*, 4 Neb. 278.

South Carolina. *State v. Petsch*, 43 S. C. 132.

Washington. *Wheeler v. Hotel Stevens Co.*, 71 Wash. 142, Ann. Cas. 1914 C 576n, 127 Pac. 840.

In a personal injury case it is proper to instruct that neither sympathy nor prejudice should influence the verdict. *Jones & Adams Co. v. George*, 227 Ill. 64, 10 Ann. Cas. 285, rev'g 125 Ill. App. 503.

But there is some diversity of opinion as to the necessity of such instructions.

In a number of decisions it is held that the question whether such a charge should be given is within the discretion of the trial court,⁵⁸ but it has also been held that such an instruction should be given when necessary,⁵⁹ and that there may be circumstances rendering it imperatively necessary,⁶⁰ as where the evidence shows a strong prejudice against a defendant.⁶¹

In one decision it was said that a case might readily be supposed "where such admonition to a jury would be not only proper, but necessary,"⁶² and it has been held that a general instruction on such subject, cannot be criticised.⁶³

That such an instruction, if asked, should be given in most cases, as it cannot harm or be of undue advantage to either party but a refusal of such an instruction was sustained because the reviewing court thought no prejudice had resulted therefrom.⁶⁴

On the other hand it has been said: The trial judge "is in a position to observe and know whether the situation is such as to render such cautionary instructions necessary to a due administration of justice, and if, in his opinion, they are not, his refusal to give them cannot ordinarily be assigned for error,"—and the refusal of such an instruction was sustained.⁶⁵

58—*Spear v. United R. R. of San Francisco*, 16 Cal. App. 637, 117 Pac. 956; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598; *State v. Talbott*, 73 Mo. 347.

59—*Wheeler v. Hotel Stevens Co.*, 71 Wash. 142, Ann. Cas. 1914 C 576n, 127 Pac. 840.

60—*State v. Barton*, 70 Ore. 470, 142 Pac. 348.

61—An instruction cautioning the jury against allowing prejudice or sentiment to influence its verdict is

necessary where the evidence shows a strong prejudice against a defendant. *State v. Barton*, 70 Ore. 470, 142 Pac. 348.

62—*Blizzard v. Applegate*, 77 Ind. 526.

63—*People v. Botkin*, 9 Cal. App. 244, 98 Pac. 861.

64—*Doyle v. Dobson*, 74 Mich. 567.

65—*Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598.

In one case the writer of the opinion states that he is not certain that a cautionary instruction on this subject ever has a particle of effect as the jurors are not aware that their opinion is being affected by the subtle influence of sympathy.⁶⁶

A request for a caution of this nature may, of course, be refused, if there is nothing in the circumstances of the case which would make it proper.⁶⁷

§ 250. Same—What instructions may be given.

An instruction that the jury in arriving at their verdict should not be influenced by any feeling of sentiment, but, that they should apply the law as given by the court to the facts of the case is proper.⁶⁸

So, an instruction that: "You have no right to act upon your sympathies without any proof; but if the proof happened to concur with your sympathies, you are not to disregard the proof because of that fact. You are to be governed by the proof in the case,"—has been approved.⁶⁹

And it has been held proper to instruct that "you will allow no false sympathy to sway you from a proper discharge of your duty;"⁷⁰ or "that it was of no consequence whether defendant was married or single;"⁷¹ or that the jury should not "lose their heads, and return a verdict for a lady on general principles;"⁷² or "should consider the case without regard to the difference in race or color of the parties."⁷³

In a case involving the fitness of an applicant for a liquor license, it was held proper to refuse an instruction that, "in passing upon this case, * * * it is your duty not to

66—Scheurmann v. Mathison, 67 Ore. 419, 136 Pac. 330.

67—Central Branch Union Pac. R. Co. v. Andrews, 41 Kan. 370, 21 Pac. 276.

68—Day v. State, 54 Fla. 25.

69—Shehan v. Barry, 27 Mich. 217.

70—Smith v. State, 4 Neb. 277.

71—People v. Young, 65 Cal. 225, 3 Pac. 813.

72—Bingham v. Bernard, 36 Minn. 114.

73—Lunsford v. Walker, 93 Ala. 36.

allow yourselves to be influenced by the presence of a lobby in the court room opposed to the granting of the plaintiff's petition," on the ground that it is calculated to prejudice the jury against the parties opposing the grant of the license.⁷⁴

An instruction cautioning the jury to dismiss all personal feeling and sympathy, aroused by the appearance in court of the widow and children of a deceased, has been held proper in view of the argument made by counsel;⁷⁵ and it has been held proper to charge that "no consideration of feeling or sympathy for the injured person or the defendant, or family of either, or relatives, should control the jury" in determining their verdict;⁷⁶ or that the jury should not be influenced by any supposed hardships of the case.⁷⁷

An instruction that it is the jury's duty to try the case without being influenced by sympathy and that they should disregard all question of the relative financial condition of the plaintiff and defendant, is improper as not being based on the evidence, where an action involves only the question of liability for negligence and punitive damages are not asked.⁷⁸

In criminal cases it has been held proper to instruct that the jury should not "allow any considerations of public policy or over-anxiety to enforce the law to influence them in the * * * decision of the case;"⁷⁹ or to "caution the jury not to be influenced by public opinion, whether for or against accused, and to state to them that they had noth-

74—*Lynch v. Bates*, 139 Ind. 206.

75—*Smith v. Sanitary Dist. of Chicago*, 260 Ill. 453.

76—*Wood v. State*, 64 Miss. 761.

77—*Davis v. Kingsley*, 13 Conn. 285. In this case the court said: "Justice, as well as law, requires that he who has assumed an obligation for another should faithfully fulfill it; and although, as men, jurors may sympathize with those who

suffer, yet as honest men, bound by oath to administer judgment according to law and evidence, they were properly cautioned by the presiding judge against the appeal made to their feelings by the counsel for the defendants."

78—*Riverside & Dan River Cotton Mills v. Carter*, 113 Va. 346.

79—*State v. Talbott*, 73 Mo. 347.

ing to do with the pleasure or displeasure of the public;”⁸⁰ or that the jury should not be controlled in making up their verdict by any fear as to what the punishment may be.⁸¹

Questions of mercy are not for the jury, but for the executive, in the exercise of the pardoning power; and it is not error to tell the jury so in the instructions.⁸²

Thus, an instruction that: “Mercy does not belong to you. No question of mercy, sentiment, or anything else resides with you, except the question as to whether or not you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty,”—is not erroneous.⁸³

In cautioning the jury against sympathy or prejudice, a remark by the court that the crime of which defendant was accused was a dastardly one was held not reversible error.⁸⁴

§ 251. Same—Actions against corporations.

Usually, the giving of a cautionary instruction as to fairness to a defendant corporation is largely within the court’s discretion.⁸⁵

Some courts have said that it is proper for the court to warn jurors to beware of giving to a private individual greater consideration than to a corporation in making up its verdict, but it is not held that such warning is indispensable.⁸⁶

An instruction in an action against a local telephone company, in which many of the citizens of the county were interested, cautioning the jury to determine the case from the

80—*McTyier v. State*, 91 Ga. 254.

81—*Brantley v. State*, 87 Ga. 149; *Wilson v. State*, 69 Ga. 240; *Coyle v. Com.*, 100 Pa. St. 573, 45 Am. Rep. 397.

It is not error to tell the jury that they have nothing to do with the question of punishment. *Clary v. State*, 61 Neb. 688.

82—*Dinsmore v. State*, 61 Neb. 418.

83—*Avery v. State*, 124 Ala. 20.

84—*State v. McCarter*, 98 N. C. 637.

85—*Donk Bros. Coal & Coke Co. v. Thil*, 228 Ill. 233, aff’g 128 Ill. App. 249; *Chicago & E. I. R. Co. v. Burridge*, 211 Ill. 9, rev’g 107 Ill. App. 23; *Leckliedèr v. Chicago City Ry. Co.*, 172 Ill. App. 557.

86—*Turner v. Southwest Mo. R. Co.*, 138 Mo. App. 143.

testimony and the law, and the instructions given, is not erroneous.⁸⁷

§ 252. Cautions as to argument of counsel.

In general, it is improper for the trial judge in charging the jury to make any statements, the tendency of which is to disparage or discredit arguments which are within the law and facts of the case.

The privilege of parties to be heard at the bar through their counsel is well recognized,⁸⁸ and a wide latitude is given to the latter in making their argument to the jury,⁸⁹ it being their privilege to refer to the evidence and to make such deductions as they think are justified.⁹⁰

Accordingly, it has been held error to direct an entire disregard of the argument;⁹¹ or to instruct the jury that they should not consider any law that has been addressed to them by counsel, whether applicable to the facts or not,⁹² so it has been held improper to refuse, as unduly limiting the effect of legitimate argument, a charge that "whatever may have been said or claimed by counsel * * * in their arguments to the court should have no influence whatever with the jury in determining the facts in the case, except so far as the testimony, when considered altogether, may show the statement to have been true;" and that "the jury should not be influenced by anything but the testimony in the cause, with whatever light may have been reflected thereon by the arguments and analysis of counsel, and the law as it has been given you in charge by the court, and from these alone endeavor to arrive at the very truth, regardless of results."⁹³

87—*Anthony v. Cass County Home Tel. Co.*, 165 Mich. 388.

88—*Garrison v. Wilcoxson*, 11 Ga. 154; *State v. O'Neal*, 29 N. C. 252.

89—*State v. O'Neal*, 29 N. C. 252.

90—*People v. Hite*, 8 Utah 461, 33 Pac. 254.

91—*Garrison v. Wilcoxson*, 11 Ga.

154; *People v. Ambach*, 247 Ill. 451; *Svensson v. Lindgren*, 124 Minn. 386, Ann. Cas. 1915 B 734n.

92—*Reeves v. State*, 34 Tex. Cr. App. 483.

93—*People v. Hite*, 8 Utah 461, 33 Pac. 254.

On the other hand, a charge "that the attorneys on either side are not supposed to be impartial, and that the jury are to take their statements both on the law and facts guardedly," has been upheld.⁹⁴

So, where counsel expressed strongly his belief in his client's innocence, it was held that an instruction that "what counsel said in their argument, and what they believed," was to have no influence with the jury whatever, was not erroneous, it being apparent from the context that the words referred solely to counsel's statement as to his belief in defendant's innocence.⁹⁵

It has also been held that the court may, after instructing the jury correctly upon a matter presented by counsel, add that, as a general rule, it is the fairest and best way for a jury to decide cases mainly upon the grounds taken and discussed by counsel in the argument.⁹⁶

An instruction that "statements of counsel are not evidence, and should not be considered by the jury in arriving at their verdict," is not objectionable as destroying the effect of a defendant's counsel's argument.⁹⁷

And a statement by the judge in charging that he could not "do anything towards brushing away the sophistries of counsel" was held not improper, where there was nothing to indicate a personal application of the words to any particular counsel, and the words were spoken when he was stating exactly and fully the restrictions of the law upon the judge endeavoring to comment upon the facts in evidence.⁹⁸

§ 253. Same—Correcting erroneous or improper argument.

In the case of improper or irrelevant argument of counsel, the error should be corrected, it being the duty of the court to keep counsel within the boundaries of legitimate argument.⁹⁹

94—State v. Jones, 29 S. C. 201.

95—Smith v. State, 95 Ga. 472.

See also, Roe v. State, 25 Tex. App. 33.

96—Melvin v. Bullard, 35 Vt. 268.

97—State v. Heath, 237 Mo. 255.

98—State v. Way, 38 S. C. 347.

99—People v. Lange, 90 Mich. 454;

The court should correct statements made by counsel of matters as proved which are not based on any evidence in the case,¹ as well as any misrepresentation of law by counsel, whether in a civil or criminal case, even though admitted to be law by the parties or their counsel.²

In a case where it was held proper for counsel to read extracts from a law book to the jury by way of illustration, it was held that an instruction "that such course was improper, and would not have been permitted if it had been objected to; that it was calculated to, and might, mislead the jury," should not have been given.³

If it is improper for counsel to read law books to the jury, the court may properly charge that any matter read to them from law books must not be considered by them for any purpose.⁴

In the case of improper argument as to a proposition of law not involved in the case, an instruction that the proposition should be disregarded should be requested,⁵ and it has been held reversible error to refuse to grant instructions to obviate prejudice caused by improper argument.⁶

Much latitude is allowed the trial court in calling attention to improper argument,⁷ but in so doing it is improper

Evans v. Town of Trenton, 112 Mo. 390; State v. Johnson, 23 N. C. 354, 35 Am. Dec. 742.

1—Birmingham Nat. Bank v. Bradley, 116 Ala. 142; Nelson v. Welch, 115 Ind. 270; Melvin v. Easley, 46 N. C. 386, 62 Am. Dec. 171; State v. O'Neal, 29 N. C. 252.

It is proper to caution the jury against the influence of statements of counsel not based on the evidence. *Szczzech v. Chicago City Ry. Co.*, 157 Ill. App. 150.

2—State v. Johnson, 23 N. C. 354, 35 Am. Dec. 742; Gregory's Adm'r v. Ohio River R. Co., 37 W. Va. 606.

3—People v. Anderson, 44 Cal. 65.

4—Morehouse v. Remson, 59 Conn. 392. See also, *Jones v. State*, 65 Ga. 510, in which it was held that, where counsel read extracts from "Phillips' Remarkable Cases of Circumstantial Evidence," it was not error to charge "that the jury must not be influenced, guided by, or accept as law in this case any imaginary cases taken from works of romance."

5—Hart v. Wilson, 177 Ill. App. 510.

6—Brow v. State, 103 Ind. 133; State v. McCartney, 65 Iowa 522.

7—Svensson v. Lindgren, 124 Minn. 386, Ann. Cas. 1915 B 734n.

to go to the extent of giving an instruction which practically tells the jury to disregard the argument.⁸

An instruction directing a disregard of statements not based on the evidence has been held not equivalent to a direction to disregard the arguments made at the trial.⁹

If extracts from reported cases are read by counsel on the question of the measure of damages, the error is cured by an instruction that the jury are to determine the case upon the evidence, uninfluenced by damages given in other cases.¹⁰

Where counsel states "that on a former trial a verdict had been rendered for plaintiff," the impropriety is cured by an instruction that the jury "had nothing to do with the former trial."¹¹

A repetition by counsel of excluded testimony is cured by an instruction which explicitly defines the issues, and directs the jury not to consider such excluded testimony.¹²

Where counsel improperly attacks the credibility of a witness, on whose testimony alone the defense depends, by the suggestion that such witness has been tampered with, the error is not cured by an instruction that the jury are to decide the case on the evidence, and what the witnesses say, and not on what counsel say.¹³

An argument prejudicial to a party will not be held to have been cured by an instruction that the jury must disregard it, where the verdict indicates that the argument was more effective than the instruction.¹⁴

8—Svensson v. Lindgren, 124 Minn. 386, Ann. Cas. 1915 B 734n.

9—North Chicago St. R. Co. v. Wellner, 206 Ill. 272, aff'g 105 Ill. App. 652.

10—City of Evansville v. Wilter, 86 Ind. 414.

11—Chesebrough v. Conover, 140 N. Y. 382.

12—Talmage v. Smith, 101 Mich. 370, 45 Am. St. Rep. 414.

13—Sullivan v. Deiter, 86 Mich. 404.

14—Galveston, H. & S. A. Ry. Co. v. Kutac, 72 Tex. 643.

§ 254. Same—At what stage of trial correction made.

In one case, it has been said that "it may be laid down as law, and not merely discretionary, that where the counsel grossly abuses his privilege, to the manifest prejudice of the opposite party, it is the duty of the judge to stop him then and there, and, if he fails to do so, * * * it is good ground for a new trial."¹⁵

But, ordinarily it will be sufficient to correct an improper statement made by counsel in argument in giving the charge to the jury.¹⁶

Where the jury return a verdict of guilty, but, on being polled, three of them refuse to concur in the verdict, it is too late for the court to say that counsel improperly represented that the opinion of the court must have been against the defendant. Such misrepresentation should be corrected when it is made.¹⁷

§ 255. Instructions to disregard comments of judge.

Improper statements or comments of the court made during the course of the trial are subject to correction by the giving of proper instructions in the same manner as improper argument of counsel.

Accordingly, it has been held proper in one case to instruct that statements made by the court are not to be taken as an expression of opinion on the facts.¹⁸

An instruction that the court does not intimate, "or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are in this case, or what are not the facts therein. It is solely

15—*Jenkins v. North Carolina Ore Dressing Co.*, 65 N. C. 564.

16—*Melvin v. Easley*, 46 N. C. 386, 62 Am. Dec. 171; *State v. O'Neal*, 29 N. C. 251. In this last case it was said that there was no obligation on the judge to interrupt counsel in stating their conclusions; that it is

the right and duty of the trial judge to correct the mistake, and that he might do it at the moment, or wait till he charges the jury—perhaps the most appropriate time.

17—*State v. Caveness*, 78 N. C. 484.

18—*Doll v. Chicago Consol. Traction Co.*, 153 Ill. App. 442.

and exclusively for the jury to find and determine the facts, and this they must do from the evidence, and, having done so, then apply to them the law as stated in these instructions,"—is not erroneous, as impressing the jury with the idea that they are independent of the court and the law.¹⁹

But, an instruction admonishing the jury that they are to ignore any language, employed by the court in discussing questions of law with counsel, which may have indicated his opinion as to the facts, as it was the duty of the court to declare the law, and of the jury to determine the facts according to their best judgment, regardless of any consideration other than that of doing even-handed justice between the parties to the suit, is erroneous, in that it leaves them to determine the facts according to their own best judgment, regardless of any consideration other than that of doing even-handed justice between the parties.²⁰

§ 256. Duty and conduct of jury.

The giving of instructions as to the duty of jurors to agree on a verdict has been considered in a prior chapter.²¹

An instruction asked, stating that each juror should decide for himself on his oath as to what his verdict should be, and should not yield his deliberate conscientious convictions as to what the verdict should be, either at the instance of a fellow-juror, or at the instance of a majority, nor yield his honest convictions for the sake of unanimity; or to avert the disaster of a new trial, is properly refused, as incorrectly stating the duty and obligation of a juror.²²

An instruction that the jury are to "consider, first, the defendant's affirmative defense, and, if it is supported by the evidence, to find for the defendant. They are then instructed that, if they do not find it supported by the evi-

19—North Chicago St. R. Co. v. Kaspers, 186 Ill. 246, aff'g 85 Ill. App. 316.

20—Chicago North Shore St. Ry. Co. v. Hebson, 93 Ill. App. 98.

21—See ch. XXIII, *ante*.

22—Horton v. United States, 15 App. Cas. (D. C.) 310. See also, Highland Foundry Co. v. New York, N. H. & H. R. Co., 199 Mass. 403.

dence, to consider plaintiff's complaint, and, if they found it supported by evidence, to find for plaintiff,"—is a correct instruction as to the burden of proof upon the facts alleged in the complaint and answer, respectively, and is not unfavorable to defendant.²³

An instruction that the jury, in deliberating upon the case, are "not to refer to or discuss any matter or issue not in evidence before you; neither shall you separate from each other, nor talk with any one not of your jury; and a violation of this injunction will be punished severely by the court,"—is not only not objectionable as a threat, but is to be heartily commended as a warning to the jury not to consider any issue not in evidence before them.²⁴

An instruction that, if the jury find for the plaintiff, they must not assess damages by adding the amounts they individually think should be awarded, and dividing the amount so obtained by the number of jurors, unless they thereafter agree upon such amount as a just sum under the evidence, is erroneous, as tending to induce the jury to reach a verdict in the manner censured by the instruction.²⁵

23—Chicago, I. & E. Ry. Co. v. Patterson, 26 Ind. App. 295.

25—West Chicago St. R. Co. v. Dougherty, 89 Ill. App. 362.

24—Villereal v. State (Tex. Cr. App.), 61 S. W. 715.

CHAPTER XXVI.

INSTRUCTIONS ON PRESUMPTIONS OF LAW AND FACT; BURDEN OF PROOF AND DEGREE OF PROOF.

- § 257. Introductory statement.
- § 258. Presumption of innocence.
- § 259. Necessity of instructions as to presumption of innocence.
- § 260. Same—Effect of giving proper instructions as to reasonable doubt.
- § 261. Sufficiency of instructions as to presumption of innocence.
- § 262. Presumption that a person intends the natural consequences of his acts.
- § 263. Presumption of malice.
- § 264. Presumption from unexplained possession of recently stolen property.
- § 265. Conflict of authority as to instructions on subject of possession of stolen property.
- § 266. Sufficiency of instructions as to possession of stolen property.
- § 267. Instructing that possession of recently stolen property raises presumption of guilt.
- § 268. Instructing that possession of recently stolen property is strong evidence of guilt.
- § 269. Instructing that burden of explaining possession is on defendant.
- § 270. Instructions as to defendant's explanation of possession.
- § 271. Presumptions as to sanity.
- § 272. Presumption that defendant is feigning insanity.
- § 273. Instructing that defense of insanity is to be viewed with care.
- § 274. Presumption that all men are sane.
- § 275. Conflicting presumption of innocence.
- § 276. Presumption as to continuance of insanity.
- § 277. Presumptions arising from flight.
- § 278. Sufficiency of instructions as to presumption arising from flight.
- § 279. Same—Invasion of province of jury.
- § 280. Same—Explanation of flight.
- § 281. Burden of proof—Necessity and propriety of giving instructions.
- § 282. Repetition of instructions as to burden of proof.
- § 283. Sufficiency of instructions as to burden of proof.
- § 284. Degree of proof necessary in civil cases.
- § 285. Necessity of instructions as to preponderance of evidence.
- § 286. Sufficiency of instructions as to preponderance of evidence.
- § 287. Same—Definitions.

§ 288. Same—Use of word “preponderance.”

§ 289. Same—Elements to be considered.

§ 290. Same—Evidence.

§ 291. Determination of preponderance of evidence from credibility and intelligence of witnesses.

§ 292. Comparison of number of witnesses.

§ 293. Same—What instructions are improper.

§ 294. Instructions as to preponderance of evidence where evidence is equally balanced.

§ 295. Instructions as to preponderance of evidence requiring too high a degree of proof.

§ 296. Same—Instructions requiring that evidence must “satisfy” jury.

§ 257. Introductory statement.

A discussion of the subject of instructions as to presumptions of law and fact is intimately connected with matters which have been treated in other chapters of this work.¹

As a general rule, when the circumstances proved are of such a character that the law itself raises a presumption, the court may properly instruct the jury to draw such an inference.²

And it has been held that presumptions of law favorable to a defendant in a criminal case, should be given to the jury whenever at all applicable;³ but presumptions of law which are against the defendant should not ordinarily be given in the charge to the jury.⁴

On a trial for furnishing drugs to procure a miscarriage, an instruction that “there is a presumption that things have happened according to the ordinary course of nature and the ordinary habits of life. Such presumption may be controverted or disproved by other evidence,” is proper,

1—See ch. VII, *ante*, “Province of Court and Jury,” and ch. VIII, *ante*.

2—**Alabama.** Weil v. State, 52 Ala. 19; Oliver v. State, 17 Ala. 587.

California. People v. Carrillo, 63 Cal. 63.

Illinois. Herkelrath v. Stookey, 63 Ill. 486.

Indiana. Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 81.

Maryland. Peterson’s Ex’rs v. Ellicott, 9 Md. 52.

Missouri. Glover’s Adm’rs v. Duhle, 19 Mo. 360.

Texas. Heldt v. Webster, 60 Tex. 207; Mitchell v. Stanton, — Tex. Civ. App. —, 139 S. W. 1033.

3—Snowberger v. State, 58 Tex. Cr. App. 530.

4—Coker v. State, 59 Tex. Cr. App.

it appearing that one of the questions in the case was whether the birth of a fully developed and perfect child had come about in the ordinary course of nature.⁵

The court must not instruct as to what inferences of fact the jury are to draw from the evidence,⁶ and an instruction stating mere presumptions of fact may be refused.⁷

It is not proper for the court to instruct the jury that a certain fact is to be presumed by them from the proof made of another or other facts,⁸ since presumptions of fact should

241; *Snowberger v. State*, 58 Tex. Cr. App. 530.

5—*People v. Richardson*, 161 Cal. 557, 120 Pac. 20.

6—*Continental Life Ins. Co. v. Yung*, 113 Ind. 159, 3 Am. St. Rep. 630n; *Coleman v. State*, 111 Ind. 563; *Louisville, N. A. & C. Ry. Co. v. Falvey*, 104 Ind. 409; *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63; *Ellis v. Spurgin*, 48 Tenn. 74.

7—*People v. Arnold*, 248 Ill. 169.

8—**Alabama.** *Weil v. State*, 52 Ala. 19; *Cox v. Knight's Adm'r*, 49 Ala. 173.

California. *People v. Carrillo*, 54 Cal. 63; *Stone v. Geyser Quicksilver Min. Co.*, 52 Cal. 35; *People v. Walden*, 51 Cal. 588.

Connecticut. *Beers v. Housatonic R. Co.*, 19 Conn. 570.

Florida. *Mayer v. Wilkins*, 37 Fla. 244.

Illinois. *Pittsburgh, Ft. W. & C. R. Co. v. Callaghan*, 157 Ill. 406; *Ashlock v. Linder*, 50 Ill. 169.

Indiana. *City of Columbus v. Strassner*, 138 Ind. 301; *Fulwider v. Ingels*, 87 Ind. 414.

Maine. *Cook v. Brown*, 39 Me. 443.

Maryland. *Newman v. McComas*, 43 Md. 70; *Wilson v. Smith*, 10 Md. 67; *Peterson's Ex'rs v. Ellicott*, 9

Md. 52; *Walkup v. Pratt*, 5 Har. & J. 57.

Michigan. *People v. Castro*, 75 Mich. 127; *Richards v. Fuller*, 38 Mich. 653.

Mississippi. *Dickson v. Moody*, 2 Smedes & M. 17.

Missouri. *Glover's Adm'rs v. Duhle*, 19 Mo. 360.

Nebraska. *Omaha Fair & Exposition Ass'n v. Missouri Pac. Ry. Co.*, 42 Neb. 535.

New York. *Gilbertson v. Forty-Second Street, M. & St. N. Ave. R. Co.*, 14 Misc. 527.

North Carolina. *State v. Cardwell*, 44 N. C. 245.

Pennsylvania. *Wenrich & Co. v. Heffner*, 38 Pa. St. 207.

Tennessee. *Neideiser v. State*, 6 Baxt. 499; *Farmers' & Merchants' Bank v. Harris*, 2 Humph. 311; *Johnson v. State*, 2 Humph. 283, 36 Am. Dec. 322; *Claxton v. State*, 2 Humph. 181; *Augusta Mfg. Co. v. Vertrees*, 4 Lea 75.

Texas. *Stooksbury v. Swan*, 85 Tex. 563; *Frisby v. Withers*, 61 Tex. 134; *Reynolds v. Weinman* (Tex. Civ. App.) 33 S. W. 302; *Clifford v. Lee* (Tex. Civ. App.) 23 S. W. 843; *Hanna v. Hanna*, 3 Tex. Civ. App. 51; *Hammond v. Coursey*, 2 Posey, Unrep. Cas. 29.

always be left to the exclusive consideration of the jury.⁹

"When a judge instructs a jury that a given fact will be presumed, he must be understood to mean that the fact is to be taken as established,—a result which cannot be reached except in those cases in which the presumption is said to be of law, and therefore conclusive, otherwise than by weighing the evidence, and therefrom determining the existence or nonexistence of the fact."¹⁰

The following cases will serve to illustrate the principle stated. Where there is conflicting evidence as to the legality of a sale, it is error to instruct that if a sale is shown it is presumed to be legal.¹¹

Upon the question of the incorporation of a company, it is error to charge that the mere execution of a deed to the company by one party, and of a new deed in confirmation by the devisee of that party, would not be sufficient proof of user of franchises to establish the incorporation. The jury should have been left to draw their own inference.¹²

An instruction that if the engine which caused the injury complained of was marked with the name of defendant's company, and also with the words, "Chicago Switching Association," there was no presumption as to which corporation or association had its management, is erroneous, as invading the province of the jury, and should be refused.¹³

To instruct that an assignment is fraudulent if the insolvent, previous thereto, obtained credit on false repre-

9—**California.** *People v. Walden*, 51 Cal. 588.

Illinois.—*Graves v. Colwell*, 90 Ill. 612; *Graff v. Simmons*, 58 Ill. 440.

Maryland. *Newman v. McComas*, 43 Md. 70.

Michigan. *People v. Gastro*, 75 Mich. 127; *Sheaham v. Barry*, 27 Mich. 217.

Mississippi. *Dickson v. Moody*, 2 Smedes & M. 17.

New York. *Stokes v. Johnson*, 57

N. Y. 673; *Justice v. Lang*, 52 N. Y. 323.

Texas. *Heldt v. Webster*, 60 Tex. 207.

10—*Stooksbury v. Swan*, 85 Tex. 563.

11—*Reynolds v. Weinman* (Tex. Civ. App.), 33 S. W. 302.

12—*Augusta Mfg. Co. v. Vertrees*, 4 Lea (Tenn.) 75.

13—*Pittsburgh, Ft. W. & C. Ry. Co. v. Callaghan*, 157 Ill. 406.

sentations as to his finances, is erroneous, since the question of fraudulent intent is for the jury alone.¹⁴

“In a suit on a bond given in compromise of a bastardy proceeding, conditioned, among other things, ‘that the said S. should not, by his misconduct, give the plaintiff legal cause for divorce,’ an instruction to the jury: ‘If you find that he (the defendant), after their said marriage, sought the society of prostitutes and women of bad repute for chastity, or that he went into a private bedroom with a woman of bad repute for chastity, or a prostitute, in the nighttime, and remained there for some time, no one else being present, then, and in either event, your verdict should be for the plaintiff,’—is erroneous, because it imposes upon the jury an inference made by the court.”¹⁵

An instruction was asked that the jury ought to presume the grant of letters testamentary upon their finding certain facts stated in it, and in which all the facts were not presented, among which was not included the proof on the opposite side that the records of the orphans’ court did not show the granting of such letters, and the declarations and admissions of the widow of the deceased, who was named as executrix in the will, and of parties claiming under her, that no such letters had been granted. It was held that this instruction was calculated to mislead the jury, and its imperative direction to the jury would be fatal, if there were no other objection.¹⁶

An instruction failing to state that the presumption of knowledge of the contents of a receipt arising from signing the same is rebuttable, is not error where such presumption is stated in other instructions.¹⁷

§ 258. Presumption of innocence.

It is a fundamental principle of criminal law that a per-

14—*Mayer v. Wilkins*, 37 Fla. 244.

15—*Stanley v. Montgomery*, 102 Ind. 102.

16—*Wilson v. Smith*, 10 Md. 67.

17—*People v. Strauch*, 240 Ill. 60, 130 Am. St. Rep. 255, aff’g 144 Ill. App. 283.

son charged with the commission of crime is presumed to be innocent, and that presumption follows the accused through every stage of the prosecution.¹⁸

While the presumption of innocence is not evidence in the true sense, it may in a sense be called "an instrument of proof," or something "in the nature of evidence," in that it determines from whom evidence shall come, and it should continue to have its logical weight in the case, not only during the taking of the testimony but during the deliberations of the jury until they arrive at a verdict.¹⁹

§ 259. Necessity of instructions as to presumption of innocence.

Instructions on the presumption of innocence are erroneous in civil cases,²⁰ but in criminal cases the defendant is entitled in every instance to an instruction on the presumption of innocence.²¹

It is error to refuse to embody this principle in proper form in the charge to the jury,²² and the refusal of such an instruction warrants reversal where no like instruction on the subject is given.²³

If, however, an instruction substantially embodying the principle is given, the court may properly decline to give any further instructions on the subject. Thus, where the

18—Potts v. Com., 113 Va. 732; Holt v. United States, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138.

19—Monaghan v. State, 10 Okla. Cr. 89, 134 Pac. 77.

20—Riesen v. Riesen, 148 Ill. App. 460.

21—Monaghan v. State, 10 Okla. Cr. 89, 134 Pac. 77.

22—Alabama. Salm v. State, 89 Ala. 56.

Florida. Long v. State, 42 Fla. 509; Reeves v. State, 29 Fla. 527; Houston v. State, 24 Fla. 356.

Illinois.—Larrance v. People, 222

Ill. 155; People v. Spencer, 171 Ill. App. 237.

Indiana.—Farley v. State, 127 Ind. 419; Aszman v. State, 123 Ind. 347, 8 L. R. A. 33n; Castle v. State, 75 Ind. 146; Line v. State, 51 Ind. 172; Long v. State, 46 Ind. 583.

Nebraska. Long v. State, 23 Neb. 33.

Texas. Hutto v. State, 7 Tex. App. 44; Mace v. State, 6 Tex. App. 470; Coffee v. State, 5 Tex. App. 545; Hampton v. State, 1 Tex. App. 652.

23—Larrance v. People, 222 Ill. 155.

court charged: "The defendant began on his trial with the presumption of innocence in his favor, and that presumption remains until removed by sufficient proof,"—it was not error to decline a request that "the defendant is presumed to be innocent, and that presumption remains with and fully protects him until it is removed by the proof."²⁴

And it is not error to refuse an instruction that the legal presumption of innocence is to be regarded by the jury as a matter of evidence, where they have been charged that the law presumes every man innocent until he is proven guilty by proper legal evidence, and that, if they have any reasonable doubt as to the guilt of defendant arising from the evidence, they should acquit.²⁵

Where the accused is either guilty or entirely innocent, a refusal to instruct that a failure to prove a motive for the commission of the crime would raise a strong presumption that the accused was innocent is proper, the court instructing that the absence of motive would be a circumstance for the jury to consider. The defendant is presumed innocent in any case.²⁶

So, when such an instruction is given, the court may properly refuse an instruction that the mere returning of an indictment raises no presumption of the guilt of the accused, and that there can be no conviction until they are satisfied, beyond a reasonable doubt, of his guilt, without reference to the nature of the indictment.²⁷

An instruction that, "where there are two presumptions,—one in favor of innocence, and the other in favor of a criminal course,—the one in favor of innocence must prevail," may be properly refused. The only presumption in a criminal case is of innocence of the defendant until guilt is established beyond a reasonable doubt, and it is sufficient if the court has so charged the jury. There cannot be two pre-

24—*Smith v. State*, 63 Ga. 170.

26—*State v. Nordstrom*, 7 Wash.

25—*Wooten v. State*, 24 Fla. 335,

506, 35 Pac. 382.

1 L. R. A. 819; *State v. Hudspeth*,
159 Mo. 178.

27—*Aszman v. State*, 123 Ind. 347;
8 L. R. A. 33n.

sumptions in a criminal case. The accused is presumed to be innocent until his guilt is established beyond any reasonable doubt, and, if the court so charges, the defendant cannot complain.²⁸

Where the jury have been told that there is a legal presumption of innocence which entitled the accused to an acquittal unless overcome by the evidence, a refusal to repeat the idea in different language, suggested by counsel for the accused, though such language may have more definitely impressed such idea upon the minds of the jurors, is not reversible error. This is in accordance with the general rule that though it is advisable to give special instructions requested on leading points in the case, if such instructions are more specific than the general charge covering the same points, yet the refusal of the request will not work a reversal if the general charge can be understood by persons of ordinary comprehension.²⁹

But an instruction that the fact that an indictment was found by the grand jury, and the indictment itself cannot be considered, is objectionable in form, and the court should have given in lieu thereof defendant's request for an instruction that the indictment is a mere formal charge against defendant, and is not, of itself, any evidence of defendant's guilt.³⁰

§ 260. Same—Effect of giving proper instructions as to reasonable doubt.

There is a want of unanimity of judicial opinion as to whether the failure to instruct that a defendant is presumed innocent until his guilt is established will constitute reversible error in and of itself, where the court properly and fully instructs the jury on reasonable doubt. It has been

28—*People v. Douglass*, 100 Cal. 1, 34 Pac. 490.

30—*State v. Hollingsworth*, 156 Mo. 178.

29—*Murphy v. State*, 108 Wis. 111.

so held by the Supreme Court of the United States,³¹ and the weight of authority is to the effect that instructions on the question of reasonable doubt, though correctly given, cannot be regarded as covering the subject of the presumption of innocence, and that it is error to refuse a separate instruction on the latter subject.³²

But it is to be noted that some states have statutes requiring the presumption of innocence to be stated.³³

In one state it has been held that where the court omits to instruct, as required by statute, that "defendant is presumed to be innocent until the contrary is proved," exception must be taken to such omission before the jury retire to consider their verdict, in order to make the error available.³⁴

In Michigan, the refusal of an instruction as to the presumption of innocence has been held error, but the failure to so instruct, when a charge on the subject was not requested, has been held not error,³⁵ and similar holdings have been made in Texas.³⁶

In the former state the decisions do not seem to be entirely harmonious. The earlier decisions hold, without qualification, that the failure of the court to instruct the jury on the presumption of innocence, whether requested or not, is reversible error,³⁷ but later decisions qualify this rule. In one of them it is said that a conviction will not necessarily

31—*Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481.

32—*People v. Macard*, 73 Mich. 15; *McMullen v. State*, 5 Tex. App. 577; *Black v. State*, 1 Tex. App. 368; *Vaughan v. Com.*, 85 Va. 671; *Cochran v. United States*, 157 U. S. 286, 39 L. Ed. 704; *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481.

33—*Burns' Ann. St.* 1914, § 2137; *Willson's Tex. Cr. St., Code Cr. Proc. Art.* 716.

34—*Murray v. State*, 26 Ind. 141.

35—*People v. Graney*, 91 Mich. 646; *People v. Potter*, 89 Mich. 353.

36—It is always advisable to give, in charge to the jury, the presumption of innocence, but an omission to do so, when not asked, is not ground for reversal. *Frye v. State*, 7 Tex. App. 94; *Hutto v. State*, 7 Tex. App. 44.

37—*People v. Potter*, 89 Mich. 353; *People v. Macard*, 73 Mich. 15; *People v. Murray*, 72 Mich. 10; *People v. De Fore*, 64 Mich. 701.

be reversed in every case where, there being no request for an instruction on the point, and the court's attention not being called thereto, the jury is not informed in so many words that the presumption of innocence remains with the accused until he is proved guilty.³⁸

And in this case and others it was held, if an instruction on the subject of reasonable doubt was given, a conviction would not be reversed for failure to instruct on the presumption of innocence, in the absence of a request for such instruction.³⁹

In Illinois it has been held that where the jury were instructed orally by agreement, and no request was made for such an instruction, and the court's attention was not called to its omission to charge on this subject, there was no error.⁴⁰

On the other hand, some courts hold expressly that it is not error to refuse a charge as to the presumption of innocence where the court correctly instructs on the doctrine of reasonable doubt.⁴¹

In one case it was stated that the doctrines of presumption of innocence and reasonable doubt are so closely related that it is not reversible error to omit to instruct on the law of presumption of innocence, if the court fully instructs on reasonable doubt.⁴²

In Alabama and California, the presumption of innocence and reasonable doubt are seemingly treated as synonymous.⁴³

A charge "that defendant is presumed to be innocent until his guilt is established by legal evidence beyond a

38—*People v. Graney*, 91 Mich. 646.

39—*People v. Ostrander*, 110 Mich. 60; *People v. Smith*, 92 Mich. 10; *People v. Graney*, 91 Mich. 646.

40—*Williams v. People*, 164 Ill. 481.

41—*Stevens v. Com.*, — Ky. —, 45 S. W. 76; *State v. Kennedy*, 154 Mo. 268; *State v. Harper*, 149 Mo.

514; *State v. Young*, 105 Mo. 634; *State v. Heinze*, 66 Mo. App. 135; *State v. Heinze*, 2 Mo. App. 1314; *Morehead v. State*, 34 Ohio St. 217; *State v. Cline*, 27 S. D. 573.

42—*State v. Douglas*, 258 Mo. 281.

43—*Moorer v. State*, 44 Ala. 15; *Ogletree v. State*, 28 Ala. 693; *People v. Lenon*, 79 Cal. 625, 21 Pac. 967.

reasonable doubt, and, if you have a reasonable doubt of his guilt, you will find him not guilty," renders it unnecessary to give a requested charge "that the burden is upon the state throughout to establish every constituent element of the offense, and never shifts from state to defendant."⁴⁴

And the accused cannot complain of the failure of the court to further charge "that the burden of proof never shifts from the state to the defendant, but is upon the state throughout to establish every constituent element of the offense."⁴⁵

§ 261. Sufficiency of instructions as to presumption of innocence.

It has been held proper to instruct that "the defendant is presumed to be innocent;"⁴⁶ that "the accused must be presumed innocent until his guilt is established by legal evidence;"⁴⁷ that the presumption of innocence prevails throughout the trial, and that it is the duty of the jury, if possible, to reconcile the evidence with this presumption;⁴⁸ that "the defendant starts out in the trial with the presumption of innocence in his favor and that presumption follows him throughout the trial or until evidence convinces you of his guilt beyond a reasonable doubt;"⁴⁹ that "the law raises no presumption against the prisoner, but every presumption of the law is in favor of his innocence;"⁵⁰ that "the law considers everybody innocent until the contrary is proven beyond a reasonable doubt;"⁵¹ that "the accused is always presumed to be innocent until his guilt

44—Huggins v. State, 42 Tex. Cr. App. 364.

45—Lewis v. State (Tex. Cr. App.), 59 S. W. 886.

46—Line v. State, 51 Ind. 172; Long v. State, 46 Ind. 582; Berry v. State, 4 Okla. Cr. 202, 31 L. R. A. (N. S.) 849, 111 Pac. 676.

47—Mace v. State, 6 Tex. App. 470.

48—Castle v. State, 75 Ind. 146.

49—Paxton v. State, 108 Ark. 316.

50—Territory v. Burgess, 8 Mont. 57, 1 L. R. A. 808, 19 Pac. 558.

51—State v. Duck, 35 La. Ann. 764; Gallaher v. State, 28 Tex. App. 247; Holt v. United States, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138.

is established by competent evidence beyond a reasonable doubt;" ⁵² that, "in the absence of evidence to the contrary, the law presumes every one innocent; and this legal presumption of innocence is a matter of evidence, to the benefit of which the party accused is entitled." ⁵³

So, on a trial for murder, where it was admitted that defendant was guilty of manslaughter, but the theory of the defense was that he was innocent of the higher offense charged, because of a want of criminal intent, a charge which gives to defendant the benefit of the presumption of innocence of such intent, and the benefit of any reasonable doubt the jury might entertain as to the intent with which he acted, is not open to the objection that the court did not instruct the jury that the presumption of innocence was with the defendant. ⁵⁴

An instruction on this subject should not invade the province of the jury, and should not extend beyond a plain statement of the law applicable to the case. ⁵⁵

Philosophic disquisition on the presumption of innocence or dissertation upon the nature of evidence should always be omitted. ⁵⁶

A qualifying statement "that the presumption of innocence is not evidence and does not partake of the nature of evidence" may easily confuse and mislead the jury. ⁵⁷

An instruction that it is the duty of the jury to reconcile the evidence with the presumption of innocence, if possible, has been held improper, ⁵⁸ and an instruction that the "accused is entitled to the legal presumption in favor of his innocence, which in doubtful cases is always sufficient to

52—Templeton v. State, 5 Tex. App. 398; Norheutt v. State, 70 Tex. Cr. App. 577.

53—Garrison v. State, 6 Neb. 285.

54—People v. Harper, 83 Mich. 273.

55—Monagham v. State, 10 Okla. Cr. 89, 134 Pac. 77.

56—Monagham v. State, 10 Okla. Cr. 89, 134 Pac. 77.

57—Monagham v. State, 10 Okla. Cr. 89, 134 Pac. 77.

58—People v. Darr, 179 Ill. App. 130.

turn the scale," is properly refused, as it does not tell the jury when a case is doubtful.⁵⁹

The following instructions have also been disapproved: That "the defendant, though indicted for perjury, is just as innocent of the crime as though not indicted;"⁶⁰ that "the prisoner is presumed to be innocent until his guilt is established by competent evidence. After the guilt of a prisoner, for crime, is established by such evidence, then such presumption of innocence no longer pertains;"⁶¹ that "the prisoner comes to trial presumed to be innocent, and this presumption extends to the close of the trial, and the jury should endeavor to reconcile all the evidence with this presumption." In condemning this instruction, the court took the view that it was no more the duty of the jury to endeavor to acquit the defendant than to convict him.⁶²

An instruction that if the jury believe from the evidence that the defendant bought the property "openly and publicly in good faith and was not concerned, or aided and abetted others in the theft of the cow, then, if you should so find, you could not convict the defendant," is prejudicially erroneous in that it deprives the defendant of the benefit of the presumption of innocence.⁶³

If an erroneous instruction is given on this presumption, it will not be ground for reversal if no prejudice could have resulted. Thus, an instruction: "Where there is a serious conflict in the testimony as to the commission of an offense like that in this case, evidence of the previous good character of the defendant should be considered by the jury, in connection with all the other evidence given on the trial,

59—Woodland v. State, 110 Ark. 15.

60—Sanders v. People, 124 Ill. 218.

61—Stapp v. State, 1 Tex. App. 734, in which case the court said: "The law is that 'a defendant in a criminal cause is presumed to be innocent until his guilt is established

by legal evidence, and, in case of reasonable doubt, * * * is entitled to be acquitted.' "

62—Barker v. Com., 90 Va. 820. Compare Castle v. State, 75 Ind. 146.

63—Wood v. State, — Okla. Cr. —, 144 Pac. 391.

in determining whether the defendant would be likely to commit, and did commit, the offense in question; that, in doubtful cases, evidence of good character is conclusive in favor of the party accused; and if, from the evidence, you find the facts and circumstances proved or relied on to establish the defendant's guilt are in doubt, or that the intent of the defendant to commit the crime is in doubt, then, if the prisoner has by evidence satisfied you that he was a man of good character up to the time of the alleged offense in this case, the presumption of the law is that the alleged crime is so inconsistent with the former life and character of the defendant that he could not have intended to commit such a crime, and it would be your duty to give the defendant the benefit of that presumption, and acquit him,"—though it may be erroneous, since evidence of good character should be considered in connection with the other evidence, cannot possibly harm the defendant if all the evidence is in favor of his previous good character.⁶⁴

An instruction as to the presumption of innocence is improperly modified by limiting the time of such presumption,⁶⁵ and an instruction is incorrect which, in effect, asserts that until the jury's finding that the defendant is guilty is made known by their verdict they must continue to presume that he is innocent, even after they have agreed upon the verdict to be rendered. The presumption of innocence does not survive the establishment of guilt beyond a reasonable doubt.⁶⁶

An instruction: "The defendant, at the outset of this trial, is presumed to be an innocent man. He is not required to prove himself innocent, or to put in any evidence at all upon that subject until the prosecution has proven to your satisfaction, and beyond all reasonable doubt, that he is guilty. Now, in considering the testimony in the case, you

64—Territory v. Burgess, 8 Mont. 57, 1 L. R. A. 808, 19 Pac. 558.

65—Flynn v. People, 222 Ill. 303.

66—Beiser v. State, 10 Ala. App. 86.

must look at that testimony, and view it in the light of that presumption, which the law clothes him with, that he is innocent, and it is a presumption that abides with him throughout the trial of the case, until the evidence convinces you to the contrary beyond all reasonable doubt,"—does not tend to convey the impression that the presumption of innocence ceases to operate at the close of the evidence of the prosecution, or at any time before the jury have finally determined upon a verdict.⁶⁷

An instruction that "the jury are to presume the defendant innocent until his guilt is established" is not inconsistent with another instruction that "every man is presumed to be sane, and to intend the natural and ordinary consequences of his acts."⁶⁸

Where the court, after instructing on the presumption of innocence, tells the jury that the law should be fearlessly administered, and that they will fail in their duty if they fail to convict on proof of defendant's guilt beyond a reasonable doubt, there is no prejudicial error, although the latter part of the instruction is in bad taste.⁶⁹

An instruction, "The defendant entered upon this trial with the presumption of innocence in his favor, and that presumption continues till the state shall satisfy you beyond any reasonable doubt of the defendant's guilt," while open to criticism as possibly suggesting that only the evidence of the state is to be weighed, is not erroneous, especially if followed by instructions that "it is incumbent on you to consider the testimony without passion and without prejudice, for the purpose of determining whether the defendant is guilty or not. He is entitled to the benefit of any reasonable doubt existing in the evidence in this case. If, after a full consideration of the testimony, you shall have any reasonable doubt of his guilt, you will give him the benefit

67—*People v. Arlington*, 131 Cal. 231, 63 Pac. 347.

68—*Greenley v. State*, 60 Ind. 141.

69—*People v. Bowers* (Cal.), 18 Pac. 660.

of that doubt by an acquittal." Such instructions clearly indicate that the jury are to look to the entire evidence.⁷⁰

A portion of a charge stating that "if he is the man to blame, you must say so; if he is not to blame, you must say so," is not erroneous as destroying the presumption of innocence, as the word "blame" is used as a synonym of "guilty."⁷¹

An instruction on the presumption of innocence that "every one accused of crime is by law presumed to be innocent unless the contrary is by the evidence proved to be true beyond a reasonable doubt," is not erroneous because the word "unless" is used instead of "until."⁷²

A request for an instruction that defendant is presumed to be innocent until proven guilty beyond a reasonable doubt, and that it is the duty of the jury to give the defendant the benefit of this presumption and to acquit him "unless they feel compelled to find him guilty," and unless the evidence convicts him of guilt beyond a reasonable doubt, is properly modified by striking out the words "unless they feel compelled to find him guilty."⁷³

§ 262. Presumption that a person intends the natural consequences of his acts.

In some cases it has been held improper to instruct that a person is presumed to intend the natural consequences of his own voluntary acts. While it is proper for the jury to draw such inference if they see fit and the court may so instruct, it is error to tell them that they must do so.⁷⁴

The decisions rest upon the principle that the presumption declared by the statute is overcome by the presumption of innocence and the rule as to reasonable doubt.

70—Murphy v. State, 108 Wis. 111.

71—State v. Aurand, 76 Wash. 529, 136 Pac. 1139.

72—People v. Warfield, 261 Ill. 293.

73—State v. Stubblefield, 157 Mo. 360.

74—People v. Willett, 36 Hun (N. Y.) 500.

Accordingly, on a murder trial, a charge that "the law presumes that a sane man intends the natural and probable consequences of any act which he wilfully and deliberately does," is erroneous.⁷⁵

It has even been held improper to charge in the language of a statute which expressly provides that "the intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act;"⁷⁶ or in the language of another statute, which provides that, "when an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention."⁷⁷

Intent being an essential element of crime, an instruction declaring that, when a crime is committed, the law presumes the intent, is absurd and meaningless,⁷⁸ and an instruction that a person intends the natural consequences of an act voluntarily done, and that if defendant pointed a loaded pistol at another and fired the same at a sufficient range for the ball to penetrate his person, and the same actually passed through his arm, then the presumption would be that he intended to take his life, is erroneous, as intent is the gist of an offense of assault with intent to commit murder and such intent is for the jury.⁷⁹

On a prosecution for assault with intent to murder, a charge that selects a portion only of the facts disclosed by the testimony, and states that, if these facts are proved, "the law presumes that the act was malicious," and that defendant "intended to kill," is erroneous, because it shifts the burden of proof, and ignores the recognized distinction between civil and criminal cases, in the measure of proof.⁸⁰

75—*Rogers v. Com.*, 96 Ky. 24.

78—*State v. Painter*, 67 Mo. 84.

76—*Black v. State*, 18 Tex. App. 124.

79—*Horton v. People*, 47 Colo. 252, 107 Pac. 257.

77—*Burney v. State*, 21 Tex. App. 572; *Thomas v. State*, 16 Tex. App. 535.

80—*Ogletree v. State*, 28 Ala. 693.

There is another line of cases which holds, however, that it is proper to instruct the jury that where a person voluntarily and wilfully does an act he is presumed to intend all the natural, probable and usual consequences of his act.⁸¹

Accordingly, an instruction that: "The law presumes that every sane person contemplates the natural and ordinary consequences of his own voluntary acts, until the contrary appears, and, when one man is found to have killed another by acts, the natural and ordinary consequence of which would be the death, if the facts and circumstances of the homicide do not of themselves, or the evidence otherwise, show that it was not done purposely, or create a reasonable doubt thereof, it is to be presumed that the death of the deceased was designed by the slayer," is proper,⁸² and when a homicide or an assault was committed with a deadly weapon, and the act was done wilfully or intentionally, an instruction that the defendant must be presumed to have intended to cause death, which is the ordinary and probable consequence of such an act, has been sustained.⁸³

Also, in a prosecution for assault with intent to murder, it is not error to instruct that defendant is presumed to have intended the natural and proximate consequences of his acts.⁸⁴

So it is not error to refuse to charge that a knowing and wilful violation of a penal statute is necessary to a conviction. The prisoner is conclusively presumed to have known of the statute he was violating.⁸⁵

It has also been held that an instruction that "a person must be presumed and is presumed to intend to do what he

81—*People v. Langton*, 67 Cal. 427, 7 Pac. 843; *State v. Shelledy*, 8 Iowa 485; *Com. v. Webster*, 5 Cush. (Mass.) 305.

82—*Achey v. State*, 64 Ind. 59. See also, *Jackson v. People*, 18 Ill. 270; *Cotton v. State*, 32 Tex. 626.

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83—*State v. Wisdom*, 84 Mo. 177; *State v. Dickson*, 78 Mo. 438.

84—*Krechnavy v. State*, 43 Neb. 337.

85—*Whitton v. State*, 37 Miss. 379.

voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts," is not at variance with a statute providing "that a person intends the ordinary consequences of his voluntary act," in the use of the word "must."⁸⁶

§ 263. Presumption of malice.

It is usually error for the court to instruct that malice does or does not exist, as the question is thereby taken from the jury, and the existence of malice is usually a question of fact for the jury.⁸⁷

In an action for malicious prosecution, it is error to instruct that the law presumes malice from a want of probable cause,⁸⁸ but it is usually held proper to instruct that the jury may infer malice from want of probable cause,⁸⁹ although it is error to instruct that malice cannot be inferred by the jury from want of probable cause.⁹⁰

86—*People v. Webster*, 13 Cal. App. 348, 109 Pac. 637.

87—*Illinois*. *Hirsch v. Feeney*, 83 Ill. 548; *Harpham v. Whitney*, 77 Ill. 32.

Iowa. *Hidy v. Murray*, 101 Iowa 65.

Massachusetts. *Ellis v. Simonds*, 168 Mass. 316.

Missouri. *Moody v. Deutsch*, 85 Mo. 237.

New York. *Thorp v. Carvalho*, 14 Misc. 554; *Kingsbury v. Garden*, 45 N. Y. Super. Ct. 224.

Pennsylvania. *Ritter v. Ewing*, 174 Pa. St. 341.

United States. *Stewart v. Sonneborn*, 98 U. S. (8 Otto) 187, 25 L. Ed. 116.

88—*Connecticut*. *Smith v. King*, 62 Conn. 515.

Illinois. *Frankfurter v. Bryan*, 12 Ill. App. 549; *Bishop v. Bell*, 2 Ill. App. 554.

Kansas. *Malone v. Murphy*, 2 Kan. 250.

North Carolina. *Bell v. Pearcey*, 27 N. C. 83.

Oregon. *Gee v. Culver*, 12 Ore. 228, 6 Pac. 775.

Pennsylvania. *McClafferty v. Philp*, 151 Pa. St. 86; *Schofield v. Ferrers*, 47 Pa. St. 194, 86 Am. Dec. 532.

Tennessee. *Greer v. Whitfield*, 4 Lea 85.

Texas. *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85.

89—*Shaul v. Brown*, 28 Iowa 45; *Bradley v. Morris*, 44 N. C. 397; *Hogg v. Pinckney*, 16 S. C. 387.

Contra, *Biering v. Galveston First Nat. Bank*, 69 Tex. 599, holding that such charge was on the weight of the evidence.

90—*Lunsford v. Dietrich*, 93 Ala. 565, 30 Am. St. Rep. 79.

An instruction that malice may be inferred from the use of a deadly weapon is proper and usual,⁹¹ and it is proper to instruct that malice may be inferred from a wilful, wanton and inexcusable act,⁹² but an instruction that, if certain enumerated acts were proved, the act in question was malicious, is erroneous.⁹³

It has been held proper to instruct that "the law itself implies or presumes malice from the commission of any unlawful or cruel act, however suddenly done. Hence, when a homicide is committed without any or without considerable provocation, the law implies or infers malice. * * * Generally speaking, if the killing of a person grow out of a state of sudden mental agitation, produced by whatever cause, or is the sudden rash condition of a mind incapable, from any cause, of deliberation or reflection, malice will be presumed or implied. So, also, when a human being is killed, and no circumstances are in proof to justify or extenuate such killing, the law, from such killing alone, will imply or infer malice." ⁹⁴

In a prosecution for malicious wounding, a refusal to instruct that "malice cannot be inferred" is not error.⁹⁵

An instruction that a malicious intent need not be proved by direct testimony, and that if the jury found that the natural and probable results of an act would be to injure or destroy the property of another, no motive appearing from the evidence, malice may be implied, if the circumstances show a wicked, depraved and wanton spirit, is not misleading, especially when followed by others, treating the subject fully and liberally.⁹⁶

91—*Jenkins v. State*, 82 Ala. 25; *State v. Zeibart*, 40 Iowa 173; *State v. Talbott*, 73 Mo. 351.

92—*Mosely v. State*, 28 Ga. 190; *State v. Williamson*, 68 Iowa 351; *State v. Enslow*, 10 Iowa 115.

93—*Ogletree v. State*, 28 Ala. 693.

94—*Kemp v. State*, 13 Tex. App. 562.

95—*Walker v. Com.*, 7 Ky. L. Rep. 44.

96—*People v. Keeley*, 81 Cal. 210, 22 Pac. 593.

§ 264. Presumption from unexplained possession of recently stolen property.

Although there are decisions to the contrary,⁹⁷ the great weight of authority is to the effect that the presumption arising from the unexplained possession of recently stolen property is a presumption of fact.⁹⁸

The possession of recently stolen property may or may not be a criminating circumstance, and whether it is or not depends upon the facts and circumstances connected with such possession. It is a circumstance to be considered by the jury in connection with all the other evidence in the given case, in determining the guilt or innocence of the accused, and its weight, as evidence, like that of any other fact, is to be determined by them alone.⁹⁹

Thus it has been said that "Any presumption that may be drawn from such possession is a presumption of fact merely;

97—See this section, *post*.

98—**Alabama.** Orr v. State, 107 Ala. 35; Malachi v. State, 89 Ala. 134; Underwood v. State, 72 Ala. 220.

Arkansas. Wiley v. State, 92 Ark. 586.

California. People v. Noregea, 48 Cal. 123; People v. Ah Ki, 20 Cal. 178.

Colorado. Brooke v. People, 23 Colo. 375, 48 Pac. 502.

Georgia. Griffin v. State, 86 Ga. 257; Tucker v. State, 57 Ga. 503; Parker v. State, 34 Ga. 263.

Indiana. Smith v. State, 58 Ind. 340; Howard v. State, 50 Ind. 190; Hall v. State, 8 Ind. 439; Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494n.

Maine. State v. Merriek, 19 Me. 398.

Massachusetts. Com. v. McGorty, 114 Mass. 299.

Michigan. Gablick v. People, 40 Mich. 293.

Nebraska. Robb v. State, 35 Neb. 285; Grentzinger v. State, 31 Neb. 460; McLain v. State, 18 Neb. 154; Thompson v. People, 4 Neb. 529.

New Hampshire. State v. Hodge, 50 N. H. 510.

New York. Stover v. People, 56 N. Y. 315.

Oregon. State v. Maloney, 27 Ore. 53, 39 Pac. 398; State v. Hale, 12 Ore. 352, 7 Pac. 523.

Tennessee. Cook v. State, 16 Lea 461.

Texas. Lockhart v. State, 29 Tex. App. 35; Lehman v. State, 18 Tex. App. 174, 51 Am. Rep. 298.

Wisconsin. Baker v. State, 80 Wis. 416.

99—People v. Noregea, 48 Cal. 123; People v. Ah Ki, 20 Cal. 178; People v. Chambers, 18 Cal. 383; Watkins v. State, 2 Tex. App. 73; State v. Walters, 7 Wash. 246, 34 Pac. 938, 1098; State v. Humason, 5 Wash. 499, 32 Pac. 111.

in other words, it is only an inference that one fact may exist from the proof of another, and does not amount to a rule of law."¹

"It is obvious that a party cannot, as a matter of law, be adjudged guilty of larceny upon proof that property has been stolen and recently thereafter found in his possession, in the absence of any explanation. Such proof shows a strong probability of guilt; but it is for the jury to determine its force, after due consideration of the kind of property, the length of time that may have elapsed between the taking and finding it in the possession of the accused, and the probability, from the character of the property and other circumstances of the case, that the accused, if innocent, could show how he acquired possession."²

In some states it is held that the presumption of guilt growing out of the recent possession of stolen property is a presumption of law, and, in the absence of other rebutting evidence, must be met by proof on the part of the accused accounting for his possession in a manner consistent with his innocence, or it will become conclusive against him; that it is not a mere presumption of fact, to be weighed with other evidence in the case.³

This holding is based on the statement of Mr. Greenleaf in his work on Evidence, where he says: "Possession of the fruits of crime recently after its commission is *prima facie* evidence of guilty possession, and, if unexplained either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive."⁴

1—Smith v. State, 58 Ind. 340; State v. Hodge, 50 N. H. 510; State v. Walters, 7 Wash. 246, 34 Pac. 938, 1098; Ingalls v. State, 48 Wis. 656; State v. Snell, 46 Wis. 524; Graves v. State, 12 Wis. 591.

2—Stover v. People, 56 N. Y. 317.

3—State v. Good, 132 Mo. 114;

State v. Kelly, 73 Mo. 608; Belote v. State, 36 Miss. 120. See also, State v. Kelly, 57 Iowa 644; Unger v. State, 42 Miss. 642; State v. Butterfield, 75 Mo. 297; United States v. Wiggins, 14 Pet. (U. S.) 334, 10 L. Ed. 481.

4—1 Greenl. Ev. § 34.

It has been held proper, where this view prevails, to instruct the jury that, "where property has been stolen, and recently thereafter the same property, or any part thereof, is found in the possession of another, such person is presumed to be the thief, and, if he fails to account for his possession of such property in a manner consistent with his innocence, this presumption becomes conclusive against him."⁵

In the case in which this instruction was approved, no evidence was submitted as to the good character of defendant. It has been held that such an instruction would be too narrow where such evidence is given, and that the evidence of good character should be submitted to the jury together with that of recent possession, the view being taken that such evidence may be sufficient to rebut the presumption of guilt.⁶

Where the fact of the larceny is not disputed, and it appears that the property was found in defendant's possession shortly after its disappearance, an instruction making his possession a presumption of guilt against him, to be rebutted by him, but not beyond a reasonable doubt, and requiring conviction unless it be rebutted by certain designated kinds of evidence, or by the combined weight of one or more of the kinds of evidence "just mentioned," is proper.⁷

§ 265. Conflict of authority as to instructions on subject of possession of stolen property.

In the states which repudiate the doctrine that the presumption arising from the unexplained possession of recently stolen property is a presumption of law, and which assert that such presumption is one of fact, there is a want of judicial harmony as to what instructions on the subject may properly be given. In one state it has been held error

5—State v. Kelly, 73 Mo. 608.

6—State v. Kelly, 57 Iowa 646;
State v. Kennedy, 88 Mo. 341; State

v. Crank, 75 Mo. 406; State v. Sidney, 74 Mo. 390.

7—State v. Good, 132 Mo. 114.

to instruct the jury that possession of recently stolen property, unexplained, is of itself sufficient to authorize a conviction.⁸

But an instruction to this effect, has been sustained in other states, especially in Illinois,⁹ and in such latter state it has been held that the jury may be told that "the possession of stolen property soon after the commission of a theft is *prima facie* evidence of the guilt of the person in whose possession it is found."¹⁰

But such an instruction has been held erroneous in Alabama and Nebraska.¹¹

Thus it has been said that: "Whether it was *prima facie* or conclusive was solely for the jury to determine, unaided by any suggestions of the court upon that proposition of fact."¹²

§ 266. Sufficiency of instructions as to possession of stolen property.

An instruction that "if the defendants were found in possession of any part of the property described in the indictment soon after such property was stolen, such possession, unless satisfactorily explained, was a circumstance to be considered, in connection with other suspicious facts, in determining their guilt or innocence," has been held proper.¹³

8—People v. Ah Ki, 20 Cal. 178; People v. Chambers, 18 Cal. 383; People v. Levison, 16 Cal. 98, 76 Am. Dec. 505.

9—Keating v. People, 160 Ill. 483; Smith v. People, 103 Ill. 82; Goldstein v. People, 82 N. Y. 231.

10—Keating v. People, 160 Ill. 483; Smith v. People, 103 Ill. 82. In Hix v. People, 157 Ill. 382, it was held that an instruction "that the possession of property recently stolen is of itself *prima facie* evidence that the person in whose possession the property is found is the

actual thief, and, unless this presumption is rebutted, * * * [the jury should] find the defendant guilty," is erroneous as directing the jury to find defendant guilty without submitting an hypothesis based on the evidence embodying all the facts necessary to establish guilt.

11—Orr v. State, 107 Ala. 35; Dobson v. State, 46 Neb. 250.

12—Dobson v. State, 46 Neb. 250.

13—People v. Fagan, 66 Cal. 534, 6 Pac. 394.

And it is not improper to instruct that "the possession of stolen property is not alone sufficient to convict. It is merely a guilty circumstance which, taken in connection with other testimony, is to determine the question of guilt."¹⁴

An instruction that "the presumption that the possessor of recently stolen property is the thief is not a presumption of law, and a weak one of fact. It is not at all conclusive, and of itself is not sufficient for conviction,"—is properly refused, as invading the province of the jury to weigh the evidence.¹⁵

And it has also been held that an instruction that unexplained recent possession, "without other circumstances tending to show felonious intention, * * * does not amount to proof, beyond a reasonable doubt, of a larceny, committed by the defendant," is properly refused as an invasion of the province of the jury.¹⁶

§ 267. Instructing that possession of recently stolen property raises presumption of guilt.

In some jurisdictions, an instruction that "possession of recently stolen property is presumptive evidence of the guilt of the possessor" is considered to trench on the province of the jury, and should not be given.¹⁷

It has also been held that an instruction that, "when the state relies upon the possession of recently stolen property as a presumption of guilt," etc., is erroneous, as leading the jury to infer that guilt will be presumed from such possession.¹⁸

14—*People v. Rodundo*, 44 Cal. 541.

15—*Reed v. State*, 54 Ark. 621.

16—*Underwood v. State*, 72 Ala. 220.

17—*McCoy v. State*, 44 Tex. 616;
Alderson v. State, 2 Tex. App. 10;
Hannah v. State, 1 Tex. App. 578;

Foster v. State, 1 Tex. App. 363; *Pol-
lard v. State*, 33 Tex. Cr. App. 197;
Baker v. State, 80 Wis. 416. See
also, *Sartorius v. State*, 2 Cushm.
(Miss.) 602.

18—*Lockhart v. State*, 29 Tex.
App. 35.

But in some jurisdictions the jury may be properly instructed that the possession of recently stolen property is presumptive evidence of guilt. Thus it has been held proper to instruct that "the possession of property, proven to have been recently stolen, is evidence from which the jury may infer that the person in whose possession such property is found is guilty of the theft, provided that such possession is not explained; and so, when a certain amount of property is proven to have been stolen at the same time, and soon thereafter a portion of such stolen property is found in possession of the defendant, such possession, if unexplained, is evidence from which the jury may infer that the defendant is guilty of the larceny of the entire amount of property then proven to have been stolen."¹⁹

So, an instruction that "Whenever it is established that a larceny has been committed, and the stolen goods are immediately afterwards found in the possession of a person, that fact is presumptive evidence that the person is guilty of the larceny of the character charged to have been committed," is proper.²⁰

And an instruction, that "possession of stolen property immediately after the theft, if an unsatisfactory account is given as to its possession, affords presumptive evidence of guilt," the whole matter of the degree of force the presumption ought to have being submitted to the jury as a matter of fact, is proper.²¹

Where property, when stolen, was all in a valise, and of necessity was taken at the same time, and by the same person, an instruction that if defendant was, within a few hours after the larceny was committed, found in possession of part of the stolen property, the presumption would arise that he stole all described in the indictment, was proper.²²

19—State v. Henry, 24 Kan. 460.

21—Com. v. McGorty, 114 Mass.

20—Tucker v. State, 57 Ga. 503. 299.

See also, McLain v. State, 18 Neb. 154.

22—State v. Wilson, 95 Iowa 341.

The court may instruct "that the jury could consider the fact of the recent possession of stolen goods, unexplained, if they were satisfied from the evidence that such was the fact, as a circumstance showing that the party having such possession was the thief." ²³

An instruction that unexplained possession of recently stolen property is presumptive evidence of guilt, and that if the jury are satisfied, from all the evidence, that the possession was a guilty possession, he should be convicted, is erroneous, since under it the defendant could be convicted of receiving stolen property, knowing it to have been stolen, —a crime with which he was not charged.²⁴

It has been held proper to refuse a charge that the fact that defendant had in his possession a portion of certain money, alleged to belong to the prosecuting witness, raised no presumption that he received it, knowing it to have been stolen, if it was stolen, because it states the law incorrectly, and because the recent possession of stolen property does impose on the possessor the onus of explaining the possession.²⁵

§ 268. Instructing that possession of recently stolen property is strong evidence of guilt.

Whether the possession of recently stolen property is strong evidence, or only slight evidence, tending to show guilt, is a matter for the jury to pass upon, and not a question for the court to determine,²⁶ and it has been held error to instruct: "That the possession of recently stolen property is regarded in law as a criminating circumstance, tending to show that the possessor stole the property, unless the facts and circumstances surrounding or connected with said possession, or other evidence, explains or shows said possession might have been acquired honestly;" ²⁷ that

23—Shepperd v. State, 94 Ala. 104.

26—People v. Ah Sing, 59 Cal. 400.

24—State v. Tucker, 76 Iowa 232.

27—State v. Walters, 7 Wash. 246,

25—Martin v. State, 104 Ala. 71.

34 Pac. 938, 1098.

“the possession of stolen property, supported by other evidence tending to show guilt, is a strong circumstance tending to show guilt;”²⁸ that “such possession, if proven to the satisfaction of the jury, and unexplained by the defendant, supported by other circumstances tending to show guilt, is a strong circumstance tending to show guilt;”²⁹ or “that the possession of stolen property, supported by other circumstances and other evidence tending to show guilt, is a strong circumstance in the case.”³⁰

§ 269. Instructing that burden of explaining possession is on defendant.

The giving of an instruction that the possession of recently stolen property casts on the defendant the burden of explaining how he acquired it has been held erroneous in some states,³¹ but in other jurisdictions such an instruction may be given.³²

An instruction that the burden is on defendant to give a satisfactory explanation of his possession of recently stolen property will not be ground for reversal, where the court, on exception being taken to such instruction, further tells the jury that it had repeatedly stated in its charge that defendant should be acquitted if the jury had any reasonable doubt as to his guilt.³³

§ 270. Instructions as to defendant's explanation of possession.

The presumption arising from the possession of recently stolen property may be rebutted by evidence explaining

28—*People v. Cline*, 74 Cal. 575, 16 Pac. 391.

29—*People v. Titherington*, 59 Cal. 598; *State v. Sullivan*, 9 Mont. 174, 22 Pac. 1088.

30—*People v. Ah Sing*, 59 Cal. 400.

31—*Brooke v. People*, 23 Colo. 375, 48 Pac. 502; *Griffin v. State*, 86 Ga. 257; *Robb v. State*, 35 Neb. 285;

Martinez v. State, 41 Tex. 164; *Lehman v. State*, 18 Tex. App. 174, 51 Am. Rep. 298. See also, *Blankenship v. State*, 55 Ark. 244.

32—*Cooper v. State*, 87 Ala. 135; *State v. Garvin*, 48 S. C. 258.

33—*Brooke v. People*, 23 Colo. 375, 48 Pac. 502.

such possession,³⁴ as where the defendant gives a reasonable and probable explanation of the possession,³⁵ and in such case the defendant is entitled to an instruction to this effect as a part of the law of the case,³⁶ and a failure or refusal to give such instruction, when warranted by the evidence, is erroneous.³⁷ Although it has been held that such error is not ground for reversal where there is no probability that the charge would have affected the verdict in any way.³⁸

It is proper to instruct that the explanation of one charged with larceny as to his possession of stolen property may be shown to be false by circumstantial evidence, if there is evidence on which the instruction can be based,³⁹ but it has been held that if the court gives a full charge as to circumstantial evidence, a special charge asked by defendant on the possession of property recently stolen need not be given.⁴⁰

It has been held not prejudicial error to refuse an instruction that possession of stolen goods is only presumptive evi-

34—If the explanation, when testified to before the jury, seems to them to be reasonable, and is not shown to be false, the presumption against the accused from his possession is rebutted, and the jury are not justified in convicting without further evidence against him. *Perry v. State*, 41 Tex. 483.

35—The statement of a defendant with regard to the character of his right to the property, when first found in possession of stolen property, and explanatory of his possession of it, if reasonable and probable, devolves the onus upon the state to show that such explanation is false. *Perry v. State*, 41 Tex. 483; *Galloway v. State*, 41 Tex. 289; *Garcia v. State*, 26 Tex. 209, 82 Am. Dec. 605; *Miller v. State*, 18 Tex. App. 38; *Sitterlee v. State*, 13 Tex. App. 587;

Johnson v. State, 12 Tex. App. 385.

36—*Schultz v. State*, 20 Tex. App. 308; *Sullivan v. State*, 18 Tex. App. 623; *Miller v. State*, 18 Tex. App. 38; *Wright v. State*, 35 Tex. Cr. App. 470.

37—*Windham v. State*, 19 Tex. App. 413; *Hyatt v. State*, 32 Tex. Cr. App. 580.

No instruction of this nature should be given if the evidence does not warrant it. *Wilson v. State* (Tex. Cr. App.), 34 S. W. 284; *Baldwin v. State*, 31 Tex. Cr. App. 589; *Connors v. State*, 31 Tex. Cr. App. 453.

38—*Teague v. State* (Tex. Cr. App.), 20 S. W. 367.

39—*Franklin v. State*, 37 Tex. Cr. App. 312.

40—*Bonnors v. State* (Tex. Cr. App.), 35 S. W. 650.

dence of guilt, where an instruction is given that the jury may consider defendant's testimony and his theory accounting for his possession, and that if the evidence in his behalf raises a reasonable doubt in their minds as to his guilt, he should be acquitted.⁴¹

Where the court instructs, in a prosecution for larceny of a horse, "If you entertain a reasonable doubt whether the defendant got the said horse from a certain person for the purpose of pawning him or borrowing money, and giving the horse as security for its payment, then find him not guilty," it is proper to refuse to instruct "that when the defendant, when first accused of the theft of the horse, gave a statement that was reasonable, and probably true, it was the duty of the state to show that said statement was false, and, unless so shown, it was their duty to acquit."⁴²

An instruction that "you are at liberty to consider the several statements made by the defendant as to the manner in which he came in possession of it (stolen property) in order to enable you to arrive at the guilt or innocence of the defendant, and, if said statements appear to be reasonable and consistent, it is a circumstance in his favor, but, if the said statements are unreasonable and false, it is a circumstance against him," is erroneous as invading the province of the jury to weigh the evidence.⁴³

And an instruction that "if you believe, from the evidence in this case, that the property alleged to have been stolen was so stolen, and recently thereafter was found in the possession of the defendant, and that the defendant, when thus found in the possession of the same, gave an explanation of his said possession which appears reasonable and probably true, then, before you will be warranted in finding a verdict of guilty in this case, you must be satisfied from the evidence, beyond a reasonable doubt, that the

41—*People v. Walters*, 76 Mich. 195.

43—*Merritt v. State*, 2 Tex. App.

42—*Gilmore v. State* (Tex. Cr. 182.

App.), 33 S. W. 120.

other testimony in the case establishes the falsity of the explanation so made by the defendant," is equivalent to telling the jury that if the defendant was found in the recent possession of the stolen horse, and he gave an account of his possession, and the state showed its falsity, this circumstance alone authorized the jury to convict the defendant, and is a charge upon the weight of the evidence.⁴⁴

So, an instruction that "if you believe from the evidence that the property alleged in the indictment to have been stolen (if stolen) was recently thereafter found in the possession of the defendant, and that the circumstances connected with his possession when first called upon were of such a character as to demand of him an explanation of his possession, and he failed or refused to make such explanation, and that before you would be warranted in finding him guilty from such circumstances of possession alone, you must be satisfied that his possession was personal, was recent, was exclusive, was unexplained, and that it involved a distinct and conscious assertion of property by the defendant," amounts to telling the jury that they are authorized to find the defendant guilty by the mere fact of being found in possession of stolen property recently after its being stolen, and is erroneous if the possession is connected with circumstances giving character to it.⁴⁵

An instruction: "The jury are instructed that, where a burglary is connected with a larceny, mere possession of stolen goods, without any other evidence of guilt, is not to be regarded as *prima facie* or presumptive evidence of the burglary; but where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the actual or exclusive possession of a person, who gives a false account, or who refuses to give any account, of the manner in which the goods came into his

⁴⁴—*McCarty v. State*, 36 Tex. Cr. App. 135; *Wilson v. State* (Tex. Cr. App.), 34 S. W. 284.

⁴⁵—*Pace v. State* (Tex. Cr. App.), 31 S. W. 173.

possession, proof of such possession and guilty conduct is evidence tending to prove not only that he stole the goods, but that he made use of the means by which access to them was obtained. There should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of larceny,"—is proper as a statement of a legal principle in the abstract.⁴⁶

§ 271. Presumptions as to sanity.

Considerable conflict exists in the reported cases as to the burden of proof upon the question of insanity as a defense to crime, and as to the quantity of proof necessary to successfully maintain such burden. Many instructions and requests for instructions have been condemned because placing the burden of proof upon the wrong party, or requiring too great a quantum of evidence to sustain the burden. Such instructions are erroneous merely because they state an incorrect proposition of law. It is beyond the scope of this book to consider the correctness of the law announced in the instructions, as such questions are not peculiar to instructions, but are the same, however they arise,—whether in the instructions, the pleadings, or otherwise.

§ 272. Presumption that defendant is feigning insanity.

An instruction that if the jury found that the prisoner was watching to see whether he was observed, and regulating his conduct accordingly, it would raise a strong presumption that the prisoner was feigning insanity, has been held proper.⁴⁷

§ 273. Instructing that defense of insanity is to be viewed with care.

An instruction that "the defense of insanity is one which may be and sometimes is resorted to in cases where the

46—Taylor v. Territory, 7 Ariz. 234, 64 Pac. 423. In this case, however, the reviewing court held that

the instruction was applicable to the evidence.

47—McKee v. People, 36 N. Y. 113.

proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While therefore this is a defense to be weighed fully and justly and when satisfactorily established must recommend itself to the favorable consideration of the humanity and justice of the jury, they are to examine it with care lest an ingenious counterfeit of such mental disease or disorder should furnish protection to guilt," has been disapproved in the later cases⁴⁸ and held erroneous in some states.⁴⁹

Such an instruction has been held erroneous as casting the burden of satisfactorily establishing insanity on the defendant, and as disparaging such defense.⁵⁰

§ 274. Presumption that all men are sane.

An instruction that the law presumes every man to be sane, and that insanity can be proved only by clear and unexceptional evidence, asserts a correct legal proposition, and is not erroneous as shifting from the court to the jury the question of the competency of the evidence.⁵¹

An instruction that the law presumes a man to be sane until the contrary is shown, and imposing the burden of proving insanity as a defense to crime on those who assert it, is not erroneous,⁵² and it is proper to instruct that "every man is presumed to be sane, and to intend the natural and usual consequences of his own acts."⁵³

48—Approved in California and Indiana but later disapproved. See *People v. Methever*, 132 Cal. 326, 64 Pac. 481; *Aszman v. State*, 123 Ind. 347, 8 L. R. A. 33n.

49—Held erroneous in Idaho and Montana. *State v. Shuff*, 9 Idaho 115, 72 Pac. 664; *State v. Crowe*, 39 Mont. 174, 18 Ann. Cas. 643, 102 Pac. 579.

50—*State v. Crowe*, 39 Mont. 174, 18 Ann. Cas. 643, 102 Pac. 579.

51—*Dominick v. Randolph*, 124 Ala. 557.

52—*State v. Clevenger*, 156 Mo. 190; *State v. Pagels*, 92 Mo. 300; *State v. McCoy*, 34 Mo. 531, 86 Am. Dec. 121.

53—*Sanders v. State*, 94 Ind. 147; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99n; *State v. Bruce*, 48 Iowa 530, 30 Am. Rep. 403; *State v. Reddick*, 7 Kan. 152; *State v. Pagels*, 92 Mo. 300.

It is also proper for the court to refuse to charge that the prosecution must affirmatively establish, as part of their case, that defendant was sane, whenever the defense is insanity, since sanity is presumed, and the burden is on the defendant to overcome that presumption in the first instance.⁵⁴

§ 275. Conflicting presumption of innocence.

A charge that "the presumption of innocence is so far of greater strength than that of sanity that, when evidence appears tending to prove insanity, it compels the prosecution to establish, from all the evidence, mental soundness beyond a reasonable doubt," has been held erroneous.⁵⁵

§ 276. Presumption as to continuance of insanity.

In a criminal trial, where insanity is relied on as a defense, it is proper to refuse to instruct the jury that if the defendant was insane a short time before the commission of the act, the presumption is that he was insane when he committed it.⁵⁶

An instruction that "insanity, when once shown to exist in an individual, is presumed to continue until the contrary is shown by the evidence," is not erroneous because omitting the words "beyond a reasonable doubt," where there is a following instruction that "evidence rebutting * * * the presumption of sanity need not, to entitle defendant to acquittal, preponderate in his favor."⁵⁷

A refusal to instruct that insanity of a permanent type, proved to have once existed, is presumed to have continued, has been held error.⁵⁸

§ 277. Presumptions arising from flight.

Ordinarily, the flight of a person suspected or charged with crime is a circumstance which the jury are authorized

54—People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

55—Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99n.

56—People v. Smith, 57 Cal. 130.

57—Grubb v. State, 117 Ind. 277.

58—State v. Wilner, 40 Wis. 304.

to consider, with other evidence in the cause,⁵⁹ as tending in some degree to prove a consciousness of guilt,⁶⁰ and the court may give the jury certain instructions on this subject provided there is evidence on which to base them. A defendant's admission, when arrested, that he was running away is quite as effectual as independent proof that he was attempting to flee, and justifies an instruction as to flight.⁶¹

§ 278. Sufficiency of instructions as to presumption arising from flight.

An instruction which permits the jury to consider flight as substantive evidence of guilt is erroneous,⁶² but the jury may be told that "evidence tending to prove flight has been offered, and may be considered by them as a circumstance bearing on the guilt of the accused, with all the other evidence in the case."⁶³

So, it has been held proper to instruct that "the flight of a person immediately after the commission of a crime, or after a crime is committed with which he is charged, is a circumstance in establishing his guilt, not sufficient, of itself, to establish his guilt, but a circumstance which the jury may consider in determining the probabilities for or against him, —the probability of his guilt or innocence. The weight to which that circumstance is entitled is a matter for the jury to determine in connection with all the facts called out in the case."⁶⁴

And the following instruction has also been approved: That "the flight of a person immediately after the commission of a crime, or after a crime has been committed with

59—Green v. State, 165 Ala. 79; Anderson v. State, 104 Ind. 467; State v. Thomas, 58 Kan. 805, 51 Pac. 228.

60—People v. Giancoli, 74 Cal. 642, 16 Pac. 510.

61—State v. Harrison, — Iowa —, 149 N. W. 452.

62—People v. Cismadija, 167 Mich. 210.

63—State v. Thomas, 58 Kan. 805, 51 Pac. 228. See also, Green v. State, 165 Ala. 79.

64—People v. Forsythe, 65 Cal. 101, 3 Pac. 402.

which he is charged, is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, * * * and if you [the jury] find, from the evidence in this case, that the deceased was killed as charged in the indictment, and that, immediately after such killing, the defendant left and escaped, * * * it is a circumstance to be weighed by you. * * * It is not sufficient, of itself, to establish the guilt of the defendant.”⁶⁵

An instruction: “That it is allowed to be proved, when a party attempts to escape or get out of the way of the arresting officer; that is only a circumstance which is allowed to be considered by the jury, like other circumstances, looking to all the surroundings * * * at the time,” is proper,⁶⁶ and the court may instruct that: “flight raises the presumption of guilt; and if you believe, from the evidence, that the defendant, after having shot and killed M., as charged in the indictment, fled the country, and tried to avoid arrest and trial, you may take that fact into consideration in determining his guilt or innocence;”⁶⁷ that if the defendant, shortly after the homicide, “concealed himself, or fled from the neighborhood where deceased was slain, then that circumstance might be considered by you with the other testimony in the case, as bearing upon the question of defendant’s guilt;”⁶⁸ or that: “If you find from the evidence that defendant did thus attempt to escape from custody, this is a circumstance to be considered by you, in connection with all the other evidence, to aid you in determining the question of his guilt or innocence.”⁶⁹

The similarity of these instructions to the one set forth at the beginning of the section will be noted. A charge that “though evidence tending to show flight is a matter to be

65—*People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549. In this case it was held that the instruction was not vicious as assuming that the crime charged against the defendant was admitted.

66—*Smith v. State*, 63 Ga. 170.

67—*State v. Gee*, 85 Mo. 647.

68—*People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73.

69—*Anderson v. State*, 104 Ind. 467.

considered by the jury, yet it is of weak and inconclusive character," is erroneous, in assuming that the flight was caused by fear of violence of the person named.⁷⁰

An instruction is not erroneous that "when a crime has been committed, and the person accused thereof knows he is accused, and then flees or conceals himself, such conduct is evidence of consciousness of guilt, and, in connection with other proof, may be the basis from which guilt may be inferred."⁷¹

It is proper to refuse an instruction that flight "is by no means an inference of guilt. Many men are naturally of weak nerve and timid, and under certain circumstances the most innocent person might seek safety in flight." These were considerations which it was the province of counsel, and not the court, to present to the jury.⁷²

Where the court did not instruct that any presumption of guilt arose from the defendant having left the state, a failure to instruct as to the presumptions from flight was not error.⁷³

§ 279. Same—Invasion of province of jury.

Some courts discountenance the giving of instructions as to evidence of flight, and have refused to reverse cases where they have been given only when it could be seen that the instruction as given was not prejudicial. This is on the ground that the tendency is to invade the jury's province in weighing the evidence, and may work much injury to the defendant.⁷⁴

An instruction that "the law recognizes another proposition as true, and it is that 'the wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition, that has been recognized so often

70—*Bodine v. State*, 129 Ala. 106.

73—*State v. Thompson*, 155 Mo.

71—*Com. v. Boschino*, 176 Pa. St.

300.

103.

72—*People v. Giancoli*, 74 Cal.

74—*People v. Jones*, 160 Cal. 358,

117 Pac. 176.

642, 16 Pac. 510.

by mankind that we can take it as an axiom, and apply it in this case,'—is erroneous, as being equivalent to a direction to the jury that the presumption of guilt arising from flight was so conclusive that it was the jury's duty to act on it as axiomatic proof.⁷⁵

A requested instruction in defendant's behalf, in a prosecution for murder, that, if his flight was caused by fear of violence at the hands of the deceased's friends, this would not be a circumstance to be considered against him, is properly refused, as being an invasion of the province of the jury.⁷⁶

And for the same reason the following instructions have been held properly refused: "Flight is not evidence of guilt unless the defendant fled from a sense of guilt; and, if defendant voluntarily surrendered herself for trial, this explained away her flight, and it will not be weighed against her;"⁷⁷ "flight is very slight evidence of guilt in any case, and ought not to weigh anything when satisfactorily explained."⁷⁸

§ 280. Same—Explanation of flight.

An instruction upon the question of flight should appropriately include as an issue to be determined by the jury, the explanation which the defendant may make,⁷⁹ and an instruction which omits the essential qualification that flight can be indicative of a guilty consciousness only when the defendant knows he is charged with crime, is erroneous.⁸⁰

Where the defendant has given a full explanation of his flight, it is for the jury to say whether that explanation is true or not, untrammelled by any instructions from the court

75—Hickory v. United States, 160 U. S. 408, 40 L. Ed. 474.

76—Miller v. State, 107 Ala. 40. This instruction was also deemed abstract.

77—Thomas v. State, 107 Ala. 13.

78—Smith v. State, 63 Ga. 170.

"Whether a given fact is evidence or not is for the court, but whether it is slight, or what weight it should have, is for the jury."

79—State v. Miller, 255 Mo. 223.

80—People v. Jones, 160 Cal. 358, 117 Pac. 176.

to the effect that the evidence is to be weighed by them as indicative of guilt.⁸¹

§ 281. Burden of proof—Necessity and propriety of giving instructions.

It is not always necessary to give an instruction as to the burden of proof, as the propriety of so doing depends on the state of the evidence.⁸²

But the mere fact "that the evidence upon an issue which is submitted to the jury is conflicting does not make it improper for the court to give a charge informing the jury as to which party has the burden of proving the issue submitted to them."⁸³

As a general rule, it is error to neglect or refuse to give an instruction on the burden of proof, when a proper charge on the subject has been requested,⁸⁴ although it is usually held that the court is not bound to instruct on this subject unless a proper instruction is requested.⁸⁵

In criminal cases, it is error to refuse an instruction that "the burden of proof to show the truth of the charge is at all times on the state,"⁸⁶ or to refuse an instruction that

81—*People v. Jones*, 160 Cal. 358, 117 Pac. 176.

82—*Frost v. Grimmer*, — Tex. Civ. App. —, 142 S. W. 615.

83—*Chittim v. Martinez*, 94 Tex. 141. But see, *Macon v. Paducah St. Ry. Co.* (Ky.), 62 S. W. 496.

84—*Stevens v. Pendleton*, 94 Mich. 405; *Black v. State*, 1 Tex. App. 369.

85—*Connecticut*. *Miles v. Strong*, 68 Conn. 273.

Georgia. *Small v. Williams*, 87 Ga. 681.

Iowa. *Martin v. Davis*, 76 Iowa 762; *Duncombe v. Powers*, 75 Iowa 185; *Smith v. Chicago, M. & St. P. Ry. Co.*, 60 Iowa 512.

Kentucky. *Anderson v. Baird*, 19 Ky. L. Rep. 444.

Michigan. In re *Bromley's Estate*, 113 Mich. 53.

Missouri. *Hunter v. McElhaney*, 48 Mo. App. 234; *McKinney v. Guhman*, 38 Mo. App. 344.

New Hampshire. *Conway v. Jefferson*, 46 N. H. 521; *Maynard v. Fellows*, 43 N. H. 255.

Pennsylvania. *Mitchell v. Mitchell*, 18 Wkly. Notes Cas. 439.

South Dakota. *Frye v. Ferguson*, 6 S. D. 392.

Texas. *Gulf, C. & S. F. Ry. Co. v. McCarty*, 82 Tex. 608; *Cooper v. Lee*, 1 Tex. Civ. App. 9.

86—*Phillips v. State*, 26 Tex. App. 228, 8 Am. St. Rep. 471; *Black v. State*, 1 Tex. App. 369. It will also be error to give an instruction calculated to leave the impression on the

the burden of proof is on the state to prove beyond a reasonable doubt every element of the crime of which the defendant may be convicted.⁸⁷

In civil cases, where the burden of proof shifts to the defendant, a request that the jury may be instructed accordingly should be granted, as the jurors generally understand that the burden of proof is always on the plaintiff.⁸⁸

It has been held, however, that if the evidence conclusively proves a fact, it is not error for the court to refuse to charge the jury upon which party the burden of proof originally rested.⁸⁹

§ 282. Repetition of instructions as to burden of proof.

The court need not repeat instructions already given as to the burden of proof,⁹⁰ and a requested instruction, which adds nothing to the force of a charge already given, may rightfully be refused.⁹¹

In criminal cases, the usual charge on reasonable doubt makes unnecessary a charge that the burden is upon the state throughout to establish every constituent element of the offense.⁹²

Where the court in its main charge instructs that "the defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt; and in case you have a reasonable doubt as to the defendant's guilt, you will acquit him," it is not error to refuse a request to charge "that the burden of proof never shifts from the state to the defendant, but is upon the state

minds of the jury that the state had made out its case, and that, unless evidence of defendant raised in their minds a reasonable doubt, they should convict. *Snyder v. State*, 59 Ind. 105.

87—*People v. Cohn*, 76 Cal. 386, 18 Pac. 410.

88—*Stevens v. Pendleton*, 94 Mich. 405.

89—*In re Yetter's Estate v. Zorick*, 55 Minn. 452.

90—*Houston & T. C. R. Co. v. Dotson*, 15 Tex. Civ. App. 73; *Garst v. United States*, 103 C. C. A. 469, 180 Fed. 339.

91—*State v. McDonald*, 65 Me. 465.

92—*Huggins v. State*, 42 Tex. Cr. App. 364.

throughout to establish every constituent element of the offense,"—at least, it is not such error as is calculated to injure the rights of defendant.⁹³

Where the court instructed that the jury must believe the defendant guilty beyond a reasonable doubt, or acquit, an instruction as to the burden of proof is unnecessary, and should not be given.⁹⁴

§ 283. Sufficiency of instructions as to burden of proof.

A charge, in effect, requiring a defendant to establish his defense beyond a reasonable doubt is erroneous as imposing a greater burden than the law authorizes,⁹⁵ but the jury may properly be instructed, on this subject, that the party holding the affirmative of the issue must prove it by a preponderance of the testimony, and that if their minds are in equipoise upon the evidence, they should find against such party.⁹⁶

A requested instruction that the burden of proof is on the plaintiff to establish the allegations of his declaration is properly modified by adding that such allegations may be established by testimony presented on behalf of the defendant, or by the defendant's admissions, if the jury find such testimony or admissions.⁹⁷

An instruction that "while, as a matter of law, the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although slightly, it would be sufficient for the jury to find the issues in his favor," is

93—*Lewis v. State* (Tex. Cr. App.), 59 S. W. 886. The controversy was apparently held in 30 Tex. App. 541, but it did not appear that the court charged upon reasonable doubt.

94—*State v. Hollingsworth*, 156 Mo. 178. See also, *Beeson v. State*, 60 Tex. Cr. App. 39.

95—*Nixon v. State*, 14 Ga. App. 261.

96—*Meyer v. Blakemore*, 54 Miss. 570; *Lockhart v. Camfield*, 48 Miss. 491. See also, *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817.

97—*Hartman v. Ruby*, 16 App. Cas. (D. C.) 45.

not erroneous as excluding from consideration the evidence introduced by defendant.⁹⁸

It is proper to refuse to charge, in an action for personal injuries, that the burden is "on the plaintiff to establish the material allegations in his petition by the preponderance of the evidence; and unless you believe from the evidence that, by a preponderance of the evidence, plaintiff has established the facts which the court has charged you are material to his recovery, you will return your verdict for the defendant," as such charge requires the plaintiff to prove all the grounds of negligence relied upon.⁹⁹

The jury may be instructed that the burden is on defendant to prove his answer by a preponderance of the evidence,¹ and this will be a sufficient instruction on the subject when no further instruction is requested.²

In a prosecution for murder, it was proper to refuse charges asked by the defendant to the effect "that, the greater the crime, the stronger is the proof required for conviction."³

The giving of an instruction which, in effect, places the burden of proof on the wrong party is reversible error, as the tendency is to mislead the jury.⁴

But instructions to the effect that the plaintiff must make out his case as pleaded, and that in the absence of such proof the jury must find for the defendant, does not change the burden of proof from the defendant to the plaintiff.⁵

In a case of criminal libel, it has been held error to charge

98—*West Chicago St. R. Co. v. O'Connor*, 85 Ill. App. 278.

99—*Houston & T. C. R. Co. v. Patterson* (Tex. Civ. App.), 57 S. W. 675.

1—*Kepler v. Jessup*, 11 Ind. App. 241.

2—*Nichol v. Laumeister*, 102 Cal. 658, 36 Pac. 925.

3—*State v. Johnson*, 104 La. 417, 81 Am. St. Rep. 139.

4—*Pennington v. Woodall*, 17 Ala. 685; *State v. Crossley*, 69 Ind. 203; *State v. Grinstead*, 62 Kan. 593, 64 Pac. 49; *Woodson Mach. Co. v. Morse*, 47 Kan. 429, 28 Pac. 152; *Willey v. Grane*, 69 Mich. 17.

5—*Clifton v. Sparks*, 25 Mo. App. 383. See also, *Clemons v. State*, 167 Ala. 20, where an instruction was held erroneous as changing the burden of proof.

that it was incumbent on defendant to satisfy the jury that the libel was not published with his knowledge or authority, and unless he had so satisfied them they should find him guilty, since this puts the burden of proof upon the defendant to show his innocence, contrary to the rule of reasonable doubt and the presumption of innocence.⁶

§ 284. Degree of proof necessary in civil cases.

Except in one jurisdiction,⁷ it is a well-settled rule that the jury in a civil case are to decide facts upon the prepon-

6—State v. Grinstead, 62 Kan. 593, 64 Pac. 49.

7—Rule in Alabama: In Alabama the rule seems to be well settled, against the weight of authority, that the jury are not compelled to find according to the mere preponderance of the evidence, unless it produces a reasonable conviction or satisfaction of the mind. *Street v. Sinclair*, 71 Ala. 110; *Wileox, Gibbs & Co. v. Henderson*, 64 Ala. 535. A mere preponderance of evidence is not sufficient to authorize a verdict for plaintiff, unless it is sufficient to "satisfy" the minds of the jury. *Acklen's Ex'r v. Hickman*, 60 Ala. 568. "No matter what might be * * * if it [the evidence] failed to produce a rational belief in the minds of the jury as to the existence of the fact, it could not in any sense be said to be proved. * * * In the absence of legal presumption, it is for the jury alone to determine upon the amount of evidence required." *Mays v. Williams*, 27 Ala. 267. In accordance with these views, it has been held that it is error to instruct the jury, as matter of law, either that they must find according to the preponderance of the evidence, or that they cannot so find. *Vandeventer v. Ford*, 60 Ala. 610. Or that

"in civil cases all that is required is that the proof shall preponderate in favor of one party or the other, and the jury must find according to the preponderance of the proof." *Mays v. Williams*, 27 Ala. 267. Or that "a preponderance of evidence, merely, inclining the minds of the jury to sustain the plaintiff's claim, cannot be regarded as sufficient." *Acklen's Ex'r v. Hickman*, 60 Ala. 568. So it has been held improper to charge that conviction should be produced in the minds of the jury after weighing all the evidence, and not by deciding on the preponderance. The process of weighing is the finding of an equilibrium or preponderance. *Vandeventer v. Ford*, 60 Ala. 610. The measure of proof in all civil actions is to reasonably satisfy the jury. Charges which require satisfaction beyond reasonable doubt exact too high a degree of proof, and should never be given. *Decatur Car Wheel & Mfg. Co. v. Mehaffey*, 128 Ala. 242.

An instruction that "the 'preponderance of evidence' does not mean that the plaintiff must produce a greater number of witnesses than the defendant. It is sufficient to entitle her to a verdict that you are reasonably satisfied, from all the evi-

derance of the evidence, even though the evidence does not show such facts to their satisfaction;⁸ that the jury should be left free to consider all the evidence and circumstances;⁹ and that their verdict should be for the party in whose favor the evidence preponderates.¹⁰

There is no rule of law which adopts any sliding scale of belief in civil controversies, and the judge should not require a greater weight of proof than the ordinary preponderance of evidence.¹¹

§ 285. Necessity of instructions as to preponderance of evidence.

It is error to relieve a plaintiff of the duty to prove his case by a preponderance of the evidence,¹² and the refusal of an instruction as to the burden of proof and preponderance of evidence is error where the subject is not covered by other instructions.¹³

dence, that the allegations of the complaint are true,"—is not open to the objection that it does not assert that if the jury are reasonably satisfied, from a fair preponderance of the evidence, the verdict shall be for plaintiff. *Louisville & N. R. Co. v. White*, 40 C. C. A. 352, 100 Fed. 239.

8—*Stratton v. Central City Horse Ry. Co.*, 95 Ill. 25.

The determination of the preponderance of evidence rests with the jury. *Chicago Union Traction Co. v. Wirkus*, 131 Ill. App. 485.

9—*Chicago Union Traction Co. v. Hampe*, 228 Ill. 346, rev'g 130 Ill. App. 596; *Miller v. John*, 208 Ill. 173, aff'g 111 Ill. App. 56.

10—*Arkansas. Shinn v. Tucker*, 37 Ark. 580.

Connecticut. Mead v. Husted, 52 Conn. 53, 52 Am. Rep. 554.

Georgia. Clark v. Cassidy, 62 Ga. 407.

Illinois. Johnson v. People, 140 Ill. 350; *American Cent. Ins. Co. v. Rothchild*, 82 Ill. 166; *Ottawa, O. & F. River Val. R. Co. v. McMath*, 4 Ill. App. 356.

Kansas. Callison v. Smith, 20 Kan. 28.

Texas. Southwestern Telegraph & Telephone Co. v. Newman (Tex. Civ. App.), 34 S. W. 661; *Dockery v. Tyler Car & Lumber Co.* (Tex. Civ. App.), 34 S. W. 660.

West Virginia. Simmons v. Insurance Co., 8 W. Va. 474.

Wisconsin. Telford v. Frost, 76 Wis. 172.

11—*Van Slyke v. Rooks*, 181 Mich. 88.

12—*Thomas v. Burks*, 120 Ill. App. 222.

13—*Johnson v. Chicago City Ry. Co.*, 166 Ill. App. 79.

But a defendant's instruction as to the effect on the burden of proof of a sworn plea denying partnership may be refused where the purported plea is not a plea in fact.¹⁴

§ 286. Sufficiency of instructions as to preponderance of evidence.

The jury may properly be instructed that a party must make out his case by a preponderance of the evidence,¹⁵ or that all disputed facts are to be determined by the preponderance of evidence.¹⁶

It is proper to instruct that the jury should find for plaintiff if there is a preponderance of evidence in his favor;¹⁷ or that "if the testimony of the plaintiff outweighs that of the defendant, if only enough to turn the scales, your verdict must be for the plaintiff;"¹⁸ or that they should find for defendant, where the burden of proof is on plaintiff, unless the evidence preponderates in plaintiff's favor;¹⁹ or that the defendant is entitled to a verdict if his plea appears to be sustained by the preponderance of the evidence.²⁰

If the answer admits the allegations of the petition, and sets up a recoupment and counterclaim, it is not improper to instruct the jury that unless the defendant does prove such defense by a preponderance of the evidence to the

14—Christo v. Nicola, 183 Ill. App. 487.

15—Cunningham v. Stein, 109 Ill. 375; De Hart v. Board Com'rs Johnson Co., 143 Ind. 363; Altschuler v. Coburn, 38 Neb. 881; Chapman v. McAdams, 1 Lea (Tenn.) 500.

16—Roe v. Bachelidor, 41 Wis. 360.

17—Green v. Southern States Lumber Co., 163 Ala. 511; Mead v. Husted, 52 Conn. 53, 52 Am. Rep. 554.

An instruction requiring the jury to find for the plaintiff if his case is established by a preponderance of the evidence is proper. Ford v. Coal Belt R. Co., 143 Ill. App. 431; Kidd

v. White, 138 Ill. App. 107; Springfield Consol. R. Co. v. Farrant, 121 Ill. App. 416; Chicago Virden Coal Co. v. Rucker, 116 Ill. App. 425.

To allow recovery if the plaintiff has proved his case is proper. Chicago & A. R. Co. v. Hatfield, 109 Ill. App. 556.

18—Telford v. Frost, 76 Wis. 172. This instruction simply requires the jury to weigh the evidence, and leaves them free to do so.

19—Southwestern Telegraph & Telephone Co. v. Newman (Tex. Civ. App.), 34 S. W. 661.

20—Shinn v. Tucker, 37 Ark. 580.

satisfaction of the jury, the jury will find for the plaintiff.²¹

It has also been held improper to refuse an instruction that if the evidence preponderates against the plaintiff, the jury should find for the defendant.²²

It is error to require a defendant to show the preponderance of evidence where the burden of proof is on the plaintiff,²³ and it has been held improper to instruct that the jury may find for the defendant if in doubt as to the preponderance of evidence.²⁴

An instruction which determines upon which side the evidence preponderates is erroneous.²⁵

It is likewise improper to instruct "the jury that, to justify a verdict in favor of the plaintiff, the preponderance of testimony in his favor must be such 'as clearly outweighs the evidence on the other side.' " This instruction might mislead the jury to believe that plaintiff's case must be fully and abundantly established, and so as to be easily apparent to any and every one, and in a doubtful case is ground for reversal.²⁶

An instruction requiring the plaintiff to prove every material allegation of the case has been held improper.²⁷

An instruction that circumstantial evidence is proof of circumstances which, with other evidence, constitute a preponderance of the evidence, is awkward but not misleading.²⁸

An instruction that: "You must find that the plaintiff

21—Procter v. Loomis, 35 Mo. App. 482.

22—Simmons v. Insurance Co., 8 W. Va. 474.

23—Eggmann v. Nutter, 155 Ill. App. 390.

24—Illinois Steel v. Koshinski, 135 Ill. App. 587, aff'd 231 Ill. 198.

25—Chicago Union Traction Co. v. Wirkus, 131 Ill. App. 485; W. H. Stubbings Co. v. World's Columbian Expos. Co., 110 Ill. App. 210.

26—Callison v. Smith, 20 Kan. 28. See also, § 292, *post*.

27—Kidd v. White, 138 Ill. App. 107; McMahon v. Scott, 132 Ill. App. 582.

Requiring proof of all the allegations of every count is error. Harvey v. Chicago & A. R. Co., 116 Ill. App. 507.

28—Chicago City Ry. Co. v. Nelson, 215 Ill. 436, aff'g 116 Ill. App. 609.

has maintained the burden of proving every essential fact by the greater weight of evidence; that is, that the theory submitted to you for your adoption upon the part of the plaintiff is more probable than the theory advanced upon the part of the defendants. So, if you reach that conclusion,—that the plaintiff has maintained the burden of proof placed upon her by law,—she has established her case by a greater weight of evidence. All that means is that the theory presented to you by the plaintiff must be more acceptable, more probable, and more consistent with your experience than the theory advanced by the defendants. If it is not, she fails,”—is erroneous. A theory may be more acceptable, probable and consistent than another, and yet be unsupported by a preponderance of the evidence. The burden of proof is not sustained by proving such a theory.²⁹

§ 287. Same—Definitions.

The term “preponderance of the evidence” is well understood, and it is not reversible error to refuse an instruction defining such term.³⁰

But in explaining what is meant by “preponderance of evidence,” there is no error in telling the jury that when a party introduces evidence that satisfies the jury that “more likely than not” a certain state of facts exists, he has established his case by a preponderance of the evidence.³¹

An instruction that the term preponderance of evidence means “best evidence” is not misleading;³² nor can error be predicated of the following definition: “Preponderance, of course, means the most weight; but it is an abstract idea to talk about weighing the testimony between two such men as these parties. I can tell you a sure test as to where the

29—*Rommeney v. City of New York*, 49 App. Div. (N. Y.) 64.

30—*Roloff v. Luer Bros. Packing & Ice Co.*, 263 Ill. 152.

31—*Groesbeck v. Marshall*, 44 S. C. 538.

32—*Johnstone v. Seattle, R. & S. R. Co.*, 45 Wash. 154, 87 Pac. 1125.

weight of testimony is in this case: It is just what you believe to be the truth. If you believe that defendant promised to repay this money, then the weight of the testimony is on the side of the plaintiff.”³³

§ 288. Same—Use of word “preponderance.”

In giving instructions of this character, it will not be proper to substitute the word “weight” for the word “preponderance.” “Preponderance” is something more than “weight.” It is superiority of weight,—outweighing.³⁴

The omission of the word “preponderance” in an instruction does not render it erroneous where other instructions require the plaintiff to prove his case by a preponderance of the evidence.³⁵

§ 289. Same—Elements to be considered.

The jury should be restricted to the essential issues,³⁶ and an instruction as to the determination of the preponderance of the evidence which does not contain all the elements the jury may consider, and which informs them that they are to consider only the element specified, is erroneous,³⁷ but an instruction enumerating the facts the jury may consider is not erroneous when it requires other facts to be considered. An instruction requiring the jury to consider certain elements has been held not to exclude other elements.³⁸

33—*Thomas v. Paul*, 87 Wis. 607.

34—*Shinn v. Tucker*, 37 Ark. 580.

35—*Coulter v. Illinois Cent. R. Co.*, 264 Ill. 414.

The omission of “preponderance” before the word “evidence” is not error. *Donk Bros. Coal & Coke Co. v. Thil*, 228 Ill. 233, *aff’d* 128 Ill. App. 249.

36—Instruction on preponderance held erroneous in not restricting reference to essential issues. *Nelson v.*

Chicago City Ry. Co., 163 Ill. App. 98.

37—*Brisch v. Chicago City Ry. Co.*, 176 Ill. App. 341; *Miers v. Charles H. Fuller Co.*, 167 Ill. App. 49; *Smith v. James*, 163 Ill. App. 501.

The omission of important elements in determining the preponderance of evidence is error. *Sullivan v. Sullivan*, 139 Ill. App. 378.

38—*Chicago Union Traction Co. v. Yarus*, 221 Ill. 641.

§ 290. Same—Evidence.

In giving instructions on this subject, it is proper to use the words “if you believe from the evidence,”³⁹ or “if you find from the evidence,”⁴⁰ but the use of the words “as shown by the evidence” has been held erroneous.⁴¹

An objection to the use of the word “direct” instead of “positive” has been held too refined.⁴²

An instruction telling the jury that they are to determine on which side the preponderance of the evidence lies from the “facts shown by the evidence and from all other facts and circumstances” is erroneous,⁴³ and it is also error to give an instruction telling the jury the meaning of preponderance of the evidence, which leaves it to the jury to determine where the preponderance of the evidence is “in accordance with the way in which it appears to their minds.”⁴⁴

The use of the word “testimony” instead of “evidence” will not be a ground of reversal;⁴⁵ nor will the use of the word “proof” instead of “evidence,” as they are often used indifferently, as synonymous with each other.⁴⁶

A sentence in an instruction stating that “the burden of proof is on the defendant, to show by a preponderance of the evidence that he was not liable,” does not use the words “burden of proof” in an improper sense.⁴⁷

39—Grese v. Donk Bros. Coal & Coke Co., 147 Ill. App. 284; Chicago & E. I. R. Co. v. Pittman, 135 Ill. App. 481, aff'd 231 Ill. 581; East St. Louis & S. R. Co. v. Zink, 133 Ill. App. 127, aff'd 229 Ill. 180; Hall v. Ditto, 128 Ill. App. 187; Hueni v. Freehill, 125 Ill. App. 345.

40—Chicago & E. I. R. Co. v. Pittman, 135 Ill. App. 481, aff'd 231 Ill. 581; Illinois Cent. R. Co. v. Warriner, 132 Ill. App. 301, aff'd 229 Ill. 91.

41—Chicago, B. & Q. R. Co. v. Sack, 129 Ill. App. 58.

42—Dowie v. Sutton, 227 Ill. 183, 118 Am. St. 266, aff'g 126 Ill. App. 47.

43—Balenovic v. Ansick, 181 Ill. App. 660.

44—Meunier v. Chicago & C. Coal Co., 180 Ill. App. 114.

45—Mann v. Higgins, 83 Cal. 66, 23 Pac. 206; Jones v. Gregory, 48 Ill. App. 228.

46—Flores v. Maverick (Tex. Civ. App.), 26 S. W. 316.

47—Harmon v. Callahan, 187 Ill. App. 312.

§ 291. Determination of preponderance of evidence from credibility and intelligence of witnesses.

In determining the preponderance of evidence, it is proper to consider the opportunity of witnesses for seeing or knowing the things about which they testify,⁴⁸ as well as their veracity,⁴⁹ their appearance and demeanor on the stand, their interest, prejudice or bias, and whether their statements were positive or equivocating,⁵⁰ and the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial.⁵¹

The court may properly instruct that the jury in determining the preponderance of the evidence are to "take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, and the probability or improbability of the truth of their several statements." ⁵²

But it has been held that a judgment should not be reversed merely because of a refusal to give such an instruction.⁵³

An instruction that the preponderance of evidence is not established by the contradictory evidence of two equally credible witnesses has been held erroneous,⁵⁴ and it has also been held error to give an instruction basing the determination of the preponderance of evidence upon the intelligence of witnesses.⁵⁵

48—Pittsburg, C., C. & St. L. R. Co. v. Gates, 137 Ill. App. 309; Robertson v. Monroe, 7 Ind. App. 470; Bierbach v. Goodyear Rubber Co., 54 Wis. 208, 41 Am. Rep. 19.

49—Pittsburg, C., C. & St. L. R. Co. v. Gates, 137 Ill. App. 309.

50—State v. Bohan, 19 Kan. 35.

51—Robertson v. Monroe, 7 Ind. App. 470.

52—Meyer v. Mead, 83 Ill. 19;

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Burles v. Oregon Short Line R. Co., 49 Mont. 129, 140 Pac. 513. Compare Chicago City Ry. Co. v. Keenan, 85 Ill. App. 367.

53—Greeley, S. L. & P. Ry. Co. v. Yount, 7 Colo. App. 189, 42 Pac. 1023.

54—Holmes v. Horn, 120 Ill. App. 359.

55—Barnes v. Chicago City Ry. Co., 147 Ill. App. 601.

An instruction that the jury are at liberty to decide that the preponderance of evidence is on the side which, in their judgment, is sustained by the more intelligent, the better informed, the more credible, and the more disinterested witnesses, whether these are the greater or the smaller number, has been held erroneous as amounting to a direction that the preponderance of evidence is with the side upon which the more intelligent and better informed witnesses testified.⁵⁶

§ 292. Comparison of number of witnesses.

The court may ignore the fact that more witnesses testify for one side than for the other,⁵⁷ but it is proper to instruct that the preponderance of the evidence is not determined solely by the number of witnesses,⁵⁸ or is not "necessarily" determined by such number alone.⁵⁹

In cases where the number of witnesses is an important factor, it may be reversible error to omit a consideration of such element,⁶⁰ and instructions omitting a consideration

56—Chicago City Ry. Co. v. Keenan, 85 Ill. App. 367.

57—McIntosh v. McIntosh, 79 Mich. 198.

58—Chenoweth v. Burr, 242 Ill. 312, aff'g 146 Ill. App. 443; Pittsburg, C. & St. L. R. Co. v. Gates, 137 Ill. App. 309; Chicago City Ry. Co. v. Enroth, 113 Ill. App. 285.

An instruction that the number of witnesses alone does not determine the preponderance of evidence, is proper. Gough v. Illinois Cent. Traction Co., 180 Ill. App. 708; Hopkins v. Chicago City Ry. Co., 178 Ill. App. 656; Kravitz v. Chicago City Ry. Co., 174 Ill. App. 182; Hackett v. Chicago, I. & L. Ry. Co., 170 Ill. App. 140.

59—An instruction that the preponderance of evidence is not "necessarily" determined by the number of witnesses alone, is proper. Elgin, J. & E. R. Co. v. Lawldr, 132 Ill.

App. 280, aff'd 229 Ill. 621. *Contra*, Eidem v. Chicago, R. I. & P. R. Co., 144 Ill. App. 320.

60—Pennington v. Gillaspie, 66 W. Va. 643. The giving of instructions on the preponderance of the evidence, stating that by a preponderance of the evidence is not necessarily meant the greater number of witnesses, and telling the jury what they may consider in determining such preponderance, but omitting the number of witnesses as an element to be considered, is reversible error in a case where the number of witnesses is an important factor. Yanloniz v. Spring Valley Coal Co., 185 Ill. App. 563.

An instruction given for the plaintiff, advising the jury that the preponderance of the evidence does not consist alone in the greater number of witnesses testifying, and then enumerating certain matters to be

of the number of witnesses are properly refused;⁶¹ but an instruction that the number of witnesses is a controlling element in determining the preponderance of evidence may, under some circumstances, be misleading.⁶²

To omit the word "necessarily" before "mean" in the phrase, "the court does not mean a larger number of witnesses," has been held not misleading.⁶³

An instruction which is not directed to the question of the preponderance of the evidence, but which refers to the number of witnesses, is not erroneous in omitting other elements which might be considered in determining the preponderance.⁶⁴

considered by the jury, but omitting the number of witnesses testifying for and against, held reversible error. *De Joannis v. Domestic Engineering Co.*, 185 Ill. App. 272.

An instruction on the preponderance of the evidence, which omits the element of the number of witnesses, is erroneous. *Devine v. City of Chicago*, 178 Ill. App. 39; *O'Donoghue v. City of Chicago*, 167 Ill. App. 349; *Cummins v. Cleveland, C., C. & St. L. Ry. Co.*, 147 Ill. App. 291; *Langan v. Chicago City Ry. Co.*, 145 Ill. App. 249; *Tripoli Sav. Bank v. Schnadt*, 135 Ill. App. 373.

An instruction which tells the jury that the preponderance of evidence does not consist merely in the number of witnesses testifying, and enumerates the circumstances which may be considered in determining where the preponderance lies, is erroneous and misleading, where it wholly omits from the enumeration the question of the relative number of witnesses. *Hays v. Johnson*, 92 Ill. App. 80.

61—*Lyons v. Joseph T. Ryerson & Son*, 242 Ill. 409, rev'g 148 Ill. App. 284; *Thompson v. Dering Coal Co.*,

158 Ill. App. 289; *Fisher v. City of Geneseo*, 154 Ill. App. 288; *Andrieck v. Chicago & E. I. R. Co.*, 150 Ill. App. 539; *Cummins v. Cleveland, C., C. & St. L. Ry. Co.*, 147 Ill. App. 291; *Illinois Commercial Men's Ass'n v. Perrin*, 139 Ill. App. 543; *Sullivan v. Sullivan*, 139 Ill. App. 378.

It is error to refuse instructions that the number of witnesses is to be considered in determining the preponderance of evidence. *Meunier v. Chicago & C. Coal Co.*, 180 Ill. App. 114; *Van Vlissingen v. Pabst Brewing Co.*, 178 Ill. App. 569; *Johnson v. Chicago City Ry. Co.*, 166 Ill. App. 79.

62—*Cunningham v. Illinois Cent. R. Co.*, 179 Ill. App. 505; *Skulimowski v. Deahl*, 169 Ill. App. 355.

63—*Gallagher v. Singer Sew. Mach. Co.*, 177 Ill. App. 198.

An instruction erroneous in omitting the element of the number of witnesses, held not reversible error. *Wesolowsky v. Twarog*, 169 Ill. App. 650.

64—*Nau v. Standard Oil Co.*, 154 Ill. App. 421.

A charge that the jury may give credit to the fewer number of witnesses if they believe them to be more credible may be properly given,⁶⁵ and an instruction "that the jury are not to be swayed by the number of witnesses, but by the quality of the testimony," has been approved.⁶⁶

It is proper to instruct that "in summing up the testimony upon any given question, you should not alone count witnesses. It is not always the most satisfactory; neither is it the most certain of the truth. The questions are: What did the witness swear to? How much did he know? Was he positive, or uncertain and equivocating? What were his means of knowledge of the transactions or matters he testified about? What is the character of the witness for truthfulness? Is he credible?"⁶⁷

So, also, it has been held that the court may tell the jury that, "other things being equal, the greater number of witnesses would carry the greater weight,"⁶⁸ or that "a case might arise wherein a jury would be justified in finding a verdict for the defendant upon the testimony of one witness, against the testimony of any greater number of witnesses."⁶⁹

An instruction that the testimony of one witness is sufficient if uncontradicted, is not misleading as commenting on the weight of the evidence.⁷⁰

An instruction that "the weight of evidence does not depend upon the number of witnesses to a given fact, but it depends upon the amount of credit that you will give to the testimony of one or all of the witnesses in the case," is not

65—Perkins v. Wabash R. Co., 233 Ill. 458, aff'g 137 Ill. App. 514.

An instruction that the evidence preponderates on the side whose witnesses are more credible, though the number be smaller, is improperly refused. St. Louis & O. R. Co. v. Union Trust & Savings Bank, 209 Ill. 457; Harvey v. McQuirk, 158 Ill. App. 50.

66—Divver v. Hall, 20 Misc. Rep. (N. Y.) 677.

67—State v. Bohan, 19 Kan. 35.

68—Spensley v. Lancashire Ins. Co., 62 Wis. 453.

69—People v. Chun Heong, 86 Cal. 329, 24 Pac. 1021.

70—Lipsey v. People, 227 Ill. 364.

error, in that it tells the jury that the number of witnesses cuts no figure on the question of preponderance of evidence; where the court has also charged in this connection that the manner of the witnesses on the stand, their apparent interest in the case, their means and opportunities of observing the facts to which they testified, and the probability of their statements, are all to be considered in determining whether they testified correctly or not; and that "in considering the question of the alleged negligence of the defendant, you are to take into consideration all of the evidence, the number, character, and appearance of the witnesses, the interest, if any, which any of them may have in the event of the suit, the manner of their giving their testimony, their apparent fairness and candor, and the probability, in connection with all of the evidence and the circumstances surrounding the matters testified to, of the truth of the matters testified to by the several witnesses." ⁷¹

§ 293. Same—What instructions are improper.

The court should not instruct that a witness on one side will offset the testimony of a witness on the other, if of equal credibility. The question of credibility is one of fact for the jury, and the court should not in any way intimate an opinion as to the effect of the testimony of competent witnesses. ⁷²

An instruction which gives the jury to understand, or

71—Hardy v. Milwaukee St. Ry. Co., 89 Wis. 183.

72—Alabama. Armstrong v. State, 83 Ala. 49; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Childs v. State, 76 Ala. 93; Dorgan v. State, 72 Ala. 173.

Georgia. Amis v. Cameron, 55 Ga. 449; Salter v. Glenn, 42 Ga. 64.

Illinois. Johnson v. People, 140 Ill. 350, criticising dictum in McFarland v. People, 72 Ill. 368; Kelley v. Louisville & N. R. Co., 49 Ill. App.

304; Christman v. Ray, 42 Ill. App. 111.

Montana. Wastl v. Montana Union R. Co., 17 Mont. 213, 42 Pac. 772.

Wisconsin. Sickel v. Wolf, 91 Wis. 396; Thomas v. Paul, 87 Wis. 607; Bierbach v. Goodyear Rubber Co., 54 Wis. 208, 41 Am. Rep. 19; Ely v. Tesch, 17 Wis. 209; Mariner v. Pettibone, 14 Wis. 195; Kuehn v. Wilson, 13 Wis. 117.

which is liable to give the jury to understand, that the preponderance of the evidence is to be determined by the number of witnesses testifying on each side, is erroneous.⁷³

An instruction that the jury are to determine the preponderance of the evidence by counting the witnesses for and against a proposition of fact invades the province of the jury.⁷⁴

The jury are to determine, not only the credibility of the witnesses, but the weight which should be given to the testimony of each witness, for there are other considerations than that of credibility which affect the question of weight, and the jury may well understand the word "credible" to refer merely to the integrity of the witness.⁷⁵

If the preponderance of evidence were to be determined solely by the number of credible witnesses, a litigant could hardly fail in any case if he should be fortunate enough to have the greater number of credible witnesses.⁷⁶

It is therefore erroneous to instruct the jury that the preponderance of evidence is to be determined by the number of witnesses on each side, if all are equally credible;⁷⁷ or that if the jury consider the witnesses equally credible, "the greater number of witnesses on one side or the other would be entitled to the greater weight;"⁷⁸ or that in case of conflict in the testimony of two witnesses "of equal credibility, the one offsets the other, and unless further evidence is given by other witnesses for the People, or circumstances proved, give the preponderance for the plaintiff," the ver-

73—Howlett v. Dilts, 4 Ind. App. 23.

The court should not tell the jury that a preponderance of the evidence is to be determined by a count of the witnesses on each side, though the jury may be told that the fact of numbers is not to be ignored in determining the preponderance of the evidence. Christman v. Ray, 42 Ill. App. 111; State v. Bohan, 19 Kan. 35.

74—Bierbach v. Goodyear Rubber Co., 54 Wis. 208, 41 Am. Rep. 19.

75—Wastl v. Montana Union R. Co., 17 Mont. 213, 42 Pac. 772; Bierbach v. Goodyear Rubber Co., 54 Wis. 208, 41 Am. Rep. 19.

76—Wastl v. Montana Union R. Co., 17 Mont. 213, 42 Pac. 772.

77—Wastl v. Montana Union R. Co., 17 Mont. 213, 42 Pac. 772.

78—Bierbach v. Goodyear Rubber Co., 54 Wis. 208, 41 Am. Rep. 19.

dict should be for the plaintiff;⁷⁹ or that when the two parties "directly contradict each other in regard to the main facts in the case the evidence is balanced unless there is some other witness or some other circumstances" in evidence corroborating one side or the other;⁸⁰ or that if two witnesses, whose statements conflict, are of equal credit, the statement of a third witness corroborating plaintiff's witness creates a preponderance of testimony for plaintiff, "unless there is some fact or evidence tending to corroborate the defendant;"⁸¹ or that "if you should find that three witnesses are of equal credibility and weight, and the two latter conflict with the former on the facts of the case, you may disregard the evidence of the former;"⁸² or "that, if the testimony of the two parties conflicts in regard to the warranty, and neither is corroborated by other testimony, so far as that testimony so conflicts, the plaintiff must fail;"⁸³ or that the jury should acquit where there are two witnesses on each side, in case they are of equal credibility;⁸⁴ or that "if one witness swears to the existence of a fact, and another witness, of equal credibility, swears that the fact is not true, then the fact is not proved, unless there is other satisfactory proof of the fact;"⁸⁵ or that the testimony of one credible witness is entitled to more weight than many false witnesses;⁸⁶ or "that one credible witness is worth more than many witnesses who, the jury may and do believe, have knowingly testified untruthfully upon any material point in issue, and are not corroborated by other credible witnesses;"⁸⁷ or to instruct in a case where plaintiff alone testified in his own behalf, and two witnesses testified for defendant, that the jury should find for defendant if de-

79—Johnson v. People, 140 Ill. 350, disapproving dictum in McFarland v. People, 72 Ill. 368; Thomas v. Paul, 87 Wis. 607.

80—Sickle v. Wolf, 91 Wis. 396.

81—Ely v. Tesch, 17 Wis. 209.

82—Childs v. State, 76 Ala. 93.

83—Kuehn v. Wilson, 13 Wis. 117.

84—Armstrong v. State, 83 Ala. 49.

85—Dorgan v. State, 72 Ala. 174.

86—Ford v. Coal Belt R. Co., 143 Ill. App. 431.

87—Henderson v. Miller, 36 Ill. App. 232.

fendant's two witnesses were credible, and their testimony was not successfully impeached.⁸⁸

So it is error to charge that "in the absence of any corroborating circumstance, if all the witnesses were surrounded by the same circumstances, and were alike in everything but numbers, the evidence of two would overcome the evidence of one, and the jury were bound to believe the two in preference to the one;"⁸⁹ or that "the preponderance of the evidence is determined by the number of witnesses on each side, where the opposing witnesses are equally credible, and equally well corroborated, and have no greater interest in the result of the suit."⁹⁰

And it has been held proper to refuse a charge "that a preponderance of the evidence does not necessarily mean a majority of witnesses, and that the evidence of one credible witness may be taken and given credence by the jury in preference to the evidence of a number of witnesses that the jury believe are swearing to falsehoods."⁹¹

An instruction that the preponderance of testimony "does necessarily consist in the number of witnesses," etc., instead of "does not necessarily consist," etc., must be condemned; for although the omission of the word "not" might have been accidental, yet it cannot be said that the jury did not understand the instruction just as it reads, and resolve the conflict of evidence upon that basis.⁹²

A charge that the jury should take into consideration the number of witnesses testifying on any particular point and if they found that a greater number had testified to a certain state of facts on behalf of one party than had testified to the contrary on behalf of the other party, and they believed that the credibility of the greater number of wit-

88—Kelley v. Louisville & N. R. Co., 49 Ill. App. 304.

89—Amis v. Cameron, 55 Ga. 449.

90—Christman v. Ray, 42 Ill. App.

91—Trott v. Wolfe, 35 Ill. App. 163.

92—Illinois Cent. R. Co. v. Zang, 10 Ill. App. 594.

nesses was equal to the credibility of the lesser number, they should find the preponderance of the evidence on the side of the greater number, is properly refused as ignoring the probative force of circumstances appearing in evidence apart from the testimony of witnesses.⁹³

§ 294. Instructions as to preponderance of evidence where evidence is equally balanced.

It is proper to give an instruction in civil cases, that where the evidence is equally balanced, the verdict of the jury must be against the party on whom rests the burden of proof,⁹⁴ but an instruction that if the evidence is evenly balanced, the jury should answer the question against the party having the burden of proof, is misleading where there are several issues.⁹⁵

Where the case as submitted to the jury does not consist solely of issues upon the declaration, but also includes affirmative issues raised by the defendant, it is error to instruct that plaintiff is bound to make "out its case by a preponderance of the evidence upon every material point;" and that "if, in weighing the evidence, the jury think that the evidence upon any point necessary to a recovery by the plaintiff is evenly balanced, or preponderates ever so slightly in favor of the defendant, they [the jury] should find for the defendant." Under such instruction, plaintiff can recover only by having every point or issue found in its favor, and that, of course, includes those as to which the burden of proof is on the defendant; and so the instruction seems to throw the burden of proof even as to them on the plaintiff.⁹⁶

93—Cunningham v. Illinois Cent. R. Co., 179 Ill. App. 505.

94—City Bank's Appeal from Com'rs, 54 Conn. 273; Jones v. Angell, 95 Ind. 376.

Where the evidence is equally balanced, the verdict of the jury must be against the party on whom rests the burden of proof. Vandeventer

v. Ford, 60 Ala. 610; Jarrell v. Lillie, 40 Ala. 271; Lindsey v. Perry, 1 Ala. 203.

95—Wright v. Sipple, 179 Ill. App. 386.

96—Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 33 Am. St. Rep. 234.

Since it is unjust to charge a defendant with liability when the preponderance of the evidence merely inclines the minds of the jury to the side of plaintiff, it is error to charge that if the evidence is equally balanced, the jury must find for the plaintiff.⁹⁷

In replevin by the mortgagee of personalty against the mortgagor, an instruction that if the jury have a doubt as to the preponderance of the evidence, they should give the plaintiff the benefit of the doubt, is erroneous, since it authorizes the jury to find for plaintiff if a single doubt as to the greater weight of the testimony for defendant had arisen during the progress of the trial, although stronger doubt as to the opposite view might have necessarily been engendered in their minds from a consideration of the whole testimony.⁹⁸

An instruction telling the jury to decide according to what they find the preponderance of the evidence to be, has been held erroneous on the ground that it furnishes the jury no rule in the event that they find the evidence equally balanced.⁹⁹

But a judgment for plaintiff will not, for that reason, be reversed, because such instruction does not authorize a verdict for the plaintiff unless there is a preponderance of evidence in his favor, and because the fact of their finding for him raises the presumption that they regarded the evidence as preponderating in his favor.¹

97—*Jarrell v. Lillie*, 40 Ala. 271.

98—*Grant v. Rowe*, 83 Mo. App. 560.

99—*Southwestern Telegraph & Telephone Co. v. Newman* (Tex. Civ. App.), 34 S. W. 661; *Dockery v. Tyler Car & Lumber Co.* (Tex. Civ. App.), 34 S. W. 660.

See *City Bank's Appeal from Com'rs*, 54 Conn. 273, where an instruction that if the proof preponderated in favor of the plaintiff, the verdict should be in his favor, but if the jury found a preponderance the

other way, their verdict should be for the defendant, was held erroneous for not instructing the jury how to find if the evidence was equally balanced. The view taken was that if the jury considered the evidence equally balanced, they could have found no verdict at all; but the court considered that the error was not prejudicial and refused to reverse the case.

1—*Dockery v. Tyler Car & Lumber Co.* (Tex. Civ. App.), 34 S. W. 660.

In some cases it has been held that when the jury are instructed that a preponderance of the evidence is necessary to entitle the plaintiff to recover, the inference is that if the evidence is equally balanced, the verdict should be for the other side, and such instruction is not erroneous because it does not expressly state such proposition.²

§ 295. Instructions as to preponderance of evidence requiring too high a degree of proof.

In civil cases it is error for a court to charge a jury so as to mislead them into the belief that more stringent proof is necessary than the law requires.³

To require the establishment of a case with the certainty required in criminal cases is error.⁴

Accordingly, an instruction requiring proof beyond a reasonable doubt is improper,⁵ but an instruction requiring proof by the preponderance of the evidence and not beyond a reasonable doubt is proper.⁶

An instruction permitting recovery though the preponderance of evidence is "slight" is proper.⁷

It is error to instruct, and proper to refuse to instruct, that the plaintiff must make out his case by a "clear pre-

2—Harper v. State, 101 Ind. 109; Blitt v. Heinrich, 33 Mo. App. 243.

3—Watkins v. Wallace, 19 Mich. 57.

4—Reynolds v. Wray, 135 Ill. App. 527.

5—Pley v. Lavette, 167 Ill. App. 494.

Charges requiring satisfaction beyond a reasonable doubt exact too high a degree of proof, and should never be given in civil actions. Proof which reasonably satisfies the jury is all that is required. Decatur Car Wheel & Manufacturing Co. v. Mehaffey, 128 Ala. 242. As to the exceptional rule prevailing in Alabama, see § 284, *ante*.

6—Pierson v. Lyon & Healy, 243 Ill. 370, *aff'g* 150 Ill. App. 116; Rioridan v. Chicago City Ry. Co., 178 Ill. App. 323; Peterson v. Chicago & O. P. El. R. Co., 176 Ill. App. 218; Lyons v. Chicago City Ry. Co., 171 Ill. App. 374; Hammond v. Woodruff & Edwards Co., 168 Ill. App. 368; Crouse v. Barber Asphalt Paving Co., 162 Ill. App. 271; Gurnea v. Baltimore & O. R. Co., 157 Ill. App. 331; Chicago City Ry. Co. v. Kastrzewa, 141 Ill. App. 10.

7—Norton v. Clark, 253 Ill. 557; Hanchett v. Haas, 219 Ill. 546, *aff'g* 125 Ill. App. 111; Young v. City of Fairfield, 173 Ill. App. 311; Hamilton v. Kankakee Elec. Ry. Co., 158 Ill.

ponderance" of the evidence. A "mere preponderance" is enough,⁸ and the use of the word "clearly" is misleading,⁹ although it has been held that such an instruction is not ground for reversal when other instructions state the rule correctly and no prejudice results.¹⁰

It is error to require the jury to be "convinced,"¹¹ or that the jury must be "conclusively convinced,"¹² or that the jury must have "an abiding conviction;"¹³ and "clearly convinced," as applied to the measure of proof required, lays down too exacting a rule."¹⁴

So it is erroneous to instruct that a fact must be "clearly and fairly proved;"¹⁵ or proved "clearly and with cer-

App. 422; *Dowd v. Chicago City Ry. Co.*, 153 Ill. App. 85; *City of Chicago v. Sullivan*, 139 Ill. App. 675; *Chicago & E. I. R. Co. v. Fowler*, 138 Ill. App. 352, rev'd 234 Ill. 619; *Chicago & G. T. R. Co. v. Smith*, 124 Ill. App. 627, aff'd 226 Ill. 178; *Devine v. Ryan*, 115 Ill. App. 498.

The use of the phrase "although but slightly" is not misleading. *LaBelle v. Grand Cent. Market Co.*, 172 Ill. App. 582.

Striking out of the words "although but slightly" held not error. *Perkins v. Sanitary Dist. of Chicago*, 171 Ill. App. 582.

8—*Nelson v. Fehd*, 203 Ill. 120, aff'g 104 Ill. App. 114; *Bitter v. Saathoff*, 98 Ill. 266; *McDeed v. McDeed*, 67 Ill. 545; *Rich v. Lence*, 147 Ill. App. 110; *Illinois Collieries Co. v. Davis*, 137 Ill. App. 15, aff'd 232 Ill. 284; *Schofield v. Baldwin*, 102 Ill. App. 560; *Chicago & E. I. R. Co. v. Storment*, 90 Ill. App. 505; *Prather v. Wilkens*, 68 Tex. 187.

9—*Prather v. Wilkens*, 68 Tex. 187.

An instruction requiring "clear" proof of fraud is not misleading

where the court, in other instructions, plainly charged that only a preponderance of evidence was necessary to establish fraud. *Stocks v. Scott*, 188 Ill. 266, aff'g 89 Ill. App. 615.

10—*Draper v. Petrea*, 147 Ill. App. 164.

11—*Brady v. Mangle*, 109 Ill. App. 172; *Merchants' Loan & Trust Co. v. Lamson*, 90 Ill. App. 18.

A requested charge requiring the jury to be "convinced" in place of being "reasonably satisfied" is properly refused as exacting too high a degree of proof. *Southern R. Co. v. Hobbs*, 151 Ala. 335.

12—*Hiester v. Laird*, 1 Watts & S. (Pa.) 245; *Greathouse v. Moore* (Tex. Civ. App.), 23 S. W. 226.

13—*Battles v. Tallman*, 96 Ala. 403.

14—*Wilcox v. Henderson*, 64 Ala. 535.

An instruction that fraud must be proved by "clear and convincing evidence" is incorrect. A preponderance of the evidence is sufficient. *Smith v. Edelstein*, 92 Ill. App. 38.

15—*Hall v. Wolff*, 61 Iowa 559.

tainty,"¹⁶ or "with certainty,"¹⁷ or "clearly proved;"¹⁸ or that the case must be free from doubt;¹⁹ or that the plaintiff must prove his case by a "fair preponderance" of the evidence.²⁰

It is also error to give an instruction requiring "more and better" evidence;²¹ or that the plaintiff must prove his case by "downright evidence;"²² that if the evidence leaves a fact "in a state of doubt and uncertainty," it "cannot be regarded as established by the testimony,"²³ and, an instruction requiring a party to "establish" his case is erroneous.²⁴

16—*Howard v. Zimpelman* (Tex.), 14 S. W. 59. In this case, the court said that the word "certainty" meant beyond a reasonable doubt.

17—*First Nat. Bank of Marshall v. Myer*, 23 Tex. Civ. App. 302.

18—*Lehman v. Kelly*, 68 Ala. 192; *McLeod v. Sharp*, 53 Ill. App. 406. Compare *Edwards v. Whyte*, 70 Ala. 365, where in a suit for breach of contract, to which the defense was a rescission, it was held that instructions that defendant must prove the rescission, "to the satisfaction of the jury, by clear and satisfactory testimony," were not erroneous; that when fairly construed, they did not call for a higher degree of proof than to the satisfaction of the jury.

19—*Whitney v. Clifford*, 57 Wis. 156. To the same effect is *Harris v. Russell*, 93 Ala. 59, where an instruction that the burden being on plaintiffs to make out their case to the satisfaction of the jury, they must find for defendants, if they are left in doubt as to any of the facts, was held erroneous, as exacting too high a measure of proof, and as calculated to make the jury understand that the evidence must be

certain beyond doubt. See also, *Spencer v. Daggett*, 2 Vt. 92, where it was held proper to refuse an instruction that if the jury doubted about the fact of defendant's liability, they must find for him.

20—*B. Lantry Sons v. Lowrie* (Tex. Civ. App.), 58 S. W. 837; *Cabell v. Menczer* (Tex. Civ. App.), 35 S. W. 206. But see, *Bryan v. Chicago, R. I. & P. Ry. Co.*, 63 Iowa 464, where it was held that in charging a jury that they are to decide on the fair preponderance of the evidence, no error is committed by the use of the word "fair;" that it means no more than the charge would have meant without it. To the same effect is *Jamison v. Jamison*, 113 Iowa 720.

21—*Chicago, B. & Q. R. Co. v. Pollock*, 195 Ill. 156, aff'g 93 Ill. App. 483; *Boyer v. Broffey*, 109 Ill. App. 94.

22—*Roe v. Bacheldor*, 41 Wis. 360.

23—*Rowe v. Baber*, 93 Ala. 422.

24—*McMasters v. Grand Trunk Ry. Co.*, 155 Ill. App. 648.

An instruction that the burden of proof is on the defendant to "establish" his plea of contributory negligence is not erroneous as imposing a

An instruction that the plaintiff's proof must "excel" that of the defendant is misleading,²⁵ and it has been held error to instruct that in order "to establish a charge of fraud, the facts must be such that they are not explicable on any other reasonable hypothesis;"²⁶ or in an action for wrongful attachment, that "the burden of proof is on the plaintiff to show that the attachment was sued out by the defendant wrongfully, maliciously, and without probable cause, and of the existence of these elements she must reasonably satisfy the minds of the jury; and if the evidence leaves them confused or uncertain as to the existence of such elements, then the plaintiff is not entitled to recover."²⁷

An instruction requiring defendants to prove "by a preponderance of all the evidence in the cause" the averments of their counterclaim, has been held subject to criticism, but in view of other instructions the error was harmless.²⁸

§ 296. Same—Instructions requiring that evidence must "satisfy" jury.

Instructions that the plaintiff is bound to prove his case to the "satisfaction" of the jury by a clear preponderance of the evidence are erroneous, and may, of course, be properly refused as requiring too high a degree of proof for the maintenance of an issue in a civil cause.²⁹

greater burden than is authorized.
Houston & T. C. R. Co. v. Swancey,
— Tex. Civ. App. —, 128 S. W. 677.

25—Sager v. St. John, 109 Ill.
App. 358.

26—Phoenix Ins. Co. v. Moog, 87
Ala. 334, 4 L. R. A. 680, 13 Am. St.
Rep. 46.

27—Brown v. Master, 104 Ala. 451.

28—Cohen v. Reichman, 55 Ind.
App. 164.

29—Alabama Great Southern R.
Co. v. Robinson, 183 Ala. 265; Low-
ery v. Rowland, 104 Ala. 420;

Mitchell v. Hindman, 150 Ill. 538;
Stratton v. Central City Horse Ry.
Co., 95 Ill. 25; Ruff v. Jarrett,
94 Ill. 475; Protection Life Ins. Co.
v. Dill, 91 Ill. 174; Wright v. Sipple,
179 Ill. App. 386; Leslie v. Joliet
Bridge & Iron Co., 149 Ill. App. 210;
Briggs v. Kohl, 132 Ill. App. 484;
Kelley v. Malhoit, 115 Ill. App. 23;
Gooch v. Tobias, 29 Ill. App. 268;
Fernandes v. McGinnis, 25 Ill. App.
165; Balohradsky v. Carlisle, 14 Ill.
App. 289; Ottawa, O. & F. River
Val. R. Co. v. McMath, 4 Ill. App.

Such an instruction might be understood to mean a higher degree of proof than is furnished by a preponderance of the evidence. This is especially so when the language is often repeated.³⁰

Accordingly, it is error to give instructions requiring the jury to be "satisfied,"³¹ or stating that one upon whom is the burden of proof "must satisfactorily prove by a preponderance of evidence" all the necessary facts;³² that plaintiff must satisfy the jury throughout the entire case of the correctness of his story;³³ that a party must establish the material allegations of his pleading "to the satisfaction of the jury;"³⁴ that the plaintiff must establish his case "to the full satisfaction of the jury, by clear and convincing proof;"³⁵ that the jury must be "well satisfied," etc;³⁶ that the jury must be "thoroughly satisfied" of a fact in dispute;³⁷ that a fact must be proved "to your entire satisfaction, * * * by testimony in which you have

356; *Miller v. Barber*, 66 N. Y. 558; *Pierpont Mfg. Co. v. Goodman Produce Co.* (Tex. Civ. App.), 60 S. W. 347; *Finks v. Cox* (Tex. Civ. App.), 30 S. W. 512; *Feist v. Boothe* (Tex. Civ. App.), 27 S. W. 33; *Grigg v. Jones* (Tex. Civ. App.), 26 S. W. 885; *McGill v. Hall* (Tex. Civ. App.), 26 S. W. 132; *Oury v. Saunders*, 5 Tex. Civ. App. 310; *Fordyce v. Beecher*, 2 Tex. Civ. App. 29.

30—*McBride v. Banguss*, 65 Tex. 174.

31—*Swigart v. Savely*, 176 Ill. App. 369; *Brunk v. Huthmacher*, 165 Ill. App. 295.

32—*Wolff v. Van Housen*, 55 Ill. App. 295; *Bauchwitz v. Tyman*, 11 Ill. App. 186.

Requested charges requiring the jury to be satisfied by a preponderance of the evidence impose too high a duty. *Southern R. Co. v. Hobbs*, 151 Ala. 335.

An instruction requiring the defendant to "satisfy" the jury by a fair preponderance of the evidence as to a certain payment requires an improper degree of proof. *Howell v. Empire State Surety Co.*, 183 Ill. App. 221.

33—*Wright v. Sipple*, 179 Ill. App. 386.

A charge that the plaintiff has to satisfy the jury throughout the entire case of the correctness of his story is properly refused, since there may have been matters in his story that were immaterial to the issues. *Wright v. Sipple*, 179 Ill. App. 386.

34—*McGill v. Hall* (Tex. Civ. App.), 26 S. W. 132.

35—*Gage v. Louisville, N. O. & T. Ry. Co.*, 88 Tenn. 724.

36—*Monaghan v. Agricultural Fire Ins. Co. of Watertown*, 53 Mich. 238.

37—*O'Donohue v. Simmons*, 58 Hun (N. Y.) 467.

implicit confidence;"³⁸ that "the law requires the plaintiff to make clear and satisfactory proof of the contract, as claimed by him; therefore, if you believe the evidence in this case is such as to leave the real terms of the contract between the parties in doubt, the plaintiff cannot recover;"³⁹ that a party alleging a fact "must prove it by a preponderance of the evidence, so clear and cogent that it leaves the mind well satisfied that the charge is true;"⁴⁰ "that the jury must be satisfied by the preponderance of the evidence, to a reasonable certainty, that a fact exists, before they can find such fact."⁴¹

It has been held, though, that an instruction that the jury "should be satisfied by a clear preponderance of proof" is not misleading when given with one that "this is a civil action, and it is not required in a civil action to establish the facts beyond a reasonable doubt, * * * but a fair preponderance of proof is all that is required."⁴²

And where a charge that before plaintiffs could recover, the jury must be satisfied from the evidence that defendant's negligence caused the fire, and that plaintiffs were not guilty of contributory negligence, was qualified as follows: "And the destruction of the cotton by fire under this clause may be shown by circumstantial evidence sufficient in your opinion to justify the belief that the fire was caused by a spark or cinders coming from defendant's engine,"— it was held that this latter clause sufficiently indicated to the jury that by the word "satisfied" nothing more was meant than opinion or belief; and the charge as an entirety did not present reversible error.⁴³

On an issue as to undue influence, an instruction that

38—Ott v. Oyer's Ex'x, 106 Pa. St. 7, in which it was said that this was equivalent to directing the jury that there must be no doubt in their minds.

39—White v. Gale, 14 Ill. App. 274.

40—Hutchinson Nat. Bank v. Crow, 56 Ill. App. 558.

41—Pelitier v. Chicago, St. P., M. & O. Ry. Co., 88 Wis. 521.

42—Hart v. Niagara Fire Ins. Co., 9 Wash. 620, 27 L. R. A. 86, 38 Pac. 213.

43—Martin v. Missouri Pac. Ry. Co., 3 Tex. Civ. App. 133.

“the law presumes in favor of honesty and fair dealing, and whoever asserts the contrary must prove it to your satisfaction, by a preponderance of the evidence,” does not impose the burden of proving undue influence beyond a reasonable doubt. The instruction requires of contestants “only ‘a preponderance of the evidence.’ The phrase ‘to your satisfaction’ informed the jurors that they were the judges as to where the preponderance lay.”⁴⁴

An instruction requiring the jury to find for a defendant if the state of mind of the jury “be in a state of doubt or confusion as to whether or not the plaintiff is entitled to a verdict,” in effect requires the proof to satisfy the jury beyond doubt, and that they must be absolutely positive of the plaintiff’s right to recover before they can find a verdict for him, and should be refused as misleading and confusing.⁴⁵

44—*Surber v. Mayfield*, 156 Ind. 375.

45—*Alabama Great Southern R. Co. v. Robinson*, 183 Ala. 265.

CHAPTER XXVII.

INSTRUCTIONS ON REASONABLE DOUBT.

- § 297. Necessity of instructions as to reasonable doubt.
- § 298. Necessity of defining reasonable doubt.
- § 299. Sufficiency of instructions.
- § 300. Repetition of instructions.
- § 301. Statutory definitions.
- § 302. Defining as doubt founded on reason.
- § 303. Defining as a doubt which would cause a reasonable man to pause and hesitate in the graver transactions of life.
- § 304. Defining as a doubt one the absence of which would cause a reasonably prudent man to act in his own most important affairs.
- § 305. Absence of reasonable doubt as equivalent to "moral certainty," or "reasonable and moral certainty."
- § 306. Absence of reasonable doubt as equivalent to an "abiding conviction to a moral certainty."
- § 307. Defining as "satisfaction" of guilt.
- § 308. Probability of innocence may create reasonable doubt.
- § 309. Negative definitions of reasonable doubt.
- § 310. Reasonable doubt not raised by argument of counsel—Not a doubt as to law.
- § 311. Reasonable doubt as doubt arising from the evidence or want of evidence.
- § 312. Doctrine applicable only to evidence considered as a whole.
- § 313. Same—Contrary view.
- § 314. Instructions as to number of jurors who must entertain a reasonable doubt in order to acquit.
- § 315. Statements that jurors must not disbelieve as jurors what they would believe as men.
- § 316. Statements that it is better that guilty escape than that innocent be punished.
- § 317. Applying doctrine to degrees of crime.
- § 318. Instructions held bad as requiring too high a degree of proof to overcome a reasonable doubt.
- § 319. Instructions held bad as requiring too high a degree of proof of innocence.
- § 320. Sufficiency of instructions taken as a whole.
- § 321. Reasonable doubt in civil cases.

§ 297. Necessity of instructions as to reasonable doubt.

The necessity of an instruction on the subject of reasonable doubt, in the absence of a request, depends both on statutory provisions and the facts of the case. If the evidence suggests no doubt, it is, of course, not ground for reversal that an instruction on the subject was not given.

But if there is any doubt of a defendant's guilt arising from the evidence, the jury should be fully instructed as to its duty;¹ and in general it may be said that it is the better practice to give an instruction on this subject, even though not requested, and though there is no statutory provision requiring such an instruction.²

In some jurisdictions, the court is, in criminal cases, required by statute to instruct the jury fully on all the law pertinent to the case, and under a statute of this nature it is apprehended the court should instruct on reasonable doubt, though no special request is made therefor, if the evidence is such that a reasonable doubt may arise from it.³ Where a statute provides that the court shall instruct the jury, in felony cases, to acquit if they have a reasonable doubt of defendant's guilt, a failure to so instruct will work a reversal in any case in which there is a conflict of evidence, or in which the evidence does not clearly establish the guilt of the defendant.⁴ This statute, however, does not require an instruction on reasonable doubt in misdemeanor cases, unless requested, but it is error not to give such an instruction when asked.⁵ In another jurisdiction, where a

1—A defendant is entitled to an acquittal if the jury is not convinced of his guilt beyond a reasonable doubt, and the instructions of the court should leave the jury in no doubt as to its duty when such a doubt is entertained. *Woodland v. State*, 110 Ark. 15.

2—*Lawless v. State*, 4 Lea (Tenn.) 173.

3—*Richardson v. State*, 70 Ga. 825. A number of other states be-

side Georgia have statutes like the one mentioned in the text.

4—*Hutto v. State*, 7 Tex. App. 44; *Robinson v. State*, 5 Tex. App. 519; *Goode v. State*, 2 Tex. App. 520; *Spears v. State*, 2 Tex. App. 244; *Priesmuth v. State*, 1 Tex. App. 481; *Lindsay v. State*, 1 Tex. App. 327.

5—*May v. State*, 6 Tex. App. 191; *Goode v. State*, 2 Tex. App. 520; *Treadway v. State*, 1 Tex. App. 669.

statute provides that, if there is a reasonable doubt of the degree of the crime of which the defendant is guilty, he must be convicted of the lower offense, the jury must be instructed that, if they have a reasonable doubt as to the degree of the offense, they should only convict of the lower degree.⁶

The refusal of a requested instruction as to reasonable doubt is harmless error where the evidence does not suggest a doubt.⁷ But if such issue is raised by the evidence, it is error to refuse a request to charge that the burden is upon the state to show every element of the crime alleged against the defendant beyond a reasonable doubt.⁸ Though requests are not in all respects such as the trial judge should give, yet, if they call his attention to the fact that the accused rests his defense largely on the theory of reasonable doubt, he should state the principle of reasonable doubt to the jury substantially and clearly.⁹ A mere definition of reasonable doubt is insufficient.¹⁰

§ 298. Necessity of defining reasonable doubt.

It is doubtful if any better definition of the term "reasonable doubt" can be given than the words themselves,¹¹ and

6—State v. McCarty, 73 Iowa 51; State v. Wood, 46 Iowa 116.

7—If the evidence is such as does not suggest a doubt, and guilt is clearly proved, a failure of the court to instruct on reasonable doubt on request will be harmless error, and not ground for reversal. Sulter v. State, 76 Ga. 105; Seiler v. State, 76 Ga. 103; Van Brown v. State, 34 Tex. 186; Pilkinton v. State, 19 Tex. 214. See also, Reg. v. Riendeau, 9 Rap. Jud. Que. B. R. 147.

8—**Alabama.** Crane v. State, 111 Ala. 45; Compton v. State, 110 Ala. 24; Elmore v. State, 92 Ala. 51; Lane v. State, 85 Ala. 11.

California. People v. Cohn, 76

Cal. 386, 18 Pac. 410; People v. Cheong Foon Ark, 61 Cal. 527.

Florida. Reeves v. State, 29 Fla. 527.

Georgia. Sulter v. State, 76 Ga. 105; Seiler v. State, 76 Ga. 103; Madden v. State, 67 Ga. 151.

Missouri. State v. Fannon, 158 Mo. 149.

Texas. Van Brown v. State, 34 Tex. 186; Pilkinton v. State, 19 Tex. 214; May v. State, 6 Tex. App. 191; Treadway v. State, 1 Tex. App. 669; Black v. State, 1 Tex. App. 369.

9—Madden v. State, 67 Ga. 151.

10—State v. Fannon, 158 Mo. 149.

11—People v. Hotz, 261 Ill. 239.

an attempt to define the term may be characterized as an attempt "to paint the lily."¹²

The term is so commonly known and understood that it requires no definition,¹³ and in a number of decisions it has been said that it would be better practice not to attempt any definition of the term.¹⁴

The term "reasonable doubt" is so clear and exact that it may well be doubted whether an instruction has ever been formulated that served either to simplify or elucidate it.¹⁵

"The term 'reasonable doubt' is almost incapable of any definition which will add much to what the words themselves imply. In fact, it is easier to state what it is not, than what it is; and it may be doubted whether any attempt to define it will not be more likely to confuse than to enlighten a jury. A man is the best judge of his own feelings, and he knows for himself whether he doubts, better than any one else can tell him."¹⁶

"If a jury cannot understand their duty when told they

12—Vasquez v. State, 54 Fla. 127, 127 Am. St. Rep. 129.

13—People v. Hansen, 263 Ill. 44.

14—Alabama. McKleroy v. State, 77 Ala. 95.

Georgia. Middleton v. State, 7 Ga. App. 1.

Kansas. State v. Mosley, 31 Kan. 355, 2 Pac. 782; State v. Kearley, 26 Kan. 87.

Kentucky. Mickey v. Com. 9 Bush 593.

Maine. State v. Rounds, 76 Me. 124; State v. Reed, 62 Me. 142.

Massachusetts. Com. v. Tuttle, 12 Cush. 502.

Michigan. People v. Stubenvoll, 62 Mich. 329; Hamilton v. People, 29 Mich. 194.

Minnesota. State v. Sauer, 38 Minn. 439.

Oklahoma. Douglas v. Territory, 1 Okla. Cr. 583, 98 Pac. 1023.

United States. Miles v. United States, 103 U. S. 304 (13 Otto), 26 L. Ed. 481.

15—State v. Harsted, 66 Wash. 158, 119 Pac. 24.

16—State v. Sauer, 38 Minn. 439. In People v. Stubenvoll, 62 Mich. 329, it is said: "Language within the comprehension of persons of ordinary intelligence can seldom be made plainer by further definition or refining. All persons who possess the qualifications of jurors know that a 'doubt' is a fluctuation or uncertainty of the mind arising from defect of knowledge, or of evidence, and that a doubt of the guilt of the accused, honestly entertained, is a 'reasonable doubt.' "

must not convict when they have a reasonable doubt of the prisoner's guilt, or of any fact essential to prove it, they can very seldom get any help from such subtleties as require a trained mind to distinguish."¹⁷

"There are no words plainer than 'reasonable doubt,' and none so exact to the idea meant. 'Reasonable hypothesis,' or 'reasonable or moral certainty' may be logically the equivalent of 'reasonable doubt,' but these expressions are not so easily understood by the ordinary lay mind."¹⁸

In one case, where, while the jury were out deliberating upon their verdict, the jury sent word to the court, through the sheriff, that they desired an additional charge upon the meaning of reasonable doubt, and the court called the jury into the court room, and asked them verbally whether they desired an additional charge upon the meaning of the two words, "reasonable doubt," and the jury, through their foreman, said that they did, a verbal instruction "that the two words, 'reasonable doubt,' were words of common use, and the jury could understand them as easily as the court, and the court had a reasonable doubt as to whether or not he could, under the law, charge them as to their meaning," was held not error.¹⁹ And it has been held that an instruction which is a complicated definition of the meaning of the term may be properly refused.²⁰

Nevertheless, most courts attempt to define the meaning of the term, but the definitions are almost innumerable, and far from harmonious. Definitions which have been approved in some jurisdictions have in others been held so erroneous as to necessitate a reversal. It has been held to be the duty of the court to explain to the jury what is meant by the term "reasonable doubt" when requested, and a refusal to do so is reversible error.²¹ But the courts all

17—*Hamilton v. People*, 29 Mich. 194.

18—*Norman v. State*, 10 Ga. App. 802.

19—*Lenert v. State* (Tex. Cr. App.) 63 S. W. 563.

20—*People v. Hansen*, 263 Ill. 44.

21—*People v. Lachanais*, 32 Cal. 434.

agree that error cannot be assigned to a failure to give this instruction, unless a request therefor has been made.²² Even where the court gives a definition, and it is not full enough, or is inadequate, counsel cannot complain of it unless he has requested a more specific instruction.²³ Accordingly, it was held that, where the court defined a reasonable doubt as a "doubt which a reasonable man, of sound judgment, without bias, prejudice, or interest, after calmly, conscientiously, and deliberately weighing all the testimony, would entertain as to the guilt of the prisoner," the counsel should have asked, at the time, such additional instruction as he desired, the definition being inadequate.²⁴

§ 299. Sufficiency of instructions.

An instruction which does not require proof beyond a reasonable doubt is erroneous,²⁵ and the instructions given upon reasonable doubt must, of course, not be misleading. This is a common fault, and, upon this ground, the refusal of many requests has been sustained, and, upon the other hand, it has been the cause of many reversals.²⁶ An instruction that "a reasonable doubt may exist, although the evidence reasonably satisfies the jury that the defendant is guilty," is argumentative and misleading.²⁷ It is proper to refuse an instruction "that, upon the trial of a criminal case, if a reasonable doubt of any fact necessary to convict

22—**California.** *People v. Ahern*, 93 Cal. 518, 29 Pac. 49; *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *People v. Gray*, 66 Cal. 271, 5 Pac. 240.

Connecticut. *State v. Smith*, 65 Conn. 283.

Indiana. *Colee v. State*, 75 Ind. 512.

Michigan. *People v. Waller*, 70 Mich. 237.

Tennessee. *Butler v. State*, 7 Baxt. 35.

Washington. *State v. Johnson*, 19 Wash. 410, 53 Pac. 667.

Wisconsin. *Winn v. State*, 82 Wis. 571. See also, *Nelson v. State*, 5 Okla. Cr. 368, 114 Pac. 1124.

23—*People v. Sheldon*, 68 Cal. 434, 9 Pac. 457; *State v. Reed*, 62 Me. 129.

24—*State v. Reed*, 62 Me. 129.

25—*People v. Whittington*, 143 Ill. App. 438.

26—*Wilson v. State*, 128 Ala. 17; *Avery v. State*, 124 Ala. 20; *People v. Smith*, 162 N. Y. 520; *Horton v. Com.*, 99 Va. 848.

27—*Brown v. State*, 128 Ala. 12.

the prisoner is raised in the mind of the jury by the evidence itself, or by the ingenuity of the counsel, upon any hypothesis consistent therewith, that doubt is decisive of the prisoner's acquittal."²⁸

Instructions that "a reasonable doubt is a doubt growing out of the evidence, for which a reason may be given," and "a reasonable doubt is such a doubt, growing out of the evidence, as would occur to the mind of a reasonable man," are calculated to confuse and mislead, as to give a reason for the existence of a mental condition is to state why it exists, and, in that sense, a reason may be given for any degree of doubt; and a reason is nevertheless a reason, though it be based upon mere conjecture, or on matters disconnected from the evidence, and improper to be considered by the jury.²⁹

A charge which instructs the jury "that, unless you believe from the evidence, beyond a reasonable doubt, that the defendant killed the deceased with malice aforethought, and under a formed design, you cannot convict the defendant of murder in either degree," is properly refused, as misleading the jury to believe that premeditation was a necessary ingredient of murder in the second degree, whereas malice which may arise on the instant, and without deliberation, when concurring with an intention to kill, may constitute that offense.³⁰

An instruction "to take this case, bring your intelligence to the consideration of it, and let your common sense and your best judgment control you in its determination," is not objectionable on the ground that it gives the impression to the jury that they might disregard the instructions as to the law. The fair meaning of this language was simply that the jury, having the evidence and the instruction of the court as to the law before them, should exercise their

28—Horton v. Com., 99 Va. 848.

29—Avery v. State, 124 Ala. 20.

See also, Blue v. State, 86 Neb. 189;

Gragg v. State, 3 Okla. Cr. 409, 106

Pac. 350.

30—Wilson v. State, 128 Ala. 17.

best judgment in coming to a conclusion.³¹ Where the court charges that "defendant in a criminal case is presumed to be innocent until his guilt is established by competent evidence beyond a reasonable doubt, and, if you have a reasonable doubt as to his guilt, you will give him the benefit of such doubt," the jury cannot be misled by the omission of the word "doubt" after "reasonable."³²

An instruction which contains the clause, "after considering all the evidence, the jury have a reasonable doubt as to the defendant's guilt of manslaughter, arising out of any part of the evidence, then you should find the defendant not guilty of any offense," is properly refused, as by the omission of the word "if," or its equivalent, what is apparently intended to state the hypothesis as to reasonable doubt is converted into an improper assertion that "the jury have a reasonable doubt," etc.³³ The following charge has been approved: "If, upon the entire case, you have a reasonable doubt of defendant being proven guilty, or as to any fact necessary to establish his guilt, you should acquit him; or, if you have such doubt as to the degree of the offense, you will find him guilty of manslaughter only."³⁴ An instruction that, "in case of a reasonable doubt, whether defendant's guilt is satisfactorily shown, he is entitled to an acquittal," is not erroneous,³⁵ but an instruction authorizing conviction on facts from which guilt may be reasonably inferred, is erroneous.³⁶

Where the court stated to the jury, clearly and specifically, each fact essential to be proven by the state that, unless the jury believed from the evidence, beyond a rea-

31—*People v. Kelly*, 132 Cal. 430, 64 Pac. 563.

32—*Toler v. State*, 41 Tex. Cr. App. 659.

33—*Wilson v. State*, 128 Ala. 17.

34—*Clark v. Com.* (Ky.) 63 S. W. 740, wherein the court said that this instruction should have been given

instead of the one which was given, which the court pronounced unintelligible.

35—*People v. Wynn*, 133 Cal. 72, 65 Pac. 126.

36—*People v. Spain*, 157 Ill. App. 49.

sonable doubt, each of such facts, they must acquit the defendant; that nothing was to be presumed or taken by implication against the defendant; that the law presumed him innocent of the crime charged until he was proven guilty, beyond a reasonable doubt, by competent evidence; that, if the evidence in the case left upon the minds of the jury any reasonable doubt of defendant's guilt, the law made it their duty to acquit him; that the jury must determine the question of his guilt from all the evidence in the case; that unless the jury could say, after a careful consideration of all the evidence in the case, that every essential fact was proved beyond a reasonable doubt, they should find a verdict of not guilty,—the jury was fully informed as to their duties and province in respect to matters of fact, and it was proper to refuse an instruction that “the jury are the sole judges of the facts, and every fact essential to the proof of the offense alleged.”³⁷

A charge that “if, after considering all the evidence in the case, the mind of the jury is left in a state of confusion as to any fact necessary to constitute the defendant's guilt, then they must find him not guilty,” is properly refused.³⁸ An instruction, “if there is no evidence to support any of the counts, then you should acquit,” is erroneous, since one cannot be convicted simply because there is evidence to support some of the counts.³⁹ An instruction that, “if one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong, and therefore, in such a case, if you have a reasonable doubt as to which of said conclusions the chain of circumstances leads, a reasonable doubt would thereby be created, and you should give the defendant the benefit of such doubt and acquit him,” is properly refused, as both

37—State v. Simas, 25 Nev. 432,
62 Pac. 242.

38—Bodine v. State, 129 Ala. 106.

39—State v. Tulip, 9 Kan. App.
454, 60 Pac. 659.

of these "opposing conclusions might lead to defendant's guilt,"⁴⁰

A statement that the jury is not entitled to resolve itself into "doubting Thomases" who refuse to be convinced by any testimony, is not erroneous.⁴¹

A suggestion that the term "reasonable doubt" is "pretty well understood but not easily defined" is unnecessary, but harmless.⁴²

§ 300. Repetition of instructions.

While it is not error to state the doctrine in several distinct instructions,⁴³ it is better practice to give one comprehensive instruction on the subject.⁴⁴ It is sufficient if the doctrine of reasonable doubt is applied to the case generally,⁴⁵ and if the doctrine is correctly stated the failure to refer to it again in connection with other parts of the charge is not reversible error.⁴⁶ One correct instruction is sufficient,⁴⁷ and the repetition of this phase of the law is liable to lead the jury to believe that the court is in doubt as to the defendant's guilt.⁴⁸

40—*People v. Clarke*, 130 Cal. 642, 63 Pac. 138.

41—*State v. Thomas*, 56 Ore. 170, 108 Pac. 135.

42—*People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075.

43—*Cannon v. Territory*, 1 Okla. Cr. 600, 99 Pac. 622; *State v. Huffman*, 69 W. Va. 770.

An instruction explaining "reasonable doubt" is not bad though it contains statements of law which might be given separately. *People v. Zajicek*, 233 Ill. 198.

44—*State v. Huffman*, 69 W. Va. 770.

45—*Perry v. State*, 61 Tex. Cr. App. 2.

46—*State v. Henriksen*, 116 Minn. 366.

47—*State v. Ferrell*, 246 Mo. 322. It is not necessary to repeat in each successive instruction the doctrine of reasonable doubt. *Steiner v. People*, 187 Ill. 244; *McCulley v. State*, 62 Ind. 428.

Where the court applies the doctrine of reasonable doubt to every issuable question in the case, it is sufficient. *Howard v. State*, 53 Tex. Cr. App. 378.

48—*State v. Ferrell*, 246 Mo. 322. The giving of five instructions on the subject of reasonable doubt covering two pages of the abstract and containing statements of the law on the subject which have been approved in various decisions, tends rather to confuse than to enlighten

Where a correct instruction has been given on the subject of reasonable doubt, the court may properly refuse a requested instruction on that subject, though it be correct.⁴⁹ Therefore, where the jury had been instructed to acquit if they had a reasonable doubt of defendant's guilt on the whole evidence, it was proper to refuse an instruction "that every material fact in the indictment must be established beyond a reasonable doubt."⁵⁰ So, it is proper to refuse to instruct that a mere preponderance of evidence would not justify an acquittal where the court had charged fully on the doctrine of reasonable doubt, and the burden of proof or presumption of innocence.⁵¹ Where the court charged, "The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and, in case you have a reasonable doubt as to the defendant's guilt, you will acquit him, and say by your verdict, 'Not guilty,'" a failure to instruct, "You are further charged that the burden of proof never shifts from the state to the defendant, but is upon the state throughout to establish every constituent element of the offense," is not erroneous.⁵²

It has also been held that, after the court has charged the jury that they must find according to the facts of the case, it is not error to refuse to charge that they must acquit the defendant if they have a reasonable doubt, etc., because this would be to repeat the charge, but the propri-

the jury. *People v. Warren*, 259 Ill. 213, Ann. Cas. 1914 C 219n.

49—**California.** *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228; *People v. Lenon*, 79 Cal. 625, 21 Pac. 967.

Iowa. *State v. Miller*, 53 Iowa 154.

Kentucky. *Patterson v. Com.*, 86 Ky. 313; *McClernand v. Com.* (Ky.), 12 S. W. 148.

Missouri. *State v. Wright*, 141 Mo. 333; *State v. Walen*, 98 Mo. 222; *Gardiner v. State*, 14 Mo. 97.

North Carolina. *State v. Brewer*, 98 N. C. 607.

Oregon. *State v. Roberts*, 15 Ore. 187, 13 Pac. 896; *State v. Anderson*, 10 Ore. 448.

Texas. *White v. State*, 11 Tex. 769.

50—*State v. Whalen*, 98 Mo. 222.

51—*People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *Clark v. State* (Tex. Cr. App.), 59 S. W. 887.

52—*Lewis v. State* (Tex. Cr. App.), 59 S. W. 886.

ety of this holding is questionable.⁵³ The general instruction upon reasonable doubt which is usually given need not be repeated in each instruction which relates to the elements of the crime or the facts of the case.⁵⁴ An instruction that "defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and, in case of a reasonable doubt in your minds as to defendant's guilt, you will acquit him, and say by your verdict, 'Not guilty,' " is a sufficient application of the law of reasonable doubt to the different phases of the evidence; and it is not incumbent on the court to attach to each clause of his charge the law of reasonable doubt.⁵⁵ Where the court, at the conclusion of its charge, instructs on reasonable doubt, it is not necessary, when charging on a particular theory of the defense, to give, in immediate connection therewith, a charge on reasonable doubt.⁵⁶

§ 301. Statutory definitions.

If the term "reasonable doubt" is defined by statute, an instruction defining it in the exact language of the statute will be sufficient,⁵⁷ and will convey the meaning of the term better than a more labored effort to explain it.⁵⁸ So, if the court instructs substantially in the language of the statute, there can be no ground of complaint.⁵⁹

An instruction in the language of the statute, that, "if there be a reasonable doubt of the defendant being proven to be guilty he is entitled to an acquittal," is sufficient.⁶⁰

53—White v. State, 11 Tex. 769.

54—State v. Murdy, 81 Iowa 603; State v. Cross, 68 Iowa 180; State v. Hennessy, 55 Iowa 299. See also, City of Topeka v. Roberts, 92 Kan. 667, 141 Pac. 240.

55—Powell v. State, 28 Tex. App. 393; Robinson v. State (Tex. Cr. App.), 63 S. W. 869; Edens v. State, 41 Tex. Cr. App. 522; Tate v. State, 35 Tex. Cr. App. 231.

56—Ford v. State (Tex. Cr. App.), 56 S. W. 338.

57—Wigginton v. Com. (Ky.) 114 S. W. 1185; Ham v. State, 4 Tex. App. 645; Bland v. State, 4 Tex. App. 15; Chapman v. State, 3 Tex. App. 67; Massey v. State, 1 Tex. App. 564.

58—Massey v. State, 1 Tex. App. 564.

59—Bramlette v. State, 21 Tex. App. 611, 57 Am. Rep. 622.

60—Minniard v. Com., 158 Ky. 210.

§ 302. Defining as doubt founded on reason.

It has been held proper to define "reasonable doubt" as a "doubt founded upon some good reason,"⁶¹ and similar definitions have been sustained in a number of decisions.⁶²

Thus it has been held proper to define reasonable doubt as a doubt such "as a jury are able to give a reason for;"⁶³ "a doubt for which a reason could be given;"⁶⁴ "such a doubt that the reason for it can be examined and discussed,"⁶⁵ or to state that "the doubt must be a reasonable doubt, not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one which you could give a reason for."⁶⁶

In similar cases, instructions defining a reasonable doubt as one for which reasons based upon the evidence can be given have been approved,⁶⁷ and the rule expressed as follows: "A doubt for which some good reason, arising from the evidence, can be given;"⁶⁸ "a doubt for which a good reason can be given, which reason must be based on the evidence, or the want of evidence;"⁶⁹ "if the jury believe that the evidence, upon any essential point in the case, admits of any reasonable doubt, a doubt consistent with reason, the prisoner is entitled to the benefit of it."⁷⁰

61—State v. Harsted, 66 Wash. 158, 119 Pac. 24.

62—Florida. Wallace v. State, 41 Fla. 547.

Louisiana. State v. Jefferson, 43 La. Ann. 995.

Oklahoma. Moore v. State, 4 Okla. Cr. 212, 111 Pac. 822.

Oregon. State v. Morey, 25 Ore. 241, 35 Pac. 655; 36 Pac. 573.

Washington. State v. Harras, 25 Wash. 416, 65 Pac. 774.

Wisconsin. Butler v. State, 102 Wis. 364.

63—State v. Patton, 66 Kan. 486, 71 Pac. 840.

64—Hodge v. State, 97 Ala. 37, 38 Am. St. Rep. 145. It was held reversible error to refuse an instruc-

tion as to reasonable doubt in the words indicated. See also, People v. Guidici, 100 N. Y. 503; State v. Serensen, 7 S. D. 277.

65—State v. Rounds, 76 Me. 123.

66—Vann v. State, 83 Ga. 44.

67—Simmons v. State, 158 Ala. 8; People v. Del Cerro, 9 Cal. App. 764, 100 Pac. 887; United States v. King, 34 Fed. 302; United States v. Jackson, 29 Fed. 504; United States v. Johnson, 26 Fed. 682. See also, State v. Neel, 23 Utah 541, 65 Pac. 494.

68—People v. Guidici, 100 N. Y. 503; United States v. Johnson, 26 Fed. 682.

69—United States v. Jackson, 29 Fed. 504.

70—State v. Meyer, 58 Vt. 457.

So, it has been held that an instruction that a reasonable doubt is "a doubt arising out of the facts and circumstances of the case, in maintaining which you can give some good reason," although not strictly accurate, is not necessarily erroneous.⁷¹

It has also been held that a reasonable doubt cannot be said to be a "painful anxiety," as such doubt is a doubt founded in reason and one for which a good reason can be given—a strong, well-founded and substantial doubt, arising in and growing out of the evidence.⁷²

But in other cases such definitions have been condemned as erroneous.⁷³ In one of these decisions it is said that defining a doubt as one for which a reason can be given is erroneous, because every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt, in law.⁷⁴ And it has been said that an instruction defining a reasonable doubt as one that the jury are able to give a reason for is erroneous, as requiring jurors to give reasons for their conclusions.⁷⁵

So, it has been held error to instruct that a reasonable doubt is one for which there exists a reason which an ordinarily intelligent man could readily give, as such an instruction deprives a defendant of the presumption of innocence and shifts the burden of proof from the state to the defendant.⁷⁶

71—*People v. Stubenvoll*, 62 Mich. 329.

72—*State v. Ferguson*, 91 S. C. 235.

73—**Alabama.** *Bodine v. State*, 129 Ala. 106; *Thomas v. State*, 126 Ala. 4; *Avery v. State*, 124 Ala. 20; *Ray v. State*, 50 Ala. 104.

Arkansas. *Bennett v. State*, 95 Ark. 100.

Indiana. *Siberry v. State*, 133 Ind. 677.

Iowa. *State v. Lee*, 113 Iowa 348.

Mississippi. *Klyce v. State*, 73 Miss. 450.

Nebraska. *Blue v. State*, 86 Neb. 189; *Carr v. State*, 23 Neb. 749; *Cowan v. State*, 22 Neb. 519.

Ohio. *Morgan v. State*, 48 Ohio St. 371.

Oklahoma. *Gragg v. State*, 3 Okla. Cr. 409, 106 Pac. 350.

74—*Ray v. State*, 50 Ala. 104.

75—*Browder v. State*, — Okla. Cr. —, 144 Pac. 188.

76—*Harris v. State*, 10 Okla. Cr. 417, 137 Pac. 365.

Instructions to the jury "that if, after considering all of the evidence, they could give a reason, arising out of any reasonable aspect of the facts proven, for acquitting the defendant, then they should acquit him," and "that if, after considering all the evidence in the case, the mind of the jury is left in a state of confusion as to any fact necessary to constitute the defendant's guilt, then they must find him not guilty," are properly refused.⁷⁷

Definitions of reasonable doubt should not be risked on criminal trials, and the juror should be allowed to have his own conception of what a reasonable doubt is to him,—not the prosecutor or the court; and he should not be under any legal compulsion to have to give, or be able to formulate and state, the reason which may raise a reasonable doubt in his mind and conscience; but an instruction to the jury "that, while it is true that the state must make out its case beyond a reasonable doubt, yet it is also true that the doubt which should induce a jury to withhold a verdict of guilty must be a reasonable one,—must be a doubt for which a reason can be given,—which reasonable doubt arises out of all the evidence in the case or the want of evidence," will not work a reversal.⁷⁸

§ 303. Defining as a doubt which would cause a reasonable man to pause and hesitate in the graver transactions of life.

In a number of cases, reasonable doubt has been defined as "one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause;"⁷⁹ thus, an instruction that a reasonable

77—*Bodine v. State*, 129 Ala. 106.

78—*Klyce v. State*, 78 Miss. 450.

79—*Colorado*. *Minich v. People*, 8 Colo. 440, 9 Pac. 4.

Illinois. *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320; *Dunn v. People*, 109 Ill. 635; *Connaghan v. Peo-*

ple, 88 Ill. 460; *May v. People*, 60 Ill. 119; *Miller v. People*, 39 Ill. 457.

Iowa. *State v. Pierce*, 65 Iowa 89.

Nebraska. *Willis v. State*, 43 Neb. 102; *Carr v. State*, 23 Neb. 749.

Pennsylvania. *Com. v. Miller*, 139 Pa. St. 77, 23 Am. St. Rep. 170.

doubt is such a doubt as would cause a juror to hesitate and to refrain from acting if a grave business matter was involved, has been held proper.⁸⁰

And an instruction that "a reasonable doubt is such a doubt as would cause a reasonable and prudent man to pause and hesitate to act in the graver and more important affairs of life, but a reasonable doubt is not merely a possibility of innocence, nor a speculation as to the innocence of the defendant not arising out of the evidence in the case or the want of it," is not objectionable.⁸¹

In approving an instruction in this language, it was said by one court: "The language under consideration does not declare that the doubt, being defined, is one upon which a reasonable man would act. The jury are thereby informed that it is such a doubt as would cause a reasonable and prudent man to hesitate and pause. There is a vast difference between hesitating or pausing and acting. The doubt which leads a man to hesitate or pause may be very far from being such a doubt as would control his action; and we think that if, in the important transactions of life, a doubt arises in the mind of a reasonable and prudent man which would not lead him to hesitate, or to pause and consider of his future action, that doubt is not such a reasonable doubt as would justify the jury, in a criminal case, in returning a verdict of acquittal."⁸²

An instruction: "A reasonable doubt is such a doubt as exists in the mind of a reasonable man after a full, free, and careful examination and comparison of all the evidence. It must be such a doubt as would cause a careful, considerate, and prudent man to pause and consider before acting in the grave and most important affairs of life,"—is not objectionable as making the verdict of the jury depend upon a

South Dakota. State v. Raice, 24 S. D. 111.

80—State v. Dickey, 48 W. Va. 325.

81—State v. Ellison, — N. M. —, 144 Pac. 10.

82—Minich v. People, 8 Colo. 440, 9 Pac. 4.

mere preponderance of the evidence, and any attempt to define reasonable doubt will not escape criticism.⁸³

§ 304. Defining a doubt as one the absence of which would cause a reasonably prudent man to act in his own most important affairs.

It is a rule of evidence that "the jury should be persuaded of the guilt of the prisoner before they find him guilty to the same extent, and with the same certainty, that they would have in the transaction of their own most important concerns,—* * * the certainty men would require in their own most important concerns,"⁸⁴

And many decisions hold that instructions embodying this rule are correct and may properly be given.⁸⁵

Thus, it has been held proper to instruct that "Evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men of the truth of a proposition with such force that they would act upon that conviction, without hesitation, in their own most important affairs;"⁸⁶ that "if you are not, then,

83—State v. Crockett, 39 Ore. 76, 65 Pac. 447.

84—3 Greenl. Ev. (14th Ed.), § 29, note (a).

Starkie says: "A juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interests." Starkie, Ev. (9th Ed.), 865.

85—Indiana. Heyl v. State, 109 Ind. 589; Stout v. State, 90 Ind. 1; Jarrell v. State, 58 Ind. 293.

Iowa. State v. Schaffer, 74 Iowa 704; State v. Ostrander, 18 Iowa 435; Stet v. Nash, 7 Iowa 347.

Kansas. State v. Kearley, 26 Kan. 77.

Nebraska. Lawhead v. State, 46 Neb. 607; Carr v. State, 23 Neb. 749; Polin v. State, 14 Neb. 540.

Pennsylvania. Com. v. Miller, 139 Pa. St. 77, 23 Am. St. Rep. 170.

South Dakota. State v. Raice, 24 S. D. 111.

Wisconsin. Emery v. State, 92 Wis. 146; Anderson v. State, 41 Wis. 430. See State v. Neel, 23 Utah 541, 65 Pac. 494; State v. Dickey, 48 W. Va. 325.

Contra rule, see this section, *post*.

86—Jarrell v. State, 58 Ind. 293. An instruction in Stout v. State, 90 Ind. 1, almost identical with the above, was approved.

so satisfied and convinced of defendant's guilt that you would act upon that conviction in matters of highest importance to yourselves, you should give the defendant the benefit of your doubt, and acquit;"⁸⁷ or that "to exclude such doubt, the evidence must be such as to produce in the minds of prudent men such certainty that they would act on the conviction, without hesitation, in their own most important affairs."⁸⁸

The following instruction attempting to state this rule has been condemned as not sufficiently clear and intelligible: "The words 'reasonable doubt' mean what they imply; that is, that the doubt must be a reasonable one,—such a doubt as might exist in the mind of a man of ordinary prudence, when he was called upon to determine which of two courses he would pursue in a matter of grave importance to himself, when two courses are open to him, and the taking of one would lead to a different result from the taking of the other, and it would be impossible for him to determine as to which of the two results would be most advantageous to him."⁸⁹

Some decisions distinctly and unequivocally repudiate the rules stated in the preceding paragraph, at least so far as stating them to the jury in instructions is concerned.⁹⁰

The view taken by these decisions is that instructions of this nature deprive the defendant of the benefit of a reasonable doubt, by lessening the quantum of evidence necessary to a conviction, and that men frequently act in their

87—State v. Schaffer, 74 Iowa 704.

88—State v. Kearley, 26 Kan. 77.

89—State v. Bridges, 29 Kan. 138.

90—Alabama. Ray v. State, 50 Ala. 104.

California. People v. Wohlfrom (Cal.), 26 Pac. 236; People v. Bemmerly, 87 Cal. 117, 25 Pac. 266; People v. Brannon, 47 Cal. 96.

Dakota. Territory v. Bannigan, 1 Dak. 451.

Kentucky. Jane v. Com., 2 Metc. 30.

Missouri. State v. Crawford, 34 Mo. 200.

North Carolina. State v. Oscar, 52 N. C. 305.

most important affairs upon a mere preponderance of evidence.⁹¹

Thus it has been said: "It is a mistake to say that there cannot remain a reasonable doubt, when even the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance."⁹²

"Men frequently act in their own grave and important concerns without a firm conviction that the conclusion they act upon is correct; but, having deliberately weighed all the facts and circumstances known to them, they form a conclusion, upon which they proceed to act, although they may not be fully convinced of its correctness."⁹³

Accordingly, the following instructions have been disapproved and held reversible error: It is the jury's duty to convict if they are "satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of the jury in the important affairs of life;"⁹⁴ that the jury should convict if it be proven to their satisfaction "that there is that degree of certainty in the case that they would act on it in their own grave and important concerns;"⁹⁵ or that, "to exclude the rational doubt, the evidence should be such as that men of fair, ordinary capacity would act upon in matters of high importance to themselves."⁹⁶

There is also a class of cases in which instructions using the words "important affairs" have been sustained;⁹⁷ as that the jury, in order to render a verdict of guilty, must find the facts to be established to such a degree of certainty as they would regard as sufficient in the important affairs of life.⁹⁸

So the court may instruct that, "by 'reasonable doubt,'

91—*People v. Brannon*, 47 Cal. 96.

96—*State v. Oscar*, 52 N. C. 305.

92—*People v. Bemmerly*, 87 Cal. 117, 25 Pac. 266.

97—*United States v. Wright*, 16 Fed. 112.

93—*Jane v. Com.*, 2 Metc. (Ky.) 30.

98—*United States v. Wright*, 16 Fed. 112.

94—*People v. Brannon*, 47 Cal. 96.

95—*Jane v. Com.*, 2 Metc. (Ky.) 30.

I do not mean any fanciful conjecture or strained inference, but I mean such a doubt as a reasonable man would act upon, or decline to act upon, when his own concerns were involved,—a doubt for which a good reason can be given, which reason must be based on the evidence, or the want of evidence.”⁹⁹

But an instruction, after stating that accused is entitled to the benefit of a reasonable doubt, that “the doubt must not be a mere possible doubt, but it must be a doubt sustained by the evidence, upon a review of all the facts and circumstances of the case, such as a reasonable man would act upon in any of the important concerns of life,” is erroneous, as calculated to mislead.¹

And an instruction that a reasonable doubt is “such as you would be willing to act upon in more weighty and important matters relating to your own affairs,” if it stands alone, is questionable.²

These decisions, however, are clearly against the weight of authority. A larger number of decisions hold that such instructions are too narrow, and fall short of stating the rule.³

They hold that a juryman in a criminal case must use all the reason, prudence and judgment which a man would exercise in the “most important” affairs of life, and that an instruction authorizing the use of any less degree of reason, prudence and judgment is erroneous;⁴ that the certainty of guilt “must be such a certainty as would justify to the mind action, not only in matters of importance, but

99—United States v. Jackson, 29 Fed. 503.

1—Bray v. State, 41 Tex. 560.

2—State v. Neel, 23 Utah 541, 65 Pac. 494.

3—Florida. Jenkins v. State, 35 Fla. 737, 48 Am. St. Rep. 267.

Indiana. Bradley v. State, 31 Ind. 492.

Minnesota. State v. Shettleworth,

18 Minn. 208 (Gil. 191); State v. Dineen, 10 Minn. 407 (Gil. 325).

Pennsylvania. Com. v. Miller, 139 Pa. St. 77, 23 Am. St. Rep. 170.

Wisconsin. Emery v. State, 92 Wis. 146; Anderson v. State, 41 Wis. 430.

Wyoming. Palmerston v. Territory, 3 Wyo. 333, 23 Pac. 73.

4—Emery v. State, 92 Wis. 146.

in those involving the highest import, involving the dearest interests.”⁵

In accordance with these views, the following instructions have been condemned: “It is such a doubt as would influence and control you in your actions in any of the important business transactions of life.”⁶ “The proof is deemed sufficient when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act in an important affair of their own.”⁷

The following instructions have also been condemned, probably for the same reasons: “The jury must determine that fact according to the evidence, and just as they would determine any fact in their own private affairs.”⁸ “If the same quantity and quality of evidence offered here was offered to a reasonably careful business man, as to important business transactions, and it would induce him to act in his important business matters, there cannot be said to be a reasonable doubt.”⁹

§ 305. Absence of reasonable doubt as equivalent to “moral certainty,” or “reasonable and moral certainty.”

An instruction using the words “morally certain” as equivalent to “beyond a reasonable doubt” is not objectionable, the terms being legal equivalents.¹⁰ Absence of reasonable doubt has been declared to be “such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt,”¹¹ or as “that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that

5—Bradley v. State, 31 Ind. 492.

6—Com. v. Miller, 139 Pa. St. 77, 23 Am. St. Rep. 170.

7—Palmerston v. Territory, 3 Wyo. 333, 23 Pac. 73.

8—Territory v. Lopez, 3 N. M. (Gild.) 156, 2 Pac. 364; 3 N. M. (Johnson) 104, 2 Pac. 364.

9—State v. Shettleworth, 18 Minn. 208 (Gil. 191).

10—Stewart v. State, 88 Ark. 602; Hendrix v. United States, 2 Okla. Cr. 240, 101 Pac. 125; State v. Wapenstein, 67 Wash. 502, 121 Pac. 989.

11—Reg. v. Sterne, Surrey Sum. Ass. 1843, cited in 3 Greenl. Ev., § 29.

condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge.”¹²

Accordingly, it has been held proper to instruct that, “unless the evidence against the prisoner should be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offense imputed to him, they must find him [the defendant] not guilty,”¹³ or to state that, “A juror is understood to entertain a reasonable doubt when he has not an abiding conviction, to a moral certainty, that the party accused is guilty.”¹⁴

Instructions substantially the same as these have been upheld in a number of other cases,¹⁵ and their refusal held erroneous,¹⁶ although there is one case to the contrary.¹⁷

In some cases, instructions have been approved which are the same in substance as those just cited, except that they use the expression, “to a reasonable and moral certainty,” instead of “to a moral certainty.”¹⁸ It has accordingly been held proper to instruct that “a reasonable doubt arises when the evidence is not sufficient to satisfy the minds of the jury, to a moral or reasonable certainty, of

12—*Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711n.

13—*Riley v. State*, 88 Ala. 193.

14—*State v. Vansant*, 80 Mo. 72.

15—*Simmons v. State*, 158 Ala. 8; *Lowe v. State*, 88 Ala. 8; *McKleroy v. State*, 77 Ala. 95; *Coleman v. State*, 59 Ala. 52; *Turbeville v. State*, 40 Ala. 715; *People v. Padillia*, 42 Cal. 536. See also, *Gray v. State*, 42 Fla. 174.

16—*Williams v. State*, 52 Ala. 411.

17—In one case the court was asked to charge that the defendant could not be convicted unless the jury were satisfied by the evidence, to a moral certainty, that the defendant was guilty. The reviewing court sustained a refusal of this in-

struction, saying: “We know of no case by which a charge like the one asked has ever been recognized as a legal charge,—no once in which such a charge was ever before asked. Its very novelty was a sufficient reason for its refusal. It is a maxim of the law that ‘the old way is the safe way.’” *McAlpine v. State*, 47 Ala. 78. It will be seen from an examination of other Alabama cases cited in this section that this case is in direct conflict with them.

18—*Dunn v. People*, 109 Ill. 635; *Sullivan v. State*, 52 Ind. 309; *Com. v. Costley*, 118 Mass. 1; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711n.

the defendant's guilt,"¹⁹ but it is not proper, however, to instruct that "persons sometimes say they are morally certain of the existence of a fact or facts, but have not the evidence to prove it. This is the condition of mind one is in when convinced beyond a reasonable doubt."²⁰

An instruction that "a reasonable doubt is an impression, after a full comparison and consideration of all the evidence, that does not amount to a certainty that the charge against the accused is true," is vicious in that it imports that the jury cannot convict unless they reach a conclusion, amounting to a certainty, without any qualification whatever,—an absolute certainty,—that the charge against the accused is true, thus requiring an impossibility. There can be no such thing as absolute certainty. The jury may be convinced to a moral certainty, and hence those who have undertaken to define a reasonable doubt usually qualify the word "certainty" by employing the word "moral," or some equivalent word or phrase.²¹

§ 306. Absence of reasonable doubt as equivalent to an "abiding conviction to a moral certainty."

An instruction that, "by a reasonable doubt is meant a doubt based on reason, and which is reasonable in view of all the evidence; and if, after an impartial consideration and comparison of all the evidence in the case, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but, if, after such impartial consideration and comparison of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in more weighty and important matters relating to your own affairs, you have no reasonable doubt. It must be a real, substantial doubt, and not one that is merely possible or imaginary. It should come to the mind spontaneously,

19—Sullivan v. State, 52 Ind. 309.

21—State v. Powers, 59 S. C. 200.

20—Heldt v. State, 20 Neb. 492,
57 Am. Rep. 835n.

and should fairly, naturally, and reasonably arise out of the evidence as given in the case," is not erroneous.²²

It has also been held proper to instruct that "a juror is understood to entertain a reasonable doubt when he has not an abiding conviction, to a moral certainty, that the party accused is guilty as charged,"²³ or to instruct that the state of mind excluding a reasonable doubt "is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."²⁴

And an instruction that "if, after a careful comparison of the evidence and a full consideration of the whole case, your minds are brought to an abiding conviction beyond a reasonable doubt," etc., is not faulty for failure to use the words "to a moral certainty,"²⁵ as the instruction requires and implies moral certainty. On the other hand, it has been held proper to state to the jury the converse of this proposition,—“that if, after a careful consideration and examination of all the evidence in the case, they still have an abiding confidence, to a moral certainty, that the defendant is guilty, this is sufficient to authorize them to find him guilty.”²⁶

§ 307. Defining as "satisfaction" of guilt.

In a number of cases it has been held that an instruction that a reasonable doubt is one that must "satisfy" a reasonable mind, is error.²⁷

An instruction that "if there is one single fact proved to the satisfaction of the jury which is inconsistent with de-

22—State v. Neel, 23 Utah 541, 65 Pac. 494.

23—State v. Vansant, 80 Mo. 67.

24—Com. v. Webster, 5 Cush. (Mass.) 295; State v. McCune, 16 Utah 170, 51 Pac. 818.

25—State v. Van Tassel, 103 Iowa 6.

26—McKee v. State, 82 Ala. 32.

27—Vasquez v. State, 54 Fla. 127, 127 Am. St. Rep. 129; Sims v. State, 54 Fla. 100; Wood v. State, 31 Fla. 221. See also, Smith v. State, 17 Wyo. 481, 101 Pac. 847.

fendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit," is properly refused, as invasive of the province of the jury, and also as misleading.²⁸

To instruct that an accused need not be proved guilty beyond a possibility of doubt, is proper,²⁹ and where the court has instructed that the jury must find from the evidence beyond a reasonable doubt that the defendant committed the crime, an instruction as to the evidence, satisfying the jury but omitting the words "of the existence of facts necessary to be established to constitute the offense," is not erroneous.³⁰

In California it is settled law that a conviction cannot be had unless the jury are "entirely satisfied" of defendant's guilt;³¹ and it has accordingly been held reversible error in that jurisdiction to give the following instructions: "You are not legally bound to acquit him [the defendant] because you may not be entirely satisfied that the defendant and no other person committed the alleged offense."³² "All that is necessary in order to justify the jury in finding the defendant guilty is that they shall be satisfied from the evidence of the defendant's guilt to a moral certainty, and beyond a reasonable doubt, although they may not be entirely satisfied from the evidence that the defendant and no other person committed the alleged offense."³³

The court, in condemning this latter instruction, said in one of these cases that this instruction, "in effect, assigns a lower grade to moral certainty beyond a reasonable doubt than is given to it by the law, and permits the jury to convict without being entirely satisfied that the defendant is guilty of the offense charged. When the jury are satisfied to a moral certainty and beyond a reasonable doubt, they

28—Ex parte Davis, 184 Ala. 26.

29—People v. Depew, 237 Ill. 574.

30—State v. Ingraham, 118 Minn.

13.

31—People v. Phipps, 39 Cal. 326, overruling People v. Cronin, 34 Cal.

191. See also, other California decisions cited in this section.

32—People v. Brown, 59 Cal. 345.

33—People v. Kerrick, 52 Cal. 446; People v. Padillia, 42 Cal. 535; People v. Phipps, 39 Cal. 326.

are entirely satisfied. The truth of any fact which is to be proven by evidence cannot be established beyond the possibility of a doubt, and yet the jury may be entirely satisfied of its truth. Anything short of entire satisfaction on the part of the jury of the truth of the charge necessarily implies, in case of a conviction, that, in their opinion, the charge is sustained by a mere preponderance of evidence," which is not sufficient for a conviction.³⁴

An instruction: "But if, upon a full and fair consideration of all the evidence in the case, you are fairly and clearly satisfied that the defendant committed the crime charged against him, you should find him guilty by your verdict, notwithstanding the proof of his good character,"—sufficiently conveys the idea that the jury must be "entirely satisfied of the defendant's guilt."³⁵

In Nevada, a different view of the law is taken, and it has been held proper to instruct the jury that they "must be satisfied, from the evidence, of the guilt of the defendant, beyond a reasonable doubt, before the jury can legally find him guilty of the crime charged against him; but in order to justify the jury in finding the defendant guilty of said crime, it is not necessary that the jury should be satisfied, from the evidence, of his guilt, beyond the possibility of a doubt. All that is necessary in order to justify the jury in finding the defendant guilty is that they shall be satisfied, from the evidence, of the defendant's guilt, to a moral certainty and beyond a reasonable doubt, although it may not be entirely proven that the defendant, and no other or different person, committed the alleged offense. And if the jury are satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the crime charged against him, they are not legally bound to acquit him because they may not be entirely satisfied that the defendant,

34—*People v. Padillia*, 42 Cal. 535.

35—*People v. Ribolsi*, 89 Cal. 492,

26 Pac. 1082.

and no other person, committed the alleged offense.”³⁶ In sustaining this instruction it was said: “If a man believes that a defendant may possibly be innocent, he cannot be said to be ‘entirely satisfied’ of his guilt, and yet he may be satisfied of it beyond a reasonable doubt, and may convict.”³⁷

§ 308. Probability of innocence may create reasonable doubt.

It is apparent that a probability of innocence will create a reasonable doubt of defendant’s guilt; hence it will be error to refuse an instruction that “a probability of the defendant’s innocence is a just foundation for a reasonable doubt of his guilt, and therefore for his acquittal;”³⁸ or that, “if there is a probability of defendant’s innocence,” the jury must acquit.³⁹

So, an instruction that the jury are not at liberty to go outside of the evidence in the case to find a reason for doubting the guilt or innocence of the defendant, is not objectionable as erroneous to instruct that “a reasonable doubt is not probability only, or conjecture, or supposition. The doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the testimony before them.”⁴⁰

It is proper to instruct not to acquit because it is possible that the defendant is innocent.⁴¹

It has been noted in a prior section that the giving of

36—State v. Bryan, 19 Nev. 365, 11 Pac. 317; State v. Nelson, 11 Nev. 334, following People v. Cronin, 34 Cal. 191, which was afterwards overruled.

37—State v. Nelson, 11 Nev. 334.

38—Cohen v. State, 50 Ala. 108; Bain v. State, 74 Ala. 38, overruling Williams v. State, 52 Ala. 411, and distinguishing Ray v. State, 50 Ala. 104, where a charge in the same

language, prefixed by the assertion that “a reasonable doubt has been defined to be a doubt for which a reason could be given,” was held erroneous because it defined a reasonable doubt as one for which a reason can be given.

39—Shaw v. State, 125 Ala. 80.

40—Browning v. State, 30 Miss. 656.

41—People v. Depew, 237 Ill. 574.

sufficient instructions as to reasonable doubt renders unnecessary instructions as to the presumption of innocence.⁴²

§ 309. Negative definitions of reasonable doubt.

While definitions of reasonable doubt of a negative nature are frequently given, and have been approved in a number of cases,⁴³ such definitions may, from their wording, be erroneous. Accordingly, an instruction that, "a reasonable doubt is not probability only, or conjecture, or supposition. The doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the testimony before them," has been held erroneous, as imposing on the jury the obligation to convict, although the evidence might preponderate in favor of the accused.⁴⁴

An instruction that, "if the jury believe from the evidence that the defendant is guilty as charged in the indictment, beyond a reasonable doubt, they must not acquit him because there may be a mere probability of the defendant's innocence, unless such probability be a reasonable probability from all the evidence," is erroneous because of the incompatibility between belief in defendant's guilt beyond a reasonable doubt and probability of his innocence.⁴⁵

An instruction to the jury that, "while it is true they are not authorized to convict unless, from all the evidence, they believe, beyond every reasonable doubt, that defendant is guilty, still this does not mean that they must know he is guilty, for mathematical certainty is not required in any case; but if they, from a full and fair comparison of all the evidence in the case, believe he is guilty, then this is sufficient, and you should convict him," is incurably erroneous. The conclusion deduced from the attempted definition of "reasonable doubt" is that it is a mere matter of belief.⁴⁶

42—See § 309, *ante*.

45—Smith v. State, 92 Ala. 30.

43—See this section, *post*.

46—Jeffries v. State, 77 Miss. 757.

44—Browning v. State, 30 Miss.

It has also been held error to give an instruction stating that, "it is not a reasonable doubt, which may be raised by conjecturing something for which there is no foundation nor suggestion in the evidence adduced."⁴⁷

An instruction that "the state is not required to prove defendant's guilt beyond all doubt, but only to prove guilt beyond a reasonable doubt," is not ambiguous or misleading;⁴⁸ and it has been held proper to instruct that: "The doubt * * * must be real, not captious or imaginary."⁴⁹ "A serious, substantial and well-founded doubt, and not the mere possibility of a doubt."⁵⁰ Not "a doubt generated by sympathy for the accused."⁵¹ Not "a doubt produced by undue sensibility in the mind of any juror, in view of the consequences of his verdict."⁵² "Not a vague or uncertain doubt."⁵³ "Not a mere possible doubt, nor is it a captious or imaginary doubt."⁵⁴ A "real and substantial, and not an imaginary or speculative, doubt."⁵⁵ Not a "fanciful conjecture or strained inference."⁵⁶ "Not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon reason and common sense, and growing

47—*Densmore v. State*, 67 Ind. 306, 33 Am. Rep. 96, in which the reason assigned was that this definition excludes all reasonable doubts arising from lack or want of evidence.

48—*Littleton v. State*, 128 Ala. 31.

49—*State v. Ostrander*, 18 Iowa 437; *People v. Finley*, 38 Mich. 482. But see, *State v. Swain*, 68 Mo. 605; *Smith v. State*, 9 Tex. App. 150, in which the use of these words is condemned. The Missouri court, in passing on this question, said: "It is better to adhere to well-settled instructions than to attempt new departures and experiments in criminal procedure."

50—*Minich v. People*, 8 Colo. 454;

Smith v. People, 74 Ill. 144; *Earll v. People*, 73 Ill. 334; *Kennedy v. People*, 40 Ill. 488.

51—*State v. Robinson*, 27 S. C. 615.

52—*Watt v. People*, 126 Ill. 9, 1 L. R. A. 403; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320n; *State v. Potts*, 20 Nev. 389, 22 Pac. 754.

53—*State v. Dickey*, 48 W. Va. 325.

54—*People v. Dewey*, 2 Idaho 79. See also, *Knight v. State*, 160 Ala. 58. Where a similar instruction was criticized as argumentative.

55—*United States v. Keller*, 19 Fed. 633.

56—*United States v. Jackson*, 29 Fed. 503.

out of the testimony in the case.”⁵⁷ “Not a mere guess—a mere surmise—that one may not be guilty of what is charged.”⁵⁸ Not “a mere misgiving of the imagination, suggestion of ingenuity, or sophistry, or misplaced sympathy.”⁵⁹ “Not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt.”⁶⁰ “Not a possible doubt, not a conjectured doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs, and depending upon moral evidence, is open to conjectural or imaginary doubt, and because absolute certainty is not required by law.”⁶¹ “The doubt which requires an acquittal must be actual and substantial, not mere possibility or speculation. It is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt.”⁶² “That which amounts to mere possibility only, or to conjecture or supposition, is not what is meant by a reasonable doubt.”⁶³ It “should grow out of the evidence in the case, and not be merely speculative, conjectural, or imaginary.”⁶⁴ “A substantial doubt of defendant’s guilt, with a view to all the evidence in the case, and not a mere possibility of defendant’s innocence.”⁶⁵ “A real, substantial, well-founded doubt, arising out of the evidence in the cause, and not a mere possibility that the defendant is inno-

57—*People v. Del Cerro*, 9 Cal. App. 764, 100 Pac. 887; *State v. McCune*, 16 Utah 170, 51 Pac. 1089.

58—*United States v. Johnson*, 26 Fed. 682.

59—*State v. Murphy*, 6 Ala. 846.

60—Charge of Chief Justice Shaw in *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711n.

61—*Dunn v. People*, 109 Ill. 635.

62—*Little v. State*, 89 Ala. 99.

63—*Cicely v. State*, 13 Smedes & M. (Miss.) 202.

64—*State v. Krug*, 12 Wash. 288, 41 Pac. 126.

65—*State v. David*, 131 Mo. 380. To the same effect, see *State v. Fisher*, 162 Mo. 169; *State v. Adair*, 160 Mo. 391; *State v. Cushenberry*, 157 Mo. 168; *State v. Holloway*, 156 Mo. 222; *State v. Duncan*, 142 Mo. 456.

cent.”⁶⁶ “Not a far-fetched one [doubt]; it is not a speculative one; it is not an arbitrary one; but it is just what it assumes to be,—a reasonable doubt.”⁶⁷ Not “a doubt suggested by the ingenuity of counsel, or by your own ingenuity, not legitimately warranted by the testimony, or one born of a merciful inclination or disposition to permit the defendant to escape the penalty of the law, or one prompted by sympathy for him, or those connected with him.”⁶⁸

It is proper to instruct that the “mere possibility that the defendant may be innocent will not warrant a verdict of not guilty,”⁶⁹ or that, though “the defendant is entitled to the benefit of any doubts they [the jury] might entertain of his guilt, they must be reasonable doubts, not ‘a may be so,’ or ‘a might be so;’ ”⁷⁰ or that they “should not go beyond the evidence to hunt for doubts, nor * * * entertain such doubts as are merely chimerical, or based on groundless conjecture.”⁷¹

An instruction, in defining reasonable doubt, that the jury “should not create sources of material doubt by resorting to trivial or fanciful suppositions or remote conjectures as to a probable state of facts differing from that established from the evidence,” is not erroneous as impliedly authorizing the jury to create such doubt in that manner, provided “the probable state of facts” did not differ from that established by the evidence.⁷²

So it has been held proper to instruct that, “if there be any reasonable hypothesis,—not a mere possible one,—any reasonable hypothesis upon which the conduct of the defendant can be explained consistently with his innocence,” this should create a reasonable doubt. This charge is not objectionable on the ground that it assumes the guilt of the

66—State v. Blunt, 91 Mo. 503.

70—Giles v. State, 6 Ga. 276.

67—McGuire v. People, 44 Mich. 286, 38 Am. Rep. 265.

71—See State v. Elsham, 70 Iowa 531; State v. Pierce, 65 Iowa 89.

68—United States v. Harper, 33 Fed. 471.

72—McArthur v. State, 60 Neb. 390.

69—See State v. Vansant, 80 Mo. 67.

defendant, and imposes on him the burden of proof to show that his conduct was reasonable and proper, and that he did not commit the crime he is charged with, instead of being upon the prosecution to show that all his acts and conduct have been inconsistent with his innocence.⁷³

§ 310. Reasonable doubt not raised by argument of counsel—Not a doubt as to law.

The court cannot submit a case to the jury upon the relative strength of the arguments of the respective counsel, and it is proper to refuse an instruction or to strike out a clause giving the defendant the benefit of any doubt created by argument of counsel, as it renders the rule as to reasonable doubt doubtful of comprehension.⁷⁴

In those jurisdictions where juries are judges of the law in criminal cases, it is held that the reasonable doubt which entitles the defendant to an acquittal is not a doubt as to the law.⁷⁵

It has accordingly been held proper to refuse an instruction "that, if they entertained a doubt as to the law, the prisoner is just as much entitled to the benefit of those doubts as if they applied to the facts; that if they entertain a reasonable doubt as to whether the evidence is applicable to the law as given them in charge, the prisoner is entitled to the benefit of that doubt, and it would be their duty to acquit."⁷⁶ Or that, "if the jury entertain the slightest doubt upon the questions of law presented by the court, the prisoner is entitled to the benefit of such doubt, and in no instance are they permitted to apply any rule of law more prejudicial to the prisoner than that laid down by the court."⁷⁷

73—*People v. Winters*, 93 Cal. 277, 28 Pac. 946.

74—*People v. Ammerman*, 118 Cal. 23, 50 Pac. 15. See also, *Horton v. Com.*, 99 Va. 848.

75—*Oneil v. State*, 48 Ga. 66; *State v. Meyer*, 58 Vt. 457.

76—*Oneil v. State*, 48 Ga. 66.

77—*State v. Meyer*, 58 Vt. 457.

§ 311. Reasonable doubt as doubt arising from the evidence or want of evidence.

Ordinarily, it is proper to instruct that a reasonable doubt must arise from the evidence,⁷⁸ or "from the evidence or the want of evidence,"⁷⁹ and an instruction containing a different statement is properly refused;⁸⁰ but an instruction merely defining reasonable doubt cannot be objected to as making no reference to the evidence.⁸¹

In one case it was said that a party who desires an instruction that reasonable doubt may arise from "want of evidence" should ordinarily ask it,⁸² and where the jury are fully and correctly instructed on the law as to a defendant's statement, and as to reasonable doubt, the omission to charge that such doubt may grow out of the statement is not error.⁸³

The following instructions on this head have been approved: "The doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the evidence before them."⁸⁴ "An actual, substantial doubt, arising from the evidence or the want of evidence."⁸⁵ "An actual, substantial doubt of guilt arising from the evidence or want of evidence in the case."⁸⁶ "A reasonable doubt means, in law, a serious, substantial, and well-founded doubt, and not the mere possibility of a doubt, and the jury have no right to go outside of the evidence to search for or hunt up doubts, in order to

78—*Simmons v. State*, 158 Ala. 8; *Bowler v. State*, 41 Miss. 570; *Cicely v. State*, 13 Smedes & M. (Miss.) 202.

79—*Earl v. People*, 73 Ill. 329; *Langford v. State*, 32 Neb. 782; *State v. Raice*, 24 S. D. 111; *United States v. Jones*, 31 Fed. 718.

80—Reasonable doubt warranting an acquittal arises from the evidence, or the lack of evidence, and an instruction containing a different

statement is properly refused. *People v. Zajicek*, 233 Ill. 198.

81—*State v. Gunnoe*, — W. Va. —, 83 S. E. 64.

82—*Herman v. State*, 75 Miss. 340.

83—*Everett v. State*, 15 Ga. App. 390.

84—*Cicely v. State*, 13 Smedes & M. (Miss.) 202.

85—*Langford v. State*, 32 Neb. 782.

86—*Ferguson v. State*, 52 Neb. 432, 66 Am. St. Rep. 512.

acquit defendant, not arising from the evidence or want of evidence."⁸⁷

In a misdemeanor case, a statement that a reasonable doubt "is an actual substantial doubt arising either from the evidence or want of evidence in the case," is not erroneous.⁸⁸ And an instruction "that the defendant is presumed to be innocent, and it devolves upon the state to prove his guilt beyond a reasonable doubt, and, unless the state has established the guilt of the defendant, as charged in the indictment, to your satisfaction beyond a reasonable doubt, you should give the defendant the benefit of such doubt, and return a verdict of not guilty; but such a doubt, to authorize an acquittal on that ground alone, should be a substantial doubt of guilt arising from the evidence in the case, and not a mere possibility of innocence,"—is not objectionable on the ground that it does not allow an acquittal on account of any reasonable doubt arising excluding a doubt founded upon the knowledge of natural laws inconsistent with the hypothesis of guilt contended for by the prosecution, when there is nothing in the record to indicate that the prosecution contended for any hypothesis inconsistent with natural law, or that evidence of any natural law would have been relevant or material.⁸⁹

The use of the words "must be based on the evidence or sprung up from the evidence" is not subject to criticism on the ground that it excludes a doubt based on a deficiency of the evidence,⁹⁰ and an instruction defining a reasonable doubt, and stating that "a doubt, to justify an acquittal, must be reasonable and arise from a candid and impartial consideration of all the evidence in the case," is not erro-

87—*Earll v. People*, 73 Ill. 329.

88—*Goemann v. State*, 94 Neb. 582.

89—*People v. Donguli*, 92 Cal. 607, 28 Pac. 782.

90—*Staton v. State*, 8 Ala. App. 221; *Hedger v. State*, 144 Wis. 279.

Contra, in one case it was held error to instruct that "a reasonable

doubt is one suggested by, or arising out of, the proof made," on the ground that such instruction excluded all reasonable doubt that might arise from lack of evidence or want of evidence. *Densmore v. State*, 67 Ind. 306, 33 Am. Rep. 96.

neous as preventing the doubt from arising from a want of evidence.⁹¹

An instruction in a murder case, to consider all the evidence and to acquit if there is a reasonable doubt of guilt, does not have the effect of excluding such doubt when raised by the testimony of the defendant himself.⁹²

Where there is positive testimony that the offense charged was committed, and also testimony to the contrary, it is not error to instruct that, "if you have a reasonable doubt of the guilt of defendant from the evidence, you will acquit," as in such a case the doubt must be engendered by the testimony, and not by a want of evidence.⁹³

It has been held improper to instruct that the evidence "includes not only the sworn testimony of the witnesses who have testified, but all the circumstances surrounding the tragedy;"⁹⁴ or that "reasonable doubts usually arise from either want of evidence, or where there was a conflict of evidence," in a case where the question of the doubt did not arise from either of these causes, but turned solely upon the internal credibility of an explanation which the defendant had given of the circumstances against him, when they were first brought to his notice.⁹⁵

It is proper to refuse a request that the jury should know to a moral certainty that they have all the facts before them before they can convict, and that if they feel, after considering the evidence, that some important matter of proof has been omitted, and their minds were not satisfied, this was a reasonable doubt, upon which they should acquit.⁹⁶

An instruction informing the jury as to the law, if they find certain facts beyond a reasonable doubt, without suggesting the weight to be given the testimony as proving any fact, is erroneous.⁹⁷

91—*Moore v. State*, 4 Okla. Cr. 212, 111 Pac. 822.

92—*People v. Curtright*, 258 Ill. 430.

93—*Whitesides v. State*, 42 Tex. Cr. App. 151.

94—*Long v. State*, 23 Neb. 33.

95—*McElven v. State*, 30 Ga. 869.

96—*Gray v. State*, 42 Fla. 174.

97—*Bedford v. State*, — Tex. Cr. App. —, 170 S. W. 727.

§ 312. Doctrine applicable only to evidence considered as a whole.

The reasonable doubt which will justify and require an acquittal of an accused must not be as to any particular fact in the case, but when the evidence as a whole is considered,⁹⁸ and an instruction which does not require the reasonable doubt which will justify acquittal to "arise from a consideration of all of the evidence in the case," or words of similar import, is not in the best form.⁹⁹

An instruction requiring an acquittal upon a reasonable doubt resting upon a part of the evidence, considered separately from the whole evidence, is properly refused.¹ According to the weight of authority, it will be sufficient to charge that the jury should acquit if, upon the whole evidence, they have a reasonable doubt of defendant's guilt. It is not necessary to charge that the jury must be satisfied beyond a reasonable doubt of each material fact before they can convict. The former instruction includes the latter, and is a sufficient direction that each material fact must be established beyond a reasonable doubt, while the latter is objectionable as singling out some particular fact for the consideration of the jury, and as diverting their attention from a consideration of the evidence, taken as a whole.²

98—*Barker v. State*, 126 Ala. 69; *Weaver v. People*, 132 Ill. 536; *Crews v. People*, 120 Ill. 317; *Davis v. People*, 114 Ill. 98; *State v. Hennessy*, 55 Iowa 299; *State v. Hayden*, 45 Iowa 11; *McCullough v. State*, 23 Tex. App. 626. See also, *Bodine v. State*, 129 Ala. 106; *State v. Trapp*, 56 Ore. 588, 109 Pac. 1094; *Smith v. State*, 17 Wyo. 481, 101 Pac. 847.

99—*State v. Christian*, 253 Mo. 382.

1—*Liner v. State*, 124 Ala. 1.

2—**Alabama.** *Barker v. State*, 126 Ala. 69.

California. *People v. Milgate*, 5 Cal. 127.

Georgia. *Nix v. State*, 97 Ga. 211; *Carr v. State*, 84 Ga. 250.

Illinois. *Lyons v. People*, 137 Ill. 602; *Weaver v. People*, 132 Ill. 536.

Iowa. *State v. Perigo*, 80 Iowa 37; *State v. Schaffer*, 74 Iowa 704; *State v. Stewart*, 52 Iowa 284; *State v. Curran*, 51 Iowa 112; *State v. Hayden*, 45 Iowa 11; *State v. Maloy*, 44 Iowa 104; *State v. Felter*, 32 Iowa 39.

Kentucky. *Jolly v. Com.*, 22 Ky. L. Rep. 1622.

Missouri. *State v. Crawford*, 34 Mo. 200; *State v. Schoenwald*, 31 Mo. 155; *State v. Dunn*, 18 Mo. 419.

In a prosecution for larceny, it is proper to refuse to instruct that "the jury cannot convict unless they believe from the evidence, beyond a reasonable doubt, that the defendant had in his possession the identical money" stolen from the prosecuting witness, as such possession is not necessarily an ingredient of the offense, and it is not required that the jury must believe, beyond a reasonable doubt, every fact introduced in evidence.³

It is also proper to refuse an instruction that, "if they [the jury] have any reasonable doubt as to whether defendant, at the time of the shooting, was under reasonable apprehension and honest fear that deceased intended and was about to inflict upon him great bodily harm, and that he fired the shots under that belief, and in self-defense, then the jury must acquit;"⁴ that, "if you have any reasonable doubt as to whether the declarations were made at the time when R. felt that death was impending and certain to follow almost immediately, and after he had despaired of life, or whether his declarations have been detailed to you by witnesses substantially as they were made, you should give the defendant the benefit of the doubt;"⁵ or that, "if the jury have a reasonable doubt whether the circumstances were such as to impress the mind of a reasonable man that he was in great danger of great bodily harm at the time of the

New Jersey. *Acker v. State*, 52 N. J. L. 259.

Texas. *Thurmond v. State*, 27 Tex. App. 347; *McCullough v. State*, 23 Tex. App. 626.

United States. *United States v. Zes Cloya*, 35 Fed. 493.

In *Jolly v. Com.*, 22 Ky. L. Rep. 1622, it was said that while an instruction that, "if the jury entertain a reasonable doubt as to any facts necessary to constitute defendant's guilt, they must acquit him," may not be misleading,

it would be better to charge, in the language of the statute, that, "if there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal."

"It is not incumbent upon the court to carve the case or the evidence into different propositions, and apply the rule to one or more of them severally." *Carr v. State*, 84 Ga. 250.

3—*Barker v. State*, 126 Ala. 69.

4—*Crews v. People*, 120 Ill. 317.

5—*Leigh v. People*, 113 Ill. 372.

killing, they must give the prisoner the benefit of the doubt, and acquit him.”⁶

A charge to the jury that “if they have a reasonable doubt as to the defendant’s guilt, arising out of any part of the evidence, then they must acquit the defendant,” pretermits all reference to a consideration of the whole evidence by the jury, and is misleading.⁷

An instruction to find an accused guilty if the jury were convinced beyond a reasonable doubt, “regardless of what you may think of any of the People’s witnesses,” is erroneous as misleading, and because it does not state that the jury are to be convinced “from the evidence.”⁸

Where an indictment charges, in four different counts, four different degrees of a crime, it is not error to refuse to charge “that, if you are reasonably doubtful as to the proof in this case of any material allegation of the indictment, you must acquit the defendant,” as the jury in such case could not convict unless they believed the averments of all the counts, although they contain different and inconsistent material averments,—a condition the office of separate counts in an indictment was designated, among other things, to prevent.⁹

Where the court charges “that, upon all the evidence in the case, the jury must be satisfied, beyond a reasonable doubt, of the defendant’s guilt,” and that it is not necessary that they should find defendant’s evidence as to commission of the crime by a third person “true beyond a reasonable doubt, but that they should consider it in connection with the rest of the testimony upon the general question as to his guilt,” it is not error to omit to charge “that it was not necessary to the defendant’s defense that the jury be convinced that the third person committed the crime, and that their failure to believe his evidence regarding the third

6—Allen v. State, 60 Ala. 19.

8—People v. Gray, 251 Ill. 431.

7—Gordon v. State, 129 Ala. 113.

9—Littleton v. State, 128 Ala. 31.

See also, Bodine v. State, 129 Ala. 106.

person would bear only upon his credit as a witness generally, and that it would be sufficient if that evidence raised a reasonable doubt in their minds as to the defendant's guilt."¹⁰

An instruction that doubt must be real, arise naturally and not be sought for, has been held not to preclude an examination of the evidence when taken as a whole.¹¹ So, instructions "that they should weigh all the evidence and reconcile it, if possible, but, if there be irreconcilable conflict in the evidence, they ought to take that evidence which they think worthy of credit, and give it just such weight as they think it entitled to," and, "in weighing the evidence, each piece and all the evidence should be weighed with all the other evidence, and you should make up your verdict from due consideration of the whole of the evidence. If the jury, after considering all the evidence, have a reasonable doubt of defendant's guilt, arising out of any part of the evidence, they should find him not guilty. But this does not mean that you have got to find every single item of testimony to be true before you can convict. If, after weighing all the evidence, you have a reasonable doubt as to any of the elements which constitute any offense charged in this indictment, then you are bound to acquit. It does not mean that you have got to believe every word of the testimony in order to convict,"—are proper.¹²

An instruction that the rule requiring the jury to be satisfied of defendant's guilt beyond a reasonable doubt "does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the evidence all together, the jury are satisfied, beyond a reasonable doubt, that defendant is guilty,"—is not erroneous.¹³

10—State v. Totten, 72 Vt. 73.

12—Bondurant v. State, 125 Ala.

11—People v. Buettner, 233 Ill. 31.

272, 13 Ann. Cas. 235.

13—Gott v. People, 187 Ill. 249.

§ 313. Same—Contrary view.

There are, however, a number of decisions in which it has been held erroneous to refuse to instruct that a reasonable doubt as to a particular fact essential to constitute guilt authorizes an acquittal. Thus, a number of decisions hold it proper and necessary, on request, to give an instruction applying the doctrine of reasonable doubt to the defense of alibi.¹⁴ So, in one case it was held erroneous to refuse an instruction that "if the jury are not satisfied, beyond a reasonable doubt, that the accused knew that the goods were stolen, he is entitled to an acquittal."¹⁵

The court should not select each fact constituting the offense, and instruct the jury that if they have a reasonable doubt as to that fact, they should acquit. It is enough to tell the jury that if, upon the whole case, they have a reasonable doubt of the guilt of the accused, he should be acquitted.¹⁶

§ 314. Instructions as to number of jurors who must entertain a reasonable doubt in order to acquit.

An acquittal or conviction of an accused can only be had where all the jury agree, and while a reasonable doubt in the minds of one or more jurors may authorize a disagreement or mistrial, the majority, or even a minority of the jurors are not required to adopt the views of a juror or jurors who have a reasonable doubt of the guilt of the defendant.¹⁷

An instruction that "if any member of the jury has a reasonable doubt of the guilt of a defendant, the jury will give the benefit of the doubt to the defendant and not return a verdict of guilty," is misleading in its tendency,¹⁸

14—See § 326, *post*.

15—Com. v. Leonard, 140 Mass. 473, 54 Am. Rep. 485.

16—State v. Dunn, 18 Mo. 419.

17—See Littleton v. State, 128 Ala. 31; State v. Witt, 34 Kan. 488, 8 Pac. 769.

"Each juror, under his oath, must vote according to his own conviction, and the doubt with which he has to do is the doubt in his own mind." State v. Sloan, 55 Iowa 217.

18—Turner v. State, 160 Ala. 40. And see, Troup v. State, 160 Ala. 125.

and it is error to instruct that "if any one of the jury entertain a reasonable doubt as to the sufficiency of the proof to establish any material averment in the indictment, you must give the defendant the benefit of the doubt, and acquit the defendant." ¹⁹

An instruction that if any one of the jurors, after having duly considered all the evidence, and after having consulted with his fellow-jurymen, should entertain a reasonable doubt of the defendant's guilt, in such case they cannot find the defendant guilty, has been held improper, as authorizing an acquittal in case a single juror entertained a doubt of defendant's guilt. ²⁰

It is not the duty of the court to address its instructions to each one of the jurors as individuals, and therefore, if the court has instructed on reasonable doubt generally, it is proper to refuse to instruct that "the law requires that no man shall be convicted of a crime until each and every one of the jury is satisfied by the evidence in the case, to the exclusion of all reasonable doubt, that the defendant is guilty as charged; * * * or, if any one of the jury, after having fully considered all of the evidence, and after having consulted with his fellow jurymen, and candidly considered their views with the purpose of reaching a just conclusion, should entertain such reasonable doubt, the jury cannot, in such case, find the defendant guilty." ²¹

In one case, an instruction that "a reasonable doubt is such a doubt as fairly and naturally arises in the minds of the whole jury, after fully and carefully weighing and considering all the evidence which has been introduced," ²² was condemned on the ground that it was liable to convey

19—State v. Rorabacher, 19 Iowa 155. An instruction the same in substance was condemned for the same reason in State v. Witt, 34 Kan. 488, 8 Pac. 769. See also, Littleton v. State, 128 Ala. 31.

20—State v. Taylor, 134 Mo. 109. See also, Reaves v. State, 158 Ala. 5.

21—State v. Cushing, 17 Wash. 544, 50 Pac. 512.

22—State v. Stewart, 52 Iowa 284. An instruction the same in substance and almost identical in language was held to have been properly refused in State v. Sloan, 55 Iowa 217, for the same reason.

the impression that, unless such doubt was shared by all the jurors, there should be a conviction.²³

The following instruction was condemned for the same reason: "While each juror must be satisfied of the defendant's guilt beyond a reasonable doubt, to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal."²⁴

In another jurisdiction this decision has been criticised, and a similar instruction—"If any of the jurors entertain a reasonable doubt as to whether defendant's guilt has been established, you cannot convict the defendant, but you cannot acquit unless all the jurors entertain a reasonable doubt"—upheld.²⁵

It has been held proper to instruct that "in case any one of the jurors entertains a reasonable doubt as to the guilt of the defendant, he ought not to find the defendant guilty; yet such doubt in the mind of one or more of the jurors ought not to control the action of the other jurors, so as to compel them to give a verdict of acquittal;"²⁶ and in one case it was held reversible error to refuse an instruction that "if any one of the jury, after having duly considered all the evidence, and after having consulted with his fellow jurymen, should entertain such reasonable doubt, the jury cannot, in such case, find the defendant guilty."²⁷ Never-

23—State v. Stewart, 52 Iowa 284.

24—Stitz v. State, 104 Ind. 359.
See also, State v. Tettaton, 159 Mo. 354.

25—State v. Rogers, 56 Kan. 362, 43 Pac. 256.

26—Fassinow v. State, 89 Ind. 235.
See also, People v. Verduzco, 13 Cal. App. 789, 110 Pac. 970.

27—Castle v. State, 75 Ind. 146, in which it was said: "Each juror should feel the responsibility resting upon him, as a member of the body, and should realize that his own mind must be convinced of the defendant's guilt beyond a reasonable

doubt before he can consent to a verdict of guilty." See also, Aszman v. State, 123 Ind. 347, where it was held erroneous to refuse an instruction that, "so long as you, or any one of you, have a reasonable doubt as to the existence of any of the several elements necessary to constitute the several crimes above defined, the accused cannot be convicted of such crime," unless it had already charged as to the individual responsibility of jurors. An instruction: "Where a criminal cause is tried by a jury, the law contemplates the concurrence of twelve minds in

theless, it has been held proper to refuse an instruction embodying this principle in the following language: "If any juror entertain a reasonable doubt of defendant's guilt, he is not required to surrender his convictions because other jurors entertained no such doubts," the court taking the view that there is no necessity for stating such a simple proposition in connection with the ordinary charge in regard to reasonable doubt.²⁸ So it is proper to refuse an instruction that each individual juror must be convinced beyond a reasonable doubt of defendant's guilt before uniting in a verdict of guilty, since such instruction would be misleading.²⁹

An instruction: "You cannot convict the defendant unless each of you is entirely satisfied from the evidence before you that defendant is guilty beyond all reasonable doubt. In determining the question, it is the duty of each juror to decide the matter for himself, and not to compromise or sacrifice his views or opinions of the case in deference to the views or opinions of others,"—is properly refused, as a

the conclusion of guilt, before a conviction can be had. Each juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he can, under his oath, consent to a verdict of guilty. Each juror should feel the responsibility resting upon him as a member of the body, and should realize that his own mind must be convinced beyond a reasonable doubt of the defendant's guilt before he can consent to a verdict of guilty. If any one of the jury, after having duly considered all of the evidence, and after having consulted with his fellow jurymen, entertain such reasonable doubt, the jury cannot, in such case, find the defendant guilty,"—was held properly refused as inaccurate and misleading; and an instruction "that if, from all the evidence in the case,

you each believe, as jurors, beyond a reasonable doubt, that the defendant committed the acts of which she is accused, in manner and form as charged in the indictment," sufficiently advised the jury as to their individual responsibility, and that each of them must be so convinced before he could consent to a verdict of conviction.

28—*State v. Hamilton*, 57 Iowa 596. The refusal of an instruction to the same effect was held proper in *State v. Penney*, 113 Iowa 691; *State v. Fry*, 67 Iowa 475; *State v. Williams*, 13 Wash. 335, 43 Pac. 15; *State v. Robinson*, 12 Wash. 491, 41 Pac. 884.

29—*Davis v. State*, 63 Ohio St. 173. *Contra*, *McGuire v. State*, 2 Ohio Cir. Dec. 318.

juror should not be entreated not to sacrifice his individual opinion. To allow such an entreaty to prevail would be to deprive litigants of the average common sense and judgment of "twelve good men and true."³⁰

§ 315. Statements that jurors must not disbelieve as jurors what they would believe as men.

An instruction containing the statement that the jurors are not to disbelieve as jurors what they believe as men has been approved in some cases,³¹ and it has been held proper to instruct that "you are not at liberty to disbelieve as jurors if, from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt, when no doubt would exist if no oath had been administered;"³² or that "you should be convinced as jurors where you would be convinced as citizens, and you should doubt as jurors only where you would doubt as men," where this sentence is used in connection with the evidence, and when the jury are instructed that they should be convinced from the evidence.³³

An instruction that, "A reasonable doubt in the jury box is exactly the same kind of reasonable doubt that an honest man meets up with in human life," is proper,³⁴ and it is not improper to instruct that the oath of the jurymen imposes no obligation to doubt where no doubt exists.³⁵ So, the following instruction on this head has also been approved: "Jurors are not artificial beings, governed by artificial or fine-spun rules; but they should bring to the con-

30—*People v. Rodley*, 131 Cal. 240, 63 Pac. 351.

31—*Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320; *Nevling v. Com.*, 98 Pa. St. 322. See also, *State v. Tyler*, 122 Iowa 125, where this instruction was inferentially approved.

The expression, "you are not at liberty to disbelieve as jurors if from the evidence you believe as men," is

not objectionable. *People v. Zajicek*, 233 Ill. 198.

32—*Leisenberg v. State*, 60 Neb. 628; *Bartley v. State*, 53 Neb. 310; *Carrall v. State*, 53 Neb. 431.

33—*McMeen v. Com.*, 114 Pa. St. 300. See also, *Com. v. Harman*, 4 Pa. St. 269; *State v. Dickey*, 48 W. Va. 325.

34—*State v. Pitt*, 166 N. C. 268.

35—*People v. Zajicek*, 233 Ill. 198.

sideration of the evidence before them their every-day common sense and judgment, as reasonable men; and those just and reasonable inferences and deductions which you, as men, would ordinarily draw from facts and circumstances proven in the case, you should draw and act on as jurors.”³⁶

Such instructions have been disapproved in other cases, when given without explanation, on the ground that the charge might mislead the jury.³⁷

In one case, the giving of such an instruction was held to have a dangerous tendency, but it was expressly announced that the error would not warrant reversal, if the guilt of the prisoner had been fully and undeniably established.³⁸

The statement first referred to is an extract from an opinion in an early Pennsylvania case,³⁹ and the idea sought to be conveyed is that a juror is not an artificial being, whose judgment is to be governed by artificial and technical rules, but that he is a man, and should, while acting as a juror, act as a man, exercising his reason, intelligence, every-day judgment and common sense. In this sense, the proposition that if one believes as a man, he should also believe as a juror, is correct.⁴⁰

§ 316. Statements that it is better that guilty escape than that innocent be punished.

In a number of cases the court has been requested to charge the jury that it is better for a specified number of guilty persons to escape than for one innocent person to be punished, and, without any exception, such an instruction has always been refused.⁴¹ These decisions unite in declar-

36—State v. Elsham, 70 Iowa 531.

37—State v. Hassan, 149 Iowa 518; State v. Ruby, 61 Iowa 86; State v. Pratt, 20 Iowa 267; State v. Collins, 20 Iowa 85.

38—State v. Collins, 20 Iowa 85. See also, State v. Pratt, 20 Iowa 267.

39—Gibson, C. J., in Com. v. Harman, 4 Pa. St. 269.

40—State v. Collins, 20 Iowa 85.

41—Alabama. Carden v. State, 84 Ala. 417; Garlick v. State, 79 Ala. 265; Ward v. State, 78 Ala. 441.

California. People v. Ebanks, 117 Cal. 652, 40 L. R. A. 269n, 49 Pac. 1049.

Illinois. Seacord v. People, 121 Ill. 623; Adams v. People, 109 Ill. 444, 50 Am. Rep. 617.

ing that there is no such rule or policy known to the law. As was well said in one case: "It is not within the purpose of the law that any guilty person should escape, or any innocent one be convicted."⁴² At most, the proposition is nothing more than a maxim, and probably as fallacious as the common run of maxims are.⁴³ So, a refusal to charge that "the jury have a right to consider that innocent men have been convicted, and to consider the danger of convicting an innocent man in weighing the evidence to determine whether there is reasonable doubt as to defendant's guilt," is proper.⁴⁴

§ 317. Applying doctrine to degrees of crime.

"In the trial of a criminal case, the defendant is entitled to the benefit of any reasonable doubt in the mind of the jury in regard to any * * * grade or degree of the offense charged in the indictment. * * * 'And where there is a reasonable doubt of the degree of the offense which the defendant has committed, he shall only be convicted of the lower degree.'"⁴⁵ It has therefore been held proper to charge, in a murder case, that "if the jury believe from all the evidence in the case, beyond a reasonable doubt, that the defendants are guilty of murder in the first

Indiana. *Coleman v. State*, 111 Ind. 563.

Missouri. *State v. Tettaton*, 159 Mo. 354.

Montana. *Territory v. Burgess*, 8 Mont. 57, 1 L. R. A. 808, 19 Pac. 558.

42—*Adams v. People*, 109 Ill. 444, 50 Am. Rep. 617.

43—"The well-known and well-worn maxim is doubtless creditable to humanity, but we are not aware that it has been adopted by courts as a legal proposition to be incorporated in a charge to a jury in a criminal trial. Like most other maxims, it has a true as well as a false side, and may be tortured and construed to work harm as well as

good. Fortunately, and to the credit of humanity, it is hardly required as a shield against injustice or prejudice, for a sense of justice and fair play is almost instinctive in the mind of man; and experience has shown that juries are much more inclined to show mercy towards the guilty than to punish the innocent." *Territory v. Burgess*, 8 Mont. 57.

44—*People v. Machado* (Cal.), 63 Pac. 66.

45—*Arnett v. Commonwealth*, 137 Ky. 270; *Payne v. Com.*, 1 Mete. (Ky.) 370; *White v. State*, 23 Tex. App. 154. See also, *State v. Hetland*, 141 Iowa 524, 18 Ann. Cas. 899.

degree or second degree, * * * but have a doubt as to the degree of offense of which the defendants are guilty, the jury will give them the benefit of such doubt, and find them guilty of the less offense.”⁴⁶ So it has been held that “an instruction that, if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant is not guilty of murder in the first degree, but that the elements of murder in the second degree, stated therein to the jury, existed, then they should find him guilty of murder in the second degree, must be construed as applying the ‘reasonable doubt’ to both degrees of murder, and cannot be prejudicial, if the jury is subsequently instructed that they should not find the defendant guilty of murder if they entertain a reasonable doubt as to whether he was guilty of murder in either the first or second degree, and the conviction is of murder in the first degree.”⁴⁷ “If, on a trial for murder, the fact of the killing is admitted, and the defense rests on the question of the grade of the offense, or whether the defendant was justified in killing on the ground of self-defense, instructions on his behalf on the question of reasonable doubt, framed so broad as to include the fact of killing * * * should be refused.”⁴⁸ Instructions in such a case should apply only to the grade of the offense and the fact of justification.⁴⁹ In one state it has been held that the law should be charged, not only upon the general question, but also as between the different degrees of culpable homicide.⁵⁰

§ 318. Instructions held bad as requiring too high a degree of proof to overcome a reasonable doubt.

In the preceding sections, it will be noted that the instructions criticised as erroneous frequently require too

46—State v. Anderson, 86 Mo. 309.
See also, Clark v. Com. (Ky.), 63 S. W. 740.

47—People v. Chun Heong, 86 Cal. 329, 24 Pac. 1021.

48—People v. Williams, 32 Cal. 280.

49—People v. Williams, 32 Cal. 280.

50—Blake v. State, 3 Tex. App. 581; Murray v. State, 1 Tex. App. 417.

high a degree of proof to overcome a reasonable doubt.⁵¹ A number of miscellaneous instructions subject to this vice particularly will be found in this section.

It is improper to require a finding of not guilty unless the evidence generates full belief in guilt of the accused equivalent to certainty,⁵² or to instruct: That there must be a "certainty" of defendant's guilt.⁵³ "That the jury must be convinced * * * to an absolute moral certainty in order to convict."⁵⁴ That the jury must acquit "unless the evidence * * * is sufficiently strong to remove every supposition or hypothesis but that of his [defendant's] guilt,"⁵⁵ or so strong "as to exclude to a moral certainty every supposition or hypothesis but that of guilt."⁵⁶ That "evidence to induce or authorize a conviction should not be a mere preponderance of probabilities, but should be so strong and convincing as to lead the mind to the careful and guarded conclusion that the defendant cannot, consistently with any reasonable hypothesis, be innocent."⁵⁷ That the jury should acquit if they could "infer any reasonable theory or hypothesis of the defendant's innocence, * * * although there may be stronger probabilities of his guilt than of his innocence."⁵⁸ So, an instruction requiring "clear and distinct proof" of guilt has been held to require a higher degree of proof than is necessary to convince "beyond a reasonable doubt."⁵⁹ A charge which requests an acquittal, if there is any doubt of the defendant's guilt which is not purely speculative doubt, requires a higher degree of proof and conviction of the mind of the defendant's guilt than the law

51—See §§ 314-317, *ante*.

52—Zuckerman v. People, 213 Ill. 114.

53—State v. Powers, 59 S. C. 200, holding that the word "certainty" should have been modified by the words "reasonable and moral."

54—People v. Hecker, 109 Cal. 451, 30 L. R. A. 403, 42 Pac. 307.

55—Simmons v. State, 129 Ala. 41; Blackburn v. State, 86 Ala. 598. But see, People v. Smith, 162 N. Y. 520, rev'g 37 App. Div. 280.

56—Harvey v. State, 125 Ala. 47.

57—Bodine v. State, 129 Ala. 106.

58—State v. Tettaton, 159 Mo. 354.

59—Griffith v. State, 90 Ala. 583.

requires.⁶⁰ It is error to instruct that "the proof must do more than reasonably satisfy the jury of the guilt of the defendant,—it must go to the extent of satisfying the jury of his guilt beyond all reasonable doubt or supposition of innocence."⁶¹ That "if the testimony is so conflicting that, after weighing it all, the jury is still in doubt as to whether the defendant did or did not commit the offense, they must acquit," because of the omission of the word "reasonable," as expressive of the doubt requiring an acquittal.⁶²

It is also error to instruct: "If the state of the case is such that, after an entire comparison, consideration, weighing, and sifting of all the evidence, it leaves the minds of the jury in that condition that they cannot say they have an abiding and absolute belief of the guilt of the defendants, they ought to find them not guilty."⁶³ That "the jury ought to acquit the defendant if, after a rational sifting and weighing of the whole evidence in this case, they are not individually certain that he is guilty," and "the jury are the sole determiners of the questions of fact; and if, according to the evidence against the defendant, he would be guilty, but, according to the evidence in his favor, he would be innocent, and the jury cannot tell where the truth indubitably lies, this would furnish a just ground for a reasonable doubt, and the defendant ought to be acquitted," as, under such instructions, "any possible, speculative, or imaginary doubt would have been sufficient to prevent a conviction."⁶⁴ That "the only just foundation for a verdict of guilty in this case is that the entire jury shall fully and perfectly believe that the defendant is guilty as charged in this indictment, to the exclusion of every reasonable doubt of his guilt; and if the state has failed to furnish this full measure of proof, and to impress the minds of the jury with such full and perfect belief of the defendant's guilt, the jury ought to find him not guilty," as lead-

60—Perry v. State, 91 Ala. 83.

63—Whatley v. State, 91 Ala. 108.

61—Brown v. State, 128 Ala. 12.

64—Ross v. State, 92 Ala. 76.

62—McClellan v. State, 117 Ala. 140.

ing the jury to require "a higher measure of proof of guilt than the law exacts, in that it requires that the jury shall fully and perfectly believe the defendant guilty, to the exclusion of every reasonable doubt of his guilt; and that, if the prosecution has failed to furnish this full measure of proof, and to impress the minds of the jury with such full and perfect belief of his guilt, he should be acquitted."

An instruction "that the only just foundation for a verdict of guilty in this case is that the entire jury shall fully and perfectly believe that the defendant is guilty as charged in this indictment, to the exclusion of every reasonable doubt of his guilt," is misleading where the indictment contains three counts charging the commission of the offense in a different manner, and only expressly charging the highest grade of the offense.⁶⁵

§ 319. Instructions held bad as requiring too high a degree of proof of innocence.

An instruction which says that if the jury believe "from the evidence" all the facts material to defendant's guilt, instead of requiring the jury to believe such things beyond a reasonable doubt, is erroneous.⁶⁶ So it is reversible error to instruct that a reasonable doubt "is doubt engendered by the investigation of the whole proof, and an inability, after such investigation, to let the mind rest easily upon the certainty of guilt or innocence," since such instruction requires defendant to prove his innocence.⁶⁷

It is also error to instruct: That to entitle the defendant to an acquittal, the jury must be satisfied that the felonious intent did not exist.⁶⁸ That if the jury thought that defendant did not commit the crime alleged, they should give him the benefit of the doubt.⁶⁹ That "all that is required to enable a jury to return a verdict is, after a comparison and

65—Lundy v. State, 91 Ala. 100.

68—Best v. State, 155 Ind. 46.

66—Arnold v. Com., 21 Ky. L. Rep. 1566.

69—State v. Raymond, 53 N. J. L. 260.

67—State v. Moss, 106 Tenn. 359.

consideration of all the testimony, to believe conscientiously that it establishes the guilt of defendant.”⁷⁰ That “can the facts and circumstances you find from the evidence to be true exist, and can you, in view of these facts and circumstances, reasonably conclude that the defendant is innocent? If so, you should find him not guilty; otherwise you should find him guilty.”⁷¹ “That a preponderance of evidence is necessary in order to raise a reasonable doubt of defendant’s guilt.”⁷² That, “if you have a reasonable doubt that the animal slaughtered by defendant was not the property of [the prosecutor], you will find the defendant not guilty,” since such instruction requires the jury to believe the innocence of defendant beyond a reasonable doubt.⁷³ That, “if you believe from the testimony, beyond a reasonable doubt, that the defendant did not take the property fraudulently, but took the property under an honest claim of right, he would not be guilty of theft, and you should acquit him.”⁷⁴

§ 320. Sufficiency of instructions taken as a whole.

It has already been noted in a previous chapter that if instructions are correct as a whole, minor errors therein will be cured,⁷⁵ and this rule applies to instructions as to reasonable doubt.⁷⁶

Where a paragraph of a charge fully and explicitly stated the degree of proof required to convict, and the following paragraphs failed to instruct that the jury find beyond a

70—*Ellerbe v. State*, 79 Miss. 10.

71—*McMillan v. State*, 7 Tex. App. 142, in which it was said that the jury need never conclude, reasonably or otherwise, that the defendant is innocent, but only that the evidence fails to establish his guilt.

72—*People v. Elliott*, 80 Cal. 296, 22 Pac. 207; *State v. Porter*, 64 Iowa 237.

73—*Landers v. State* (Tex. Cr. App.), 63 S. W. 557.

74—*Lewis v. State*, 29 Tex. App. 105.

75—See § 197, *ante*.

76—Where the instructions, taken as a whole, clearly present the law to the jury, minor errors in one instruction will not be ground for reversal. *People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *Smith v. State*, 7 Ga. App. 555; *People v. Kreidler*, 180 Mich. 654; *Bartley v. State*, 53 Neb. 310.

reasonable doubt, it was held that, taking the instructions together, no doubt could have existed in the minds of the jury that their finding must be beyond a reasonable doubt.⁷⁷

Where the court, after correctly instructing the jury on the subject of reasonable doubt, said: "But mere probabilities of innocence or doubts, however reasonable, which beset some minds on all occasions, should not prevent a verdict" of guilty, it was held that this could not have misled the jury, though the latter instruction was somewhat ambiguous.⁷⁸ Even the fact that the court erroneously charged that defendant must make out his defense by a preponderance of the evidence has been held not reversible error, where the court also charged that the jury must give the defendant the benefit of every reasonable doubt.⁷⁹

Where the instructions as a whole clearly and fully state the law, and properly define reasonable doubt, a portion of a charge stating that the jury should acquit "if you conscientiously believe on your oaths, under the evidence and the law that the defendant is not guilty," cannot be objected to.⁸⁰ And where the whole of the charge as to reasonable doubt contains a sufficiently accurate statement of the law upon that subject, a statement that "mere possible doubts, however reasonable, which beset some minds on all occasions, should not prevent a verdict of guilty," though to be condemned as being meaningless and tending to confusion, will not constitute prejudicial error.⁸¹

An instruction that, in order to find the defendant guilty of negligent homicide, the jury must believe, beyond a reasonable doubt, the facts on which this defense is based, is not error, where the court elsewhere gave a charge on rea-

77—*Steiner v. People*, 187 Ill. 244;
State v. Rainsbarger, 79 Iowa 745.

78—*People v. Lee Sare Bo*, 72 Cal.
623, 14 Pac. 310. See also, *People*
v. Kernaghan, 72 Cal. 609, 14 Pac.
566.

79—*State v. Taylor*, 57 S. C. 483,
76 Am. St. Rep. 575.

80—*State v. Shea*, 78 Wash. 342,
139 Pac. 203.

81—*People v. Chun Heong*, 86 Cal.
329, 24 Pac. 1021.

sonable doubt in connection with negligent homicide.⁸² So, an instruction as to the degrees of the offense of homicide, and stating that should the jury entertain a reasonable doubt as to which of the grades of crime named the defendant may be guilty, or if any, they will give him the benefit of such doubt, and acquit him of the higher offense, and find him guilty of the lower offense only, is not prejudicially erroneous, as assuming that they cannot find him not guilty, where it appears from the general tenor of the charge, and from the instruction as to the form of the verdict, that the jury were expressly told that they could bring in a verdict of acquittal.⁸³

An instruction requiring "the jury to find the issues" on the evidence introduced by the state" will not be ground for reversal where the remaining instructions require the jury to find defendant guilty upon the evidence beyond a reasonable doubt, and to acquit if, on the whole evidence, they have a reasonable doubt of his guilt.⁸⁴

Where the court charges that "it devolves upon the prosecution to establish the guilt of the defendant to your satisfaction, beyond a reasonable doubt, before you are authorized to find a verdict against him," and that "all persons charged with a criminal offense are presumed to be innocent until the jury are satisfied beyond a reasonable doubt of their guilt," and that, "if you have a reasonable doubt as to the guilt or innocence of the defendant, you should give him the benefit of the doubt, and acquit him," and repeats the words "beyond a reasonable doubt" some fifteen times, an instruction that, "if you are satisfied that the defendant is guilty of the offense charged, and that he committed it in the nighttime,—that is, between sunset of one day and sunrise of the next,—you should find him guilty of burglary in the first degree," is not erroneous on the ground that it

82—*Spears v. State*, 41 Tex. Cr. App. 527.

84—*State v. Jackson*, 99 Mo. 60.

83—*People v. Ah Gee Yung*, 86 Cal. 144, 24 Pac. 860.

omits the words "beyond a reasonable doubt," and leaves the jury to be simply "satisfied" of the defendant's guilt, no matter whether they entertained a reasonable doubt of his guilt or not.⁸⁵ So, where the instructions repeatedly stated that the defendant must be acquitted if the jury had a reasonable doubt as to his guilt, or of a single fact necessary to establish his guilt, it was not reversible error to charge that the jury must be "satisfied" of the truth of a certain fact presented in defense.⁸⁶

The omission of the word "doubt" in a charge is not error warranting reversal, as it will be presumed that a jury of ordinary intelligence will supply the word.⁸⁷

An erroneous instruction as to reasonable doubt is not cured by the giving of another instruction, when it is impossible to say which the jury followed.⁸⁸

§ 321. Reasonable doubt in civil cases.

While there are a few civil cases holding that, where the proof of a crime is involved in a civil action, its existence must be proved beyond a reasonable doubt, the great majority of courts refuse to recognize any difference between this and any other class of civil actions; and, as has already been noted, a charge as to the doctrine of reasonable doubt is usually considered erroneous as imposing too high a degree of proof.⁸⁹ Such instructions should not be given and may be properly refused.⁹⁰

An instruction that "fraud is never presumed, but the burden rests upon one charging fraud to make it out by clear and convincing evidence," is not objectionable as conveying an impression that fraud must be proved beyond a reasonable doubt.⁹¹

85—*People v. Flynn*, 73 Cal. 511, 15 Pac. 102. See also, *Steiner v. People*, 187 Ill. 244.

86—*People v. Flannelly*, 128 Cal. 83, 60 Pac. 670.

87—*Cromwell v. State*, 59 Tex. Cr. App. 525.

88—*People v. Lee*, 248 Ill. 64.

89—See § 283, *ante*.

90—*Seymour v. Bailey*, 76 Ga. 338; *Reeves v. Graffing*, 67 Ga. 514.

91—*Stevens v. Stevens*, 127 Ind. 560; *Wallace v. Mattice*, 118 Ind. 59.

CHAPTER XXVIII.

INSTRUCTIONS AS TO DEFENSE OF ALIBI.

- § 322. Necessity of propriety of instructions as to defense of alibi.
- § 323. Sufficiency of instructions.
- § 324. Propriety and sufficiency of instructions where burden of proof is not on defendant to establish alibi.
- § 325. Instructions where burden of proof is on defendant to establish alibi.
- § 326. Doctrine of reasonable doubt as applicable to defense of alibi.
- § 327. Instructions requiring defense of alibi to be viewed with caution.
- § 328. Instructions as to the effect of an unsuccessful attempt to prove alibi.

§ 322. Necessity or propriety of instructions as to defense of alibi.

It is the duty of the trial court to instruct on the law of alibi, and error to refuse such an instruction, when there is substantial evidence in support of the defense,¹ or when the only defense is that of alibi, and the proof tends clearly to establish such defense,² if not equivalent instruction on the subject is given.³ Accordingly, where there is direct and positive evidence of an alibi, the court may instruct the

1—**Florida.** Knight v. State, 60 Fla. 19; Long v. State, 42 Fla. 509.

Iowa. State v. Porter, 74 Iowa 623.

Kansas. State v. Conway, 55 Kan. 323, 40 Pac. 661.

Missouri. State v. Kelly, 16 Mo. App. 213.

Oklahoma. Courtney v. State, 10 Okla. Cr. 589, 140 Pac. 163.

Tennessee. Wiley v. State, 5 Baxt. 662.

Texas. Jones v. State, 30 Tex. App. 345; Quintana v. State, 29 Tex.

App. 401, 25 Am. St. Rep. 730; Long v. State, 11 Tex. App. 381; Padron v. State, 41 Tex. Cr. App. 548; Rountree v. State (Tex. Cr. App.), 55 S. W. 827; Lee v. State, 34 Tex. Cr. App. 519.

2—Courtney v. State, 10 Okla. Cr. 589, 140 Pac. 163.

3—Where the evidence raises an issue as to alibi, the refusal of an instruction thereto is error when no equivalent instruction is given in the charge. Burns v. State, 75 Ohio St. 407.

jury to consider such evidence in connection with other evidence given on other points of the case, showing the physical impossibility of the defense of alibi being true.⁴

There is however, some conflict of authority as to the necessity of requesting instructions as to this defense. In one state it is said that the court should instruct the jury on the subject of alibi, where this is the sole defense;⁵ and in a case where alibi is the only defense interposed, the omission of the court to instruct on alibi, exception being taken in the motion for new trial, is cause for reversal;⁶ and that, when the defendant relies upon the evidence going to prove an alibi, the trial court should usually charge upon that theory.⁷ But in one case where no charge on alibi was requested, a charge as to the presumption of innocence was held sufficient.⁸ Apparently the rule seems to be settled that an omission to charge with reference to an alibi is not reversible error unless the charge be excepted to because of such omission, or unless specific instructions on that subject are requested and refused.⁹ But if exceptions are duly saved to the court's omission to instruct on this subject, or a special request for such an instruction is made and refused, this will be ground for reversal.¹⁰ In another state it has been held that, where the question of personal identity and the fact of alibi in a criminal case are virtually the same defense, the omission of the court to instruct separately on alibi is not error,¹¹ and in this state it has been

4—State v. Standley, 76 Iowa 215.

5—Ninnon v. State, 17 Tex. App. 650; Deggs v. State, 7 Tex. App. 359.

6—Arismendis v. State (Tex. Cr. App.), 60 S. W. 47.

7—Quintana v. State, 29 Tex. App. 401, 25 Am. St. Rep. 730; McGrew v. State, 10 Tex. App. 539.

See also, Wheeler v. State, 56 Tex. Cr. App. 547.

8—Brown v. State, 72 Tex. Cr. App. 33.

9—Quintana v. State, 29 Tex. App. 401, 25 Am. St. Rep. 730; Ayres v. State, 21 Tex. App. 399; Clark v. State, 18 Tex. App. 468; McAfee v. State, 17 Tex. App. 131; Anderson v. State, 34 Tex. Cr. App. 546, 53 Am. St. Rep. 722.

10—Bennett v. State (Tex. App.), 15 S. W. 405; Rountree v. State (Tex. Cr. App.), 55 S. W. 827; Conway v. State, 33 Tex. Cr. App. 327.

11—Dale v. State, 88 Ga. 552.

held that, where the evidence is mainly circumstantial, and there is evidence tending to show that at the time of the commission of the crime defendant was absent a distance of three-quarters of a mile, and asleep, it was reversible error not to instruct fully on the issue of alibi, and an examination of this case discloses that no request for such an instruction was made.¹² In a number of jurisdictions, a failure of the court to instruct as to this defense of its own motion cannot be assigned as error. The defendant must ask a special charge on the subject.¹³

In the absence of evidence warranting it, no instruction on the defense of alibi should be given.¹⁴ Accordingly, where there is no testimony, in a prosecution for murder, as to the whereabouts of defendant for about thirty minutes before the commission of the crime, and for about fifteen minutes after its commission, and defendant was in the vicinity of the crime, a failure to instruct on alibi is not error, in the absence of any request for such an instruction,¹⁵ and an instruction in a prosecution for murder, may properly be refused where the testimony in support of the defense is vague and inconclusive, and such testimony is not supported by any evidence that the witness knew when the deceased was killed.¹⁶ Where one is jointly prosecuted with others, on the theory that they all conspired together to commit the crime, and this theory is supported by evidence, it is proper to refuse to direct the jury to acquit him if they should find

12—*Fletcher v. State*, 85 Ga. 666. Compare *Boothe v. State*, 4 Tex. App. 202.

13—*State v. Peterson*, 38 Kan. 205, 16 Pac. 263; *Com. v. Boschino*, 176 Pa. St. 103; *Goldsby v. United States*, 160 U. S. 70, 40 L. Ed. 343. See also, *State v. Sutton*, 70 Iowa 268; *Courtney v. State*, 10 Okla. Cr. 589, 140 Pac. 163.

14—*Burger v. State*, 83 Ala. 36; *State v. Seymour*, 94 Iowa 699; *State v. Jackson*, 95 Mo. 623; *State*

v. Murray, 91 Mo. 95. There is no necessity for an instruction as to the defense of alibi, where there was no suggestion from any of the witnesses that defendant was absent at the time of the alleged assault. *Johnson v. State* (Tex. Cr. App.), 58 S. W. 105. See also, *Benavides v. State* (Tex. Cr. App.), 61 S. W. 125.

15—*State v. Seymour*, 94 Iowa 699.

16—*State v. Murray*, 91 Mo. 95.

that he was not actually present participating in the crime. Of course it is not true that a co-conspirator must be acquitted because he establishes an alibi, though it is equally true that, if the evidence tends to show that there was no conspiracy, and that the alleged co-conspirator was not present at the commission of the crime, an instruction on the defense of alibi would be proper.¹⁷

§ 323. Sufficiency of instructions.

In determining the sufficiency of instructions on this subject they must be considered as a whole,¹⁸ and an instruction that, if the jury entertain a reasonable belief that, at the time deceased was killed, the accused was at his own home, and not at the place of the killing, they should acquit, is not a sufficient charge *per se* on the subject of alibi, but, when followed by a sufficient charge on the doctrine of reasonable doubt, the entire context will be a sufficient charge on the subject of alibi.¹⁹

An instruction that evidence of alibi should cover the entire time of the transaction is proper.²⁰

Where, at the preliminary examination, the accused permits testimony of a false alibi, and also allows his counsel, before the state has opened its case, to introduce evidence of such alibi, the judge may say that the people claim that the defendant intends to set up an alibi.²¹

It has been held proper to instruct that "the defense of an alibi is a legitimate defense, and is in fact, when thoroughly proved, the most logical defense that can be possibly introduced,"²² and error to refuse an instruction that "the defense of an alibi, as it is called, is as legitimate a defense as any other defense. You are to give the same credit to wit-

17—State v. Johnson, 40 Kan. 266,
19 Pac. 749.

18—Forte v. People, 57 Colo. 450,
140 Pac. 789.

19—Boothe v. State, 4 Tex. App.
202.

20—People v. Probst, 237 Ill. 390.

21—People v. Connor, 56 Hun (N.
Y.) 644.

22—People v. Burns, 59 Cal. 359.

nesses who testify concerning it as to those who testify to anything else.”²³

Error cannot be predicated of a charge that “to make an alibi available as a defense within itself, it must be so strong as to preclude the idea of the party’s being at the place where the crime was committed at the time the crime was committed.”²⁴

An instruction: “An alibi is a defense which is established by showing that the person charged with the crime was at some place other than that where the crime was committed, at such time that he could not have been at the place of the crime at the time of its commission. If the evidence offered to establish an alibi fails to show the accused at the place claimed at such a time that he could not have been where the crime was committed at the time of its commission, the alibi fails. In other words, if the accused might have been at the place he claims at the time shown, and yet might have been at the place of the crime at the time of its commission, there is no alibi,”—is a correct statement of law as to what constitutes an alibi.²⁵

Where one is indicted as a principal offender for a murderous assault, an instruction “that all persons are principals who are guilty of acting together in the commission of an offense,” and that, if the jury believe that others than defendant assaulted the prosecuting witness, “then you must not convict this defendant for their act, unless you are satisfied that defendant was present, and, knowing their unlawful intent, aided them by his acts in committing such assault; and if, upon this issue, you have a reasonable doubt, then you should give him the benefit of the doubt, and acquit him,” sufficiently presents the issue of alibi.²⁶

An instruction that “one defense in this case is what is known in law as an ‘alibi,’—that is, that the defendants

23—*People v. Hare*, 57 Mich. 505.

24—*Simpson v. State*, 78 Ga. 91.

25—*State v. Powers*, 72 Vt. 168.

26—*Benavides v. State* (Tex. Cr. App.) 61 S. W. 125.

were not present at the time and place of the commission of the offense charged in the indictment, if any such offense has been committed, but that they were at that time at another and different place,"—is not erroneous on the ground that it classes alibi as a defense. Though it is true that, in order to convict the defendants, it devolves upon the state to prove their presence at the time and place of the commission of the offense, yet, in order to overcome the case made out by the state against them, they assume the burden of showing such a state of facts as will raise in the minds of the jury a reasonable doubt as to their presence at the time and place of the commission of the offense, and to this extent an alibi is a defense.²⁷

The jury may be instructed "that the state must establish the guilt of the respondent beyond a reasonable doubt to entitle it to a conviction, and that, if the evidence in support of the alibi, in connection with the other evidence, raised in their minds a reasonable doubt as to his guilt, he was entitled to an acquittal. * * * It is proper to thus submit the question of the alibi, instead of treating it as an independent issue."²⁸

An instruction "that if, after considering all the facts and circumstances in proof, they [the jury] had no reasonable doubt of the presence of plaintiffs in error at the house of K. at the time of the assault, then the defense of alibi had not been made out, and was unavailing," has been held proper, and not in conflict with the rule as to reasonable doubt.²⁹

"Where the evidence tends to prove an alibi, the use of the words 'possible' and 'impossible,' as applied to the ability of the defendant to have been at a certain place, other than where the crime was committed, and at the place where the crime was committed at the time of its commission, is erroneous."³⁰

27—State v. Hale, 156 Mo. 102.

28—State v. Powers, 72 Vt. 168.

29—Aneals v. People, 134 Ill. 401.

30—Snell v. State, 50 Ind. 516.

In a prosecution for theft of cattle, it is error, in a charge in reference to alibi, to require the absence of the accused, not only from the place of the original taking, but from the possession of the cattle while being driven from the place of taking.³¹

An instruction that, "if the evidence of an alibi has introduced in the minds of the jury a doubt as to whether or not the defendant was at or about the place when the alleged robbery is said to have been committed, you will acquit the defendant," is properly refused, since the doubt justifying the acquittal must be a reasonable one.³²

§ 324. Propriety and sufficiency of instructions where burden of proof is not on defendant to establish alibi.

By the weight of authority the burden of proving an alibi is not imposed on defendant, it being considered that the doctrine of reasonable doubt prevents the imposition of such burden,³³ and instructions assuming that an alibi is a special defense, the proof of which by a preponderance of the evidence upon that issue is a burden resting on the defendant, are erroneous.³⁴

Accordingly, it is error to instruct that the burden of

31—Thompson v. State, 42 Tex. Cr. App. 140.

32—Gibbs v. State, 1 Tex. App. 12.

33—Indiana. French v. State, 12 Ind. 670, 74 Am. Dec. 229.

Michigan. People v. Pearsall, 50 Mich. 233.

Missouri. State v. Miller, 156 Mo. 76; Toler v. State, 118 Mo. 170; State v. Howell, 100 Mo. 628; State v. Jennings, 81 Mo. 185, 51 Am. Rep. 236.

North Carolina. State v. Starnes, 94 N. C. 973; State v. Josey, 64 N. C. 56.

North Dakota. State v. Nelson,

17 N. D. 13; State v. Hazlett, 16 N. D. 426.

Ohio. Walters v. State, 39 Ohio St. 215.

Oklahoma. Thompson v. State, 6 Okla. Cr. 50, 117 Pac. 216.

Oregon. State v. Chee Gong, 16 Ore. 534, 19 Pac. 607.

Texas. Gallaher v. State, 28 Tex. App. 247; Johnson v. State, 21 Tex. App. 368.

The participation of the defendant in the crime committed must be proved by the state beyond a reasonable doubt. Thompson v. State, 6 Okla. Cr. 50, 117 Pac. 216.

34—People v. Hoosier, 24 Cal. App. 746, 142 Pac. 514.

proof is on the defendant to make out the defense of an alibi;³⁵ that testimony adduced to prove an alibi should not be considered unless it has established the alibi by a preponderance of evidence;³⁶ that evidence of alibi must "be of a strong convincing character and exclude any reasonable hypothesis except the nonpresence of the accused;"³⁷ or that an alibi must be proved by evidence which outweighs that given for the state.³⁸

Such instructions seem plainly inconsistent with the rule that the jury must give the defendant the benefit of every reasonable doubt.³⁹

An instruction that defendant "may establish any fact essential to his defense by merely a preponderance of evidence" is not a good form, as in some cases it may lead the jury to infer that no evidence on the part of the defendant of a fact would be sufficient to raise a reasonable doubt of his guilt, unless he actually proved the fact by a preponderance of evidence. But such an instruction will not work a reversal if the only harmful effect it could have is in relation to the defense of alibi, and the court charges that, "where evidence has been offered by the defendant for the purpose of proving an alibi,—that is to say, that the defendant was in another place at the time of the alleged act of murder, and was distant from the scene of the killing charged, at the time, and therefore could not have participated in it; if, from the whole case, and a consideration of all the testimony, the evidence in this behalf produced be sufficient to create a reasonable doubt as to whether the defendant was present at the time and place of the murder,—he should be acquitted."⁴⁰

An instruction that an alibi is a good defense, if proved

35—State v. Chee Gong, 16 Ore. 534, 19 Pac. 607.

36—State v. Howell, 100 Mo. 628; Walters v. State, 39 Ohio St. 215; State v. Anderson, 59 S. C. 229.

37—State v. Nelson, 17 N. D. 13.

38—French v. State, 12 Ind. 670, 74 Am. Dec. 229.

39—Johnson v. State, 21 Tex. App. 380. But see the following section.

40—People v. Tarm Poi, 86 Cal. 225, 24 Pac. 998.

to the satisfaction of the jury, has been held proper, since it does not convey any intimation that the burden of proving it rests upon the defendant.⁴¹

The fact that the court erroneously charges the jury that the defendant must prove his defense by a preponderance of the evidence is not error, where the jury are also instructed that they must give the defendant the benefit of every reasonable doubt.⁴²

And an instruction that the defendant may establish any fact essential to his defense by a preponderance of evidence does not necessarily import that he must prove the alibi by a preponderance of evidence; and any apparent error in such instruction is cured if the jury are explicitly charged that the defendant must be acquitted in case of a reasonable doubt as to his presence at the time and place of the crime.⁴³

So, in an instruction that, "if the jury believe and find from the evidence that the defendant was not present at the place and time the alleged rape is stated to have been committed, by the prosecuting witness, but that the defendant, at the time of the alleged rape, was elsewhere, at another and different place than where the alleged rape is stated to have taken place, then you should acquit the defendant," has been held not objectionable, as conveying the idea that alibi must be made out by a preponderance of the evidence.⁴⁴

An instruction "that the defense [of alibi], if made out, was perfect, and was conclusive of respondent's innocence, and that they must be satisfied of respondent's guilt by proofs beyond reasonable doubt, but that, as the proof of the alibi was in conflict with the direct proof offered by the prosecution, they should weigh the testimony thereof in connection with the other testimony in the case, and consider it as met or explained by evidence of the defense, and determine whether, in view of all the testimony, the wit-

41—State v. Starnes, 94 N. C. 973.

43—People v. Chun Heong, 86 Cal.

42—State v. Taylor, 57 S. C. 483,

329, 24 Pac. 1021.

76 Am. St. Rep. 575.

44—State v. Johnson, 91 Mo. 439.

nesses to the alibi were mistaken, or that they were able to say from the testimony of the prosecution, as explained by that of the defense, that there was no reasonable doubt that respondent was guilty," is erroneous, as likely to convey the impression that the alibi must be affirmatively shown.⁴⁵

§ 325. Instructions where burden of proof is on defendant to establish alibi.

In a number of jurisdictions, the burden of proof as to the defense of alibi is upon the party who sets up that defense,⁴⁶ and he must prove it by a preponderance of the evidence.⁴⁷

The doctrine that the burden of proof rests upon the defendant of course carries with it the principle that an alibi must be established by a preponderance of the evidence, for no fact can be established by any less evidence, and such principle does not abrogate the doctrine of reasonable doubt.⁴⁸

In accordance with this holding it has been held proper to instruct that the burden of proof is on the defendant to establish the fact that he was not present, by a preponderance of evidence;⁴⁹ or that the jury should acquit if they

45—*People v. Pearsall*, 50 Mich. 233.

46—**Alabama.** *Holley v. State*, 105 Ala. 100; *Pellum v. State*, 89 Ala. 28.

Arkansas. *Rayburn v. State*, 69 Ark. 177.

Delaware. *State v. Lee*, 24 Del. 18.

Illinois. *Ackerson v. People*, 124 Ill. 709.

Iowa. *State v. McGarry*, 111 Iowa 709; *State v. Maher*, 74 Iowa 77; *State v. Johnson*, 72 Iowa 393; *State v. Rowland*, 72 Iowa 327; *State v. Reed*, 62 Iowa 40; *State v. Hamilton*, 57 Iowa 598; *State v. Kline*, 54 Iowa 185; *State v. Northrup*, 48 Iowa 583; 30 Am. Rep. 408.

Pennsylvania. *Rudy v. Com.*, 128 Pa. St. 500.

South Carolina. *State v. Drawdy*, 14 Rich. 87.

Virginia. *Thompson v. Com.*, 88 Va. 45.

47—*State v. Rowland*, 72 Iowa 327; *State v. Reed*, 62 Iowa 40; *State v. Red*, 53 Iowa 71; *State v. Northrup*, 48 Iowa 583, 30 Am. Rep. 408; *State v. Hardin*, 46 Iowa 623, 26 Am. Rep. 174; *State v. Ward*, 61 Vt. 155.

48—*State v. Red*, 53 Iowa 71; *State v. Ward*, 61 Vt. 155. See also, *State v. McGarry*, 111 Iowa 709. For a forcible statement of the contrary view, see *Johnson v. State*, 21 Tex. App. 380.

49—*State v. Hamilton*, 57 Iowa 598.

An instruction that the testi-

found the alibi “supported by a fair preponderance of the evidence;”⁵⁰ or that the evidence to prove an alibi must outweigh the evidence to show the respondent at the place of the crime, and, if so established, they should acquit;⁵¹ or that, where the accused relies upon or attempts to prove an alibi in his defense, the burden of proving the alibi rests upon him, but upon other questions in the case the burden still rests upon the commonwealth;⁵² or that the burden of proof is on defendant to establish by preponderance of evidence his defense of alibi, but that the burden of proof is on the state to establish beyond a reasonable doubt that the crime charged was in fact committed, and that, if the entire evidence upon the whole case raises a reasonable doubt as to defendant’s guilt, then the jury should acquit;⁵³ or that “the defendant is not required to prove an alibi beyond a reasonable doubt, but it is sufficient if you are satisfied by a preponderance of evidence that defendant” was at another place than the place of the alleged crime at the time it was said to be committed.⁵⁴

An instruction “that it is the duty of defendant, in proving an alibi, to reasonably satisfy the jury that he was else-

mony in support of the defense of alibi, “to be entitled to weight, must be such as to show that, at the very time of the commission of the crime, the defendant was at another place so far away, or under such circumstances, that he could not have been at the place where the crime was committed. The burden of establishing this defense by a preponderance of the credible testimony is upon the defendant. If he has so established it, he is entitled to an acquittal. If, however, the defendant has failed to establish this defense by a preponderance of the credible testimony, then he is not entitled to an acquittal upon this ground, nor to have it considered by

you as a basis of a reasonable doubt,”—is erroneous, for though the evidence offered in support of the alibi does not amount to a preponderance, yet such evidence is for the consideration of the jury; and if, upon the whole case, including that part pertaining to the alibi, they have a reasonable doubt of defendant’s guilt, he should be acquitted. *State v. McGarry*, 111 Iowa 709.

50—*State v. Johnson*, 72 Iowa 393.

51—*State v. Ward*, 61 Vt. 155.

52—*Thompson v. Com.*, 88 Va. 45.

53—*State v. Van Winkle*, 80 Iowa 15. See also, *Long v. State*, 42 Fla. 509.

54—*State v. Kline*, 54 Iowa 185.

where at the time of the commission of the offense," is sufficient,⁵⁵ and an instruction that "the burden of showing an alibi is on the defendant, but if, on the whole case, the testimony raises a reasonable doubt that the defendant was present when the crime was committed, he should be acquitted; but the jury should scrutinize the testimony of witnesses, to see if some of them may or may not be mistaken as to dates and times when they saw the defendant," does not shift the burden upon the defendant to prove his innocence. The burden to show the defendant's presence and participation in the crime is still upon the state, when the evidence is considered as a whole, including that introduced by the defendant on the question of alibi.⁵⁶

It has been held proper to refuse an instruction that the defendant was not required to establish the defense of an alibi, which he had set up, to the reasonable satisfaction of the jury;⁵⁷ or that the jury should be "fully satisfied" of the truth of the alibi.⁵⁸

§ 326. Doctrine of reasonable doubt as applicable to defense of alibi.

An accused is entitled to an acquittal, and the jury may be so instructed, where the evidence is sufficient to create in the minds of the jury a reasonable doubt as to his guilt,⁵⁹

55—*Pellum v. State*, 89 Ala. 28.

56—*Rayburn v. State*, 69 Ark. 177. In this case, the court expressed a preference for a statement as follows: "That, where the defendant sought to establish the fact that he was at a particular place at any given time, and wished them to take it as an affirmative fact proved, the burden of proof was upon him, and, if he failed in maintaining that burden, the jury could not consider it as a fact proved in the case; that the burden, however, was upon the government to show that the defendant was present at the time of the

commission of the offense, and, as bearing upon that question, the jury were to consider all the evidence offered by the defendant tending to prove an alibi; and if, upon all the evidence, the jury entertained a reasonable doubt as to the presence of the defendant at the fire, they were to acquit."

57—*Holley v. State*, 105 Ala. 100.

58—*State v. Henry*, 48 Iowa 403.

59—*People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *Long v. State*, 42 Fla. 509; *Howard v. State*, 50 Ind. 190; *State v. Vanella*, 40 Mont. 326, 20 Ann. Cas. 398. 106 Pac. 364; *Cald-*

and this rule applies where such doubt is raised either by the evidence as to an alibi alone,⁶⁰ or in connection with all the other evidence which is presented in the case.⁶¹

In such case when the evidence is sufficient to warrant an instruction on the subject its refusal is error,⁶² and ground for reversal.⁶³

Accordingly, it has been held erroneous to refuse an instruction "that, if the jury had a reasonable doubt that the defendant was absent at the time the homicide was committed, they should acquit him;"⁶⁴ or "that, if the proof of alibi raised a reasonable doubt of the defendant's guilt,

well v. State, 28 Tex. 566; Walker v. State, 6 Tex. App. 576; Stevens v. State, 42 Tex. Cr. App. 154.

60—**Alabama.** McClain v. State, 182 Ala. 67.

California. People v. Nelson, 85 Cal. 421, 24 Pac. 1006; People v. Mar Gin Suie, 11 Cal. App. 42, 103 Pac. 951.

Indiana. Howard v. State, 50 Ind. 190.

Iowa. State v. Hardin, 46 Iowa 623, 26 Am. Rep. 174.

Missouri. State v. Taylor, 118 Mo. 167; State v. Lewis, 69 Mo. 92; State v. Kelly, 16 Mo. App. 213; State v. Emory, 12 Mo. App. 593.

Nebraska. McLain v. State, 18 Neb. 154.

Tennessee. Wiley v. State, 5 Baxt. 662.

Texas. Walker v. State, 42 Tex. 360; Caldwell v. State, 28 Tex. App. 566; Walker v. State, 6 Tex. App. 576.

Compare Mullins v. People, 110 Ill. 46, where it was held that it is not quite correct to say that, when the jury have considered all the evidence offered on the point made as to the alibi, if they have a reasonable doubt as to whether "defend-

ant was in some other place when the offense was committed," they should acquit. "A better expression of the law would be, when the jury have considered all the evidence, as well that touching the question of the alibi, as the criminating evidence introduced by the prosecution, then, if they have any reasonable doubt of the guilt of the accused, they should acquit; otherwise not."

61—**Alabama.** McClain v. State, 182 Ala. 67; Pate v. State, 94 Ala. 18.

Georgia. Landis v. State, 70 Ga. 651, 48 Am. Rep. 588.

Illinois. Sheehan v. People, 131 Ill. 22.

Indiana. Binns v. State, 46 Ind. 312.

Mississippi. Dawson v. State, 62 Miss. 244; Pollard v. State, 53 Miss. 421, 24 Am. Rep. 703.

Pennsylvania. Watson v. Com., 95 Pa. St. 418.

Tennessee. Chappel v. State, 7 Cold. 92.

62—Long v. State, 42 Fla. 509; Binns v. State, 46 Ind. 312; Wiley v. State, 5 Baxt. (Tenn.) 662.

63—State v. Lewis, 69 Mo. 92.

64—State v. Taylor, 118 Mo. 167.

he must be acquitted;”⁶⁵ or that it is not necessary that “defendants shall prove an alibi beyond a reasonable doubt,—that it is sufficient if the evidence offered to prove it raises a reasonable doubt in the minds of the jury whether or not the accused was at the scene of the crime and participated therein, and that in such cases it is the duty of the jury to acquit.”⁶⁶

Where the court instructs: “An alibi is a defense which is established by showing that the person charged with the crime was at some place other than that where the crime was committed, at such a time that he could not have been at the place of the crime at the time of its commission. If the evidence offered to establish an alibi fails to show the accused at the place claimed at such a time that he could not have been where the crime was committed at the time of its commission, the alibi fails. In other words, if the accused might have been at the place he claims at the time shown, and yet might have been at the place of the crime at the time of its commission, there is no alibi,”—the jury are in effect told that the state must establish the guilt of the respondent beyond a reasonable doubt to entitle it to a conviction, and that, if the evidence in support of the alibi, in connection with the other evidence, raised in their minds a reasonable doubt as to his guilt, he was entitled to an acquittal; and it is not error to refuse to instruct “that, if they were satisfied, by a fair balance of the testimony, that he was at another place at the time of the burglary, the verdict should be not guilty.”⁶⁷

A charge to the jury “that, if there is any evidence before you that raises in your minds a reasonable doubt as to the presence of the defendant at the time and place where the crime is charged to have been committed, you will acquit the defendant,” is correct in form,⁶⁸ and an instruction gives

65—Wiley v. State, 5 Baxt. (Tenn.) 662.

66—Long v. State, 42 Fla. 509.

67—State v. Powers, 72 Vt. 168.

68—State v. Adair, 160 Mo. 391. See also, Mass v. State, 59 Tex. Cr. App. 390.

the defendant the full benefit of the evidence as to alibi, which tells the jury that defendant is not bound to prove an alibi, but, if his evidence raises a reasonable doubt in their minds as to his complicity in the crime, they must acquit him.⁶⁹

It has also been held that an instruction that "the commission of a crime implies the presence of the defendant at the necessary time and place, and evidence of the absence of the defendant is always a defense, and, if a reasonable doubt is created by this evidence, it is the duty of the jury to acquit the defendant," as amended by the court by inserting after the word "always" the words "admitted to establish," is a correct statement of the law, and properly given.⁷⁰ And an instruction that: "If the defendant was, at the time of such killing, at another and different place from that at which such killing was done, and therefore was not and could not have been the person who killed the deceased, if he was killed. Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the deceased was killed (if killed), at the time of such killing, you will find him not guilty,"—has been held a correct and sufficient charge on the subject of alibi.⁷¹

An instruction that, "the defendant could not be guilty as charged unless he was present at the commission of the offense, if any, and, if you have a reasonable doubt of the defendant being present at the killing of said decedent, if any, then you will acquit him, * * * is a distinct, clear, and substantive charge upon the law of alibi, disconnected from and independent of any other part of the charge," and it cannot be objected that the court did not charge in the usual form,—that defendant "relies in this case upon the defense of alibi, which means that he was not present at

69—State v. Miller, 156 Mo. 76.

71—Walker v. State, 6 Tex. App.

70—People v. Nelson, 85 Cal. 421, 576.

24 Pac. 1006.

that particular time and place, and therefore, if you find he was not present, find him not guilty.”⁷²

A charge: “Unless the evidence proves beyond a reasonable doubt that the defendant was not only present at the killing, but that he had knowledge of the unlawful intent of those who actually committed the homicide, if that has been shown, and that he aided or encouraged them in the killing, then you should acquit him. If the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the time and place of the killing, then you should acquit him,”—is to the effect that, if the jury entertain a reasonable doubt as to the presence of the defendant at the time and place of the killing, they should give defendant the benefit of such reasonable doubt, and acquit him, and does not place the burden upon the accused of showing his defense beyond a reasonable doubt.⁷³

An instruction that, “among other defenses set up by defendant is what is known in legal phraseology as an alibi; that is, that, if the offense was committed as alleged, then the defendant was, at the time of the commission thereof, at another and different place from that where such offense was committed, and therefore was not, and could not have been, the person who committed the same. Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the offense was committed at the time of the commission thereof, you will find the defendant not guilty,”—is not objectionable on the ground that it requires the introduction of exculpatory evidence, and is calculated to impress the jury that, without such evidence, the guilt of accused is established beyond a reasonable doubt.⁷⁴

It is erroneous to instruct that the defense of alibi must be

72—*Stevens v. State*, 42 Tex. Cr. App. 154. See also, *Benavides v. State* (Tex. Cr. App.), 61 S. W. 125.

73—*Gutierrez v. State* (Tex. Cr. App.), 59 S. W. 274.

74—*Villereal v. State* (Tex. Cr. App.), 61 S. W. 715.

proved beyond a reasonable doubt;⁷⁵ or “not beyond a reasonable doubt, but by the preponderance of the testimony;”⁷⁶ that, if the doubt of defendant’s guilt or innocence only arises from the consideration of evidence tending to prove an alibi, he is not entitled to the benefit of that doubt;⁷⁷ or that the defendant was not to have the benefit of any doubt in regard to the alleged alibi, unless the jury should find as a fact that he was at another place than the place where the crime was committed, when it occurred.⁷⁸

It is also erroneous to so instruct the jury as to take away from their consideration the evidence of an alibi, unless it is sufficient to establish that defense, or to assume in the instruction that, unless the evidence to prove an alibi produces conviction in the minds of the jury that defendant was not present at the commission of the offense, it cannot avail;⁷⁹ or to state that, when the defense of an alibi is set up, the jury should “bear in mind that the proof necessary to establish the alibi must be proven with as much certainty as the state would have to establish the guilt of the accused;”⁸⁰ or to state that the defense must be fully and satisfactorily established to the satisfaction of the jury before it was a good and complete defense;⁸¹ or that, if the evidence satisfied the minds of the jury that the defendant was not at the place of the alleged crime at the time it was committed, the jury should acquit.⁸² It has been held,

75—*Landis v. State*, 70 Ga. 651, 48 Am. Rep. 588; *Meyers v. Com.*, 83 Pa. St. 144; *State v. Watson*, 7 S. C. 65; *Gutierrez v. State* (Tex. Cr. App.), 59 S. W. 274.

76—*State v. Anderson*, 59 S. C. 229, wherein such instruction was held erroneous, as requiring too great a degree of proof; but the error was held cured by the further instruction that it was the duty of the state to prove every material allegation beyond a reasonable doubt, and that the defendant was entitled to the

benefit of any reasonable doubt growing out of all the testimony.

77—*State v. Waterman*, 1 Nev. 553.

78—*People v. Fong Ah Sing*, 64 Cal. 253, 28 Pac. 233.

79—*Walker v. State*, 42 Tex. 360. See also, *State v. McGarry*, 111 Iowa 709.

80—*Chappel v. State*, 7 Cold. (Tenn.) 92.

81—*Dawson v. State*, 62 Miss. 244.

82—*Howard v. State*, 50 Ind. 190.

however, that an instruction that, if it be established to the entire satisfaction of the jury that the defendant was in another place at the time the alleged crime was committed, it follows that he could not have been at the place where the crime was committed, is not erroneous, in the absence of a request for a more specific charge.⁸³ So, where the court instructed that, "it need not be established beyond a reasonable doubt, but it should be established to the satisfaction of the jury," and the court answered a request for a charge that "if, taking the whole case together,—taking the evidence for the prosecution and the evidence respecting the alibi,—they have any doubt of the guilt of the prisoner, they must acquit," by saying, "I have so charged already," this was held equivalent to saying that his intention was to so instruct the jury, and, if the jury could have misunderstood the charge, its adoption by the court of the correct rule must have removed the erroneous impression.⁸⁴ So it is not accurate to say that the defense of alibi merely tends to cast a reasonable doubt on the case made by the state; but it has been held that this error is cured by an instruction that, "the law being that, when the jury have considered all the evidence, as well that touching the question of the alibi as the criminating evidence introduced by the prosecution, then if they have any reasonable doubt of the guilt of the accused of the offense with which he stands charged, they should acquit; otherwise not."⁸⁵

The weight of authority is to the effect that the defendant is deprived of the benefit of a reasonable doubt by an instruction that, "in order to support an alibi, it was essential that the testimony should so cover the whole time

83—*People v. O'Neil*, 59 Cal. 259.

84—*People v. Stone*, 117 N. Y. 480. In this case, two of the judges dissented, and apparently with good reason. The action of the court was certainly not equivalent to giving

the requested instruction, and even then it is doubtful whether it would have been sufficient to correct the erroneous impression given by the other instruction.

85—*Sheehan v. People*, 131 Ill. 22.

involved in the transaction as to render it impossible for the defendant to have committed the offense charged against him;"⁸⁶ or by an instruction that, "in order to make the defense of an alibi successful, * * * it is essential that the evidence to establish this defense should cover and account for the whole time of the transaction in question, or at least so much of it as to render it impossible that the defendant could have committed the offense."⁸⁷ An instruction that, "to render proof of an alibi satisfactory, the evidence must cover the whole time of the transaction in question, so as to render it impossible that defendant, setting up such defense, could have committed the act," has been condemned, on account of the last clause contained therein. The reviewing court did not consider the first clause of this instruction erroneous, and so far this case is in conflict with the preceding ones.⁸⁸

It has, however, been held proper to refuse an instruction that, in order to support an alibi, "it is not necessary that the evidence in support of an alibi should cover every moment of time in which the offense was committed, but it is only necessary to create a reasonable doubt that the defendant was there; and if, under all the evidence, there is any reasonable probability that the defendant was not present when the deceased was killed, then they must find him not guilty."⁸⁹

In some decisions it has been held that it is not erroneous to charge that, where an alibi is not complete, it cannot avail the defendant, where the court further declares that, if there is a reasonable doubt of the prisoner's guilt, the jury must acquit.⁹⁰ So, it has also been held that, where

86—Kaufman v. State, 49 Ind. 248; Stuart v. People, 42 Mich. 260; Pollard v. State, 53 Miss. 410, 24 Am. Rep. 703.

87—Beavers v. State, 103 Ala. 36; Albritton v. State, 94 Ala. 76. To the same effect, see McAnally v. State, 74 Ala. 9.

88—Wisdom v. People, 11 Colo. 170, 17 Pac. 519.

89—Pate v. State, 94 Ala. 14.

90—People v. Worden, 113 Cal. 569, 45 Pac. 844; State v. Reitz, 83 N. C. 634. See also, State v. McGarry, 111 Iowa 709.

evidence has been introduced tending to show that the defendant was at a place other than the place where the crime was committed, at the time of its commission, but where the exact time of the commission of the crime is not shown, but it is shown to have been committed during a night or a part of a night, it is proper to instruct that evidence of an alibi must cover the whole of such time.⁹¹

§ 327. Instructions requiring defense of alibi to be viewed with caution.

In some decisions it has been held proper to instruct: that "the defense of alibi is one easily manufactured, and jurors are generally and properly advised by the courts to scan the proofs of an alibi with care and caution;"⁹² that the jury "are to carefully scrutinize any evidence in relation to an alibi. An alibi is a defense which is easily proven, and hard to disprove. Therefore you will be careful and cautious in examining evidence in regard to an alibi;"⁹³ that the jury should consider the evidence of an alibi with great caution; that the law so considered it, for the reason that it was so easily manufactured; but that an alibi, when once established to the satisfaction of the jury, was as good as any other evidence;⁹⁴ and that "evidence to establish an alibi, like any other evidence, may be open to special observation. Persons may perhaps fabricate it with greater hopes of success or less fear of punishment than most other kinds of evidence; and honest witnesses often mistake dates and periods of time, and identity of people seen, and other things about which they testify."⁹⁵

So, it has been held that a charge that evidence of alibi "should be closely scrutinized because of its liability to

91—West v. State, 48 Ind. 483.

92—Rowland v. State, 55 Ala. 210; State v. Blunt, 59 Iowa 468. See also, State v. Whitbeck, 145 Iowa 29.

93—State v. Wright, 141 Mo. 333.

94—Provo v. State, 55 Ala. 222.

95—People v. Wong Ah Foo, 69 Cal. 180, 10 Pac. 375. See also, People v. Lee Gam, 69 Cal. 552, 11 Pac. 183.

abuse," is not erroneous as an intimation that failure to prove an alibi is evidence of guilt, especially where it appears that the charge as a whole could not have been misunderstood.⁹⁶

A portion of an instruction stating that, "it is your duty to examine such evidence carefully to determine its truth or falsity" has been held not to suggest a doubt of the credibility of witnesses for the defendant when the entire charge was considered.⁹⁷

It is well known that the defense of alibi is often attempted to be sustained by false and perjured testimony, and that the jury may and should scan the testimony carefully for the purpose of determining its truth or falsity. But regardless of this, the defense is not intrinsically a suspicious one, and on the contrary is as honorable and satisfactory as any which the law permits. Frequently it may be the only defense of an innocent man. Accordingly, it has been held error in a large number of decisions to instruct that the defense of an alibi is a defense upon which the law looks with suspicion.⁹⁸ So it is error to tell the jury that the defense of an alibi is to be viewed with peculiar suspicion and distrust;⁹⁹ or that an alibi is a species of defense "which the law always looks upon with suspicion;"¹ or that the defense of alibi is to be received

96—State v. Rochelle, 156 N. C. 641.

97—Harris v. Neal, 153 Mich. 57.

98—Alabama. Spencer v. State, 50 Ala. 124; Williams v. State, 47 Ala. 659.

California. People v. Lattimore, 86 Cal. 403, 24 Pac. 1091.

Indiana. Albin v. State, 63 Ind. 598; Sater v. State, 56 Ind. 378; Line v. State, 51 Ind. 174.

Mississippi. Dawson v. State, 62 Miss. 241; Simmons v. State, 61 Miss. 243.

Missouri. State v. Sidney, 74 Mo. 390; State v. Lewis, 69 Mo. 92.

New York. People v. Kelly, 35 Hun 295.

North Carolina. State v. Jaynes, 78 N. C. 504.

Oregon. State v. Chee Gong, 16 Ore. 534, 19 Pac. 607.

South Carolina. State v. Smalls, 98 S. C. 297.

Texas. Walker v. State, 37 Tex. 366.

99—Simmons v. State, 61 Miss. 243.

1—Spencer v. State, 50 Ala. 124; People v. Kelly, 35 Hun (N. Y.) 295. In this last case the court said: "The defense is as honorable, and,

with caution;² or that "evidence given in support of it [an alibi] should be scrutinized otherwise or differently from that given in support of any other issue in the cause;"³ or that "an alibi is a species of defense often set up in criminal cases, and one which seems to figure * * * in this" case;⁴ or that "the defense of an alibi is one that is easily fabricated, and is often attempted by contrivance, subornation and perjury;"⁵ or that "the law regards evidence to prove an alibi among the weakest and most unsatisfactory of all kinds of evidence;"⁶ or to instruct that the defense "is very often resorted to by guilty persons, as well as innocent ones, and one in which perjury, mistake, and deception are often committed;"⁷ or to assume that the defense of alibi is "frivolous and unfounded;" as by refusing to give an instruction upon the only defense presented, viz., alibi.⁸

In a prosecution for larceny, an instruction that, "where property has been stolen, and recently thereafter the same property, or any part thereof, is found in the possession of another, such person is presumed to be the thief, and, if he fails to account for his possession of such property, in a manner consistent with his innocence, this presumption becomes conclusive against him, and in such cases the law further presumes that the thief resorted to and made use of all the means necessary to gain access to and possession of such stolen property," is erroneous if there is evidence of an alibi, as such instruction in effect tells the jury that "it is true there is evidence of an alibi, but you

when clearly proved, as satisfactory, as any defense which the law permits."

2—State v. Smalls, 98 S. C. 297.

3—People v. Lattimore, 86 Cal. 403, 24 Pac. 1091; Sater v. State, 56 Ind. 382; Line v. State, 51 Ind. 174; Dawson v. State, 62 Miss. 241.

4—Walker v. State, 37 Tex. 366.

5—Dawson v. State, 62 Miss. 241;

Nelms v. State, 58 Miss. 362. This precise charge was given in the Webster Case by Chief Justice Shaw, and sustained. Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711n.

6—Williams v. State, 47 Ala. 659.

7—State v. Chee Gong, 16 Ore. 534, 19 Pac. 607.

8—State v. Lewis, 69 Mo. 92.

need pay no attention to that; and if you find that defendant had the stolen property in his possession recently after the theft, then return a verdict of guilty.”⁹

It has been held that an instruction vicious in this respect is not cured by another instruction declaring that such defense, when “established by the evidence, * * * is a good and complete legal defense.”¹⁰

But in one case it was held that such an instruction would not be ground for reversal if the remaining portion of the charge was such that, when given as a whole, an intelligent jury could not have been misled by it.¹¹

An instruction stating that “the defendant has introduced evidence tending to establish what is known as an alibi” is not a disparagement of that defense, and is not subject to criticism.¹²

§ 328. Instructions as to the effect of an unsuccessful attempt to prove alibi.

There is considerable conflict of authority as to what instructions may properly be given as to the effect of an unsuccessful attempt to prove an alibi.

An instruction “that an unsuccessful attempt to prove an alibi in a criminal case is a circumstance to be weighed against the defendant” has been approved in one decision,¹³ and held not reversible error in another,¹⁴ and it has been held not improper to instruct in effect that, if the defendant makes a corrupt attempt to manufacture a false alibi, it may be considered as a circumstance against him.¹⁵

On the other hand, it has been held error to instruct “that an unsuccessful attempt to prove an alibi is always

9—State v. Sidney, 74 Mo. 390.

10—Dawson v. State, 62 Miss. 241.

11—People v. Lattimore, 86 Cal. 403, 24 Pac. 1091.

12—Rownd v. State, 93 Neb. 427.

13—Kilgore v. State, 74 Ala. 5.

14—Jackson v. State, 117 Ala. 155.

15—Com. v. McMahon, 145 Pa.

St. 413; Pilger v. Com., 112 Pa. St. 220. Compare Turner v. Com., 86 Pa. St. 54, 27 Am. Rep. 683, wherein the instruction condemned implied that a mere failure to establish an alibi was sufficient to show an attempt to manufacture evidence.

a circumstance of great weight against the defendant;"¹⁶ or that a failure to prove an alibi "ought to raise a strong presumption against the bona fides of the defense;"¹⁷ or that an unsuccessful attempt to prove an alibi implies "the truth and relevancy of the facts alleged" against defendant;¹⁸ or that, if the jury found defendant guilty of falsity in alleging his alibi, such falsity should be considered as additional evidence of his guilt;¹⁹ or that a failure to prove an alibi may be properly considered in connection with any other evidence in the case tending to prove guilt;²⁰ or that, "if the proof of an alibi," which, if true, "would work a complete destruction of the charges against the defendants, should turn out to be false and manufactured, the legal presumption is that the evidence introduced by the state, and upon which it bases a claim for the conviction of the defendants, whether weak or strong, is true."²¹

It has also been held erroneous to charge that the "failure to prove the defense of alibi satisfactorily is a circumstance unfavorable to the defendant;"²² or that an alibi, if proved, "constitutes a complete defense; if not proved, * * * the attempt to manufacture evidence is a circumstance which always bears against the prisoner. No innocent person is driven to manufacture evidence;"²³ or that it is "essential to the successful proof of an alibi that it should cover the whole time of the transaction in question, and when it fails to do so it is regarded

16—**Alabama.** Albritton v. State, 94 Ala. 76.

California. People v. Malaspina, 57 Cal. 628.

Illinois. Miller v. People, 39 Ill. 458.

Iowa. State v. Collins, 20 Iowa 85.

North Carolina. State v. Josey, 64 N. C. 59.

17—Com. v. Fisher, 15 Phila. (Pa.) 387.

18—State v. Collins, 20 Iowa 85.

19—State v. Byers, 80 N. C. 426.

20—Parker v. State, 136 Ind. 284.

21—Sawyers v. State, 15 Lea (Tenn.) 695.

22—Prince v. State, 100 Ala. 144, 46 Am. St. Rep. 28; Adams v. State, 28 Fla. 551.

23—Turner v. Com., 86 Pa. St. 54, 27 Am. Rep. 683.

as the most suspicious of evidence; that the witnesses all testified to having retired by ten o'clock, and it was for the jury to say whether the prisoner might have left, or did leave, his bed, commit the deed, and return before the alarm of fire was given."²⁴

An instruction: "The defendant pleads specially an alibi. He has attempted to prove that he was not present at the place where the crime was committed,"—is erroneous, as discrediting the defense of alibi, and the injurious effect of this charge is not remedied by an additional instruction that, if the jury believe the plea of alibi, they are not authorized to convict.²⁵

24—State v. Jaynes, 78 N. C. 504.

25—Kimbrough v. State, 101 Ga.
583.

CHAPTER XXIX.

INSTRUCTIONS ON ABSENCE OF ALLOWABLE EVIDENCE.

- § 329. Absence of witnesses or failure to produce evidence within the power of a party in civil cases.
§ 330. Same—Criminal cases.
§ 331. Failure of party to testify in civil cases.
§ 332. Same—Criminal cases.
§ 333. Same—What instructions are proper.

§ 329. Absence of witnesses or failure to produce evidence within the power of a party in civil cases.

In civil cases, it has been held that an instruction that no inference may be drawn against a defendant from the fact alone that he offered no evidence, is proper,¹ and it is also proper to give an instruction that the jury are not to draw an unfavorable inference from the unavoidable absence of a witness.² But ordinarily, the court may properly comment on the failure to call a witness to testify as to a material fact peculiarly within the knowledge of the witness.³ And if any fact appears in the case made by plaintiff, which, though not conclusive, tends to establish a preponderance of evidence against defendant, and the latter has it in his power to contradict such fact, the court may comment on the failure of defendant to call witnesses to disprove or explain such fact.⁴

An instruction precluding the jury from drawing its

1—Simon v. Griffin Wheel Co., 168 Ill. App. 533.

2—Warth v. L. Loenwenstein & Sons, 121 Ill. App. 71, modified, 219 Ill. 222.

3—Ripley v. Second Ave. R. Co., 8 Misc. Rep. (N. Y.) 449.

4—Flynn v. New York El. R. Co., 50 N. Y. Super. Ct. 375.

own inferences from a party's failure to produce evidence is erroneous.⁵

A request for an instruction that if, upon conflicting testimony, the jury find that a party has purposely withheld material evidence in his control, they might draw therefrom an inference unfavorable to his claim, is sufficiently complied with by submitting the fact for consideration.⁶ And an instruction on the effect of failure to produce evidence within the power of a party is sufficiently definite and intelligible when it announces the presumption of law to be that the evidence, if produced, would be prejudicial to the party.⁷

An instruction in an action on a promissory note, that if the plaintiff had it peculiarly within his power to produce the evidence of a witness as to the genuineness of a signature, and failed to do so, then the jury might presume that the evidence was unfavorable, has been held proper.⁸

But where, irrespective of the testimony which may be given by witnesses whom defendant fails to call, defendant has sufficiently met the case made by plaintiff, and it does not appear that such witnesses are more under the control of defendant than of plaintiff, or more in the interest of defendant, it is error to instruct that the failure of the defendant to produce such witnesses may be considered by the jury in forming their conclusion.⁹

It is error to comment on the omission to call a witness who has no other or better knowledge of the matter in dispute than those who are produced and give evidence,¹⁰ or upon the failure to produce a witness summoned at a former trial, if it appears that on such former trial the witness testified to his lack of memory on the point in con-

5—*Momence Stone Co. v. Groves*, 197 Ill. 88, aff'g 100 Ill. App. 98.

6—*Sherlock v. German-American Ins. Co.*, 21 App. Div. (N. Y.) 18.

7—*Nicol v. Crittendon*, 55 Ga. 497.

8—*Closson v. Bligh*, 41 Ind. App. 14.

9—*Flynn v. New York El. R. Co.*, 50 N. Y. Super. Ct. 375.

10—*Fitzpatrick v. Woodruff*, 47 N. Y. Super. Ct. 436.

troversy.¹¹ So, where a party fails to call one of two favorably disposed witnesses, it is error to charge that the jury may infer that the testimony of the witness who took the stand, as to matters within the knowledge of the witness not called, was untrue.¹² And an instruction as to the inference from a failure to introduce evidence is improper where the defendant relies upon the inherent improbability of the plaintiff's evidence.¹³

§ 330, Same—Criminal cases.

According to some decisions, the court may charge that if a strong case is made out against defendant, and it is within his power to produce countervailing evidence other than his own testimony, they may consider his failure to do so in determining his guilt or innocence.¹⁴ And it has been held that the court may properly charge "that, when a man has evidence at hand by which he could prove a given fact material to his defense, and does not use it, it is for the jury to say whether it should be considered against him or not."¹⁵

11—Fitzpatrick v. Woodruff, 47 N. Y. Super. Ct. 436.

12—Brown v. Town of Swanton, 69 Vt. 53. In this case it was said: "If it is ever fair to assume from the failure to produce one of two favorably disposed witnesses that the testimony given by the other is false, it must be in view of a variety of circumstances which it is the province of the jury to pass upon."

13—Smith v. Chicago City Ry. Co., 165 Ill. App. 190.

14—Com. v. Costley, 118 Mass. 1, in which the court said: "Evidence having been introduced, strongly tending to show that the homicide was committed by the defendant in Norfolk, the jury were rightly instructed that, if they thought that, if it had been committed elsewhere,

the defendant would have the means of showing it by other witnesses, they might consider the absence of evidence that it was committed in another county." State v. Grebe, 17 Kan. 458, where the following instruction was approved: "Where evidence which would rebut or explain certain facts and circumstances of a grave and suspicious nature is peculiarly within the defendant's knowledge and reach, and he makes no effort to procure it, the jury may properly take such fact into consideration in determining the prisoner's guilt or innocence; but no inference of guilt is to be drawn from the omission of the defendant and his wife to testify."

15—Brulo v. People, 16 Hun (N. Y.) 119.

The instructions approved in these decisions limit the failure to produce evidence to the testimony of witnesses other than defendant himself, and this would certainly seem to be the proper course, inasmuch as it is generally considered erroneous to comment adversely on defendant's failure to testify. This view is supported by a case in which the jury were told "that the failure of a defendant to produce evidence which it was in his power to produce, to meet the evidence adduced by the commonwealth, was a competent and proper matter for them to weigh in considering the question of his guilt." The reviewing court held that this instruction was erroneous, because the jury "were not told that this last remark did not apply to his [defendant's] own testimony, but merely to his failure to produce other witnesses."¹⁶ And an instruction that, "when all the circumstances proved raise a strong presumption of the guilt of the accused, his failure to offer any explanation, where it is in his power to do so, tends to confirm the presumption of his guilt," has also been condemned.¹⁷

On the other hand, Chief Justice Shaw charged the jury in the Webster Case as follows: "When pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain, the charge; but this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution."¹⁸

This instruction, as is seen, does not limit the failure to

16—Com. v. Harlow, 110 Mass. 411.

18—Com. v. Webster, 5 Cush.

17—Doan v. State, 26 Ind. 498.

(Mass.) 316.

produce countervailing evidence to testimony of other witnesses than defendant, and to that extent is against the weight of authority. In one other decision, a charge was given which seems to be subject to the same objection. The jury were told, in effect, that where the only direct evidence of defendant's guilt was the testimony of an accomplice, who testified that he and defendant stayed at a certain house on the night of the crime; that they left the house, and, after committing the crime, returned and stayed there all night,—the jury might consider, as a circumstance corroborating the testimony of the accomplice, defendant's failure to produce any evidence that he was not at the house mentioned on the night of the crime.¹⁹

It has been held erroneous to instruct that the jury cannot consider the failure of the prosecution to call a witness;²⁰ and it has also been held erroneous to charge that defendant's failure to show where he was on the day the crime was committed, by some witness, renders what was not absolute before a certainty.²¹

Where no evidence of dying declarations is introduced, it is proper to refuse an instruction drawing inferences from the fact that a written dying declaration in the possession of the prosecution has not been given in evidence. In such case, an instruction to view with distrust secondary evidence would be abstract.²²

§ 331. Failure of party to testify in civil cases.

In civil cases, some decisions hold that it is not proper for the court in any manner to call the jury's attention to the fact that a party has failed to take the stand in his own behalf,²³ but the weight of authority is against this

19—*People v. Dyle*, 21 N. Y. 578.

20—*State v. Smallwood*, 75 N. C. 104.

21—*Gordon v. People*, 33 N. Y. 501. The law attributes no such consequences to the omission of a prisoner, upon the trial of a capital

offense, to produce proof of his whereabouts upon the day when the crime charged was committed. *Gordon v. People*, 33 N. Y. 501.

22—*People v. Brown*, 130 Cal. 591, 62 Pac. 1072.

23—*Moore v. Wright*, 90 Ill. 470.

view.²⁴ While the privilege of a party to testify in his own behalf is a personal one, of which he may avail himself or not at his election, failure of a party to testify, when, by testifying, he might exonerate himself from liability sought to be established against him, is a probative fact, and the court, while it should take care not to give specific directions as to the effect of such fact, may charge "that the fact that the defendant did not appear to testify in the case was a matter they might consider and give such weight to it as they thought it might deserve."²⁵

Thus it has been held proper for the presiding judge to instruct the jury, in case of defendant's failure to testify, that they might infer that his evidence would not have benefited his case, the court saying: "It is an inference so naturally arising to a jury themselves possessing ordinary sense and acumen, that such a remark might be hardly necessary; but it is clearly within the discretion of the judge in remarking on the evidence which had been adduced, and that which had not been adduced."²⁶

The following form of instruction has also been approved: "The court instructs you that, if you find there are material and important circumstances appearing in evidence against the defendant, and you further find that defendant has not satisfactorily explained said circumstances by other evidence, then the fact that he was not a witness in his own behalf may be considered in evidence against him, and you are to give it just such weight as it is entitled to when considered with the other evidence in the case."²⁷ And it has been held that where the plaintiff was fully informed as to the nature of the transaction out

24—Iowa. *Miller v. Dayton*, 57 Iowa 423.

Maine. *Union Bank v. Stone*, 50 Me. 595, 79 Am. Dec. 631.

Michigan. *Blackwood v. Brown*, 29 Mich. 483.

New York. *Brooks v. Steen*, 6 Hun 516.

New Brunswick. *Tufts v. Hatheway*, 4 Allen 62.

25—*Union Bank v. Stone*, 50 Me. 595, 79 Am. Dec. 631.

26—*Tufts v. Hatheway*, 4 Allen (N. B.) 62.

27—*Miller v. Dayton*, 57 Iowa 423.

of which the cause of action arose, and failed to appear and testify at the trial, it was proper for the court to submit to the jury the plaintiff's absence as a circumstance for them to consider, and to instruct them that if they found such absence to be of a suspicious character, it would throw suspicion upon his case.²⁸

It has also been held that the court may properly charge that the jury are at liberty to draw unfavorable inferences against the defendant for failure to testify as a witness in explanation of material transactions, if they believe them to be within his knowledge.²⁹ But if there is no evidence that a party has any knowledge concerning one of the vital points in the case, it is error for the court to assume that if such party had made himself a witness, and told the truth, he would have established the issue on such point in favor of his adversary. Under a rule permitting such an instruction, it would be dangerous for a man to fail to put himself on the stand.³⁰ So, a request for an instruction that plaintiff's failure to testify on a former trial of the action as to certain facts was a suspicious circumstance, which the jury should consider in testing their credibility, because the issues were the same upon the former trial as in the case at bar, was held properly refused.³¹

§ 332. Same—Criminal cases.

The statutory provisions of the various states usually provide that defendants in criminal cases are competent witnesses in their own behalf, but it is optional whether such defendants shall testify at the trial. Under such statutory provisions, the trial judge is not authorized to comment unfavorably on the failure of a defendant to testify.³²

28—*Brooks v. Steen*, 6 Hun (N. Y.) 516.

29—*Blackwood v. Brown*, 29 Mich. 483.

30—*Emory v. Smith*, 54 Ga. 273.

31—*Brady v. Cassidy*, 9 Misc. Rep. (N. Y.) 107.

32—*Ruloff v. People*, 45 N. Y. 213.

“Neither the prosecuting officer nor the judge has the right to allude to the fact that a person has not availed himself of this statute, and it would be the duty of the court promptly to interrupt a prosecuting

It has been held, however, that where an allusion to defendant's failure to testify has been made, the error is cured if the court, on its attention being called to it, states to the jury that there was no law requiring the prisoner to be sworn, and no inference to be drawn against him from the fact of his not having been sworn.³³

Under a statute providing that defendant's failure to testify shall not "be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place," the court is not at liberty to make any comments whatever, whether favorable or otherwise, on defendant's failure to testify.³⁴ And the same is the case under a statute providing that, "on the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the court." This statute goes further than the statutes of some other states, in that it prohibits not only the prosecuting attorney, but the court, from making comment. The trial court is forbidden to hint at the existence of a law giving the defendant the right to testify, and such statute seems calculated to protect the interests of the accused, as the grant-

counsel who should so far forget himself and the duties of his office as to attempt to make use of the fact in any way, to the prejudice of a person on trial. An allusion by the judge to the fact, unexplained, cannot but be prejudicial to a person on trial, and a provision intended for his benefit will prove a trap and a snare. It is an intimation to the jury of the effect upon his mind of the omission of the accused to explain, by his own oath,

suspicious and doubtful facts and circumstances, as affecting the question of guilt or innocence." *Ruloff v. People*, 45 N. Y. 213. But see, *State v. Wines*, 65 N. J. L. 31.

Contra, *Kops v. Reg.*, [1894] App. Cas. 650, construing a provision that the accused in a criminal case "shall be competent, but not compellable," to testify.

33—*Ruloff v. People*, 45 N. Y. 213.

34—*State v. Robinson*, 117 Mo. 649.

ing of a request that "the failure of defendant to testify cannot be taken into consideration by the jury" would many times do harm by calling the attention of the jury to the failure of the defendant to avail himself of his statutory privilege.³⁵

Under a statute providing that a person charged with crime shall be a competent witness at his own request and not otherwise, and that a failure to make such a request shall not create any presumption against him, the weight of authority seems to hold that it is not error or a violation of the statute for the court to instruct that the fact that defendant has not testified in his own behalf shall raise no presumption against him, where no reference thereto has been made by the prosecuting attorney.³⁶

A statute providing that "defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state, and, should a defendant not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state during the trial refer to the fact that the defendant did not testify in his own behalf, and, should he do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial," does not prohibit the court from telling the jury that such failure raised no presumption against the defendant;³⁷ and the jury may be so instructed where the statute provides that, "on a trial of all indictments, complaints, and other pro-

35—State v. Pearce, 56 Minn. 226.

36—State v. Wisnewski, 13 N. D. 649, 3 Ann. Cas. 907; State v. Carlisle, 28 S. D. 169, Ann. Cas. 1914 B 395n.

37—State v. Weems, 96 Iowa 426; Fulcher v. State, 28 Tex. App. 465; Pearl v. State, 43 Tex. Cr. App. 189.

It is proper for the court to charge that the jury must not consider a defendant's failure to testify. Wil-

lingham v. State, 62 Tex. Cr. App. 55. See also, Kinkead v. State, 61 Tex. Cr. App. 651; Singleton v. State, 57 Tex. Cr. App. 560.

While it is not error to caution the jury against considering a defendant's failure to testify, it is also not usually error to fail to instruct the jury not to consider such fact. Adams v. State, — Tex. Cr. App. —, 105 S. W. 497.

ceedings against a person charged with the commission of an offense, the person so charged shall, at his own request, but not otherwise, be a competent witness; but his neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, nor any comment be made upon, such neglect or refusal.”³⁸

A statutory prohibition of a defendant's failure to testify being made “the subject of comment of counsel” does not make it error for the court to caution the jury not to draw any inference from the defendant's failure to offer himself as a witness.³⁹

In some jurisdictions, the statutes make it the duty of the court to instruct the jury that no inference of defendant's guilt is to be drawn from the fact of his not testifying;⁴⁰ and this the court must do, whether requested or not.⁴¹

In other jurisdictions, while it is proper for the court to give a charge of this nature, it is not bound to do so, in the absence of a request therefor.⁴²

Where a defendant avails himself of the right to testify, a request to instruct the jury that the defendant is under no obligation to testify, and that his failure to do so will not create any presumption against him, is properly refused, as having no application to the case.⁴³

38—*Sullivan v. State*, 9 Ohio Cir. Ct. R. 652.

39—*Brandes v. State*, 10 Ala. App. 239.

40—*State v. Cameron*, 40 Vt. 555; *Linbeck v. State*, 1 Wash. St. 336, 25 Pac. 452.

41—See decisions in preceding note.

42—**California.** *People v. Flynn*, 73 Cal. 511, 15 Pac. 102.

Colorado. *Matthews v. People*, 6 Colo. App. 456, 41 Pac. 839.

Indiana. *Felton v. State*, 139 Ind. 531; *Grubb v. State*, 117 Ind. 277; *Foxwell v. State*, 63 Ind. 539.

Michigan. Comp. L. 1897, § 10211; *Howell's Mich. St. Ann.*, § 12855. See also, Pub. Acts 1915, No. 314, § 64; *People v. Peterson*, 166 Mich. 10; *People v. Mitchell*, 164 Mich. 583. It is not error for the court to charge on its own motion as to a failure to testify. *People v. Murphy*, 145 Mich. 524.

Nebraska. *Metz v. State*, 46 Neb. 547.

Texas. *Torey v. State*, 41 Tex. Cr. App. 543.

43—*Williams v. People*, 166 Ill. 132.

According to some decisions, a request to instruct that the fact that defendant "does not testify in this cause is not to be considered unfavorably to him by the jury" should be granted,⁴⁴ and that this is especially true after a codefendant has testified, and the court has charged as to the statute making defendants competent witnesses in their own behalf;⁴⁵ or where counsel has made comments on defendant's failure to testify.⁴⁶

Where the jury's attention is called to the fact that an accused does not take the stand, he has a right to have an explicit instruction given insuring that the jury have a proper understanding of his statutory right.⁴⁷

If the defendant becomes a witness in his own behalf, he is made competent for all purposes in the case. If, by his own testimony, he can explain and rebut a fact tending to show his guilt, if innocent, and he fails to do so, the same presumption arises from his failure that would arise from a failure to give the explanation by another witness, if in his power so to give it, and the jury may be so instructed.⁴⁸

§ 333. Same—What instructions are proper.

It is proper to instruct: "That the defendant has a right

44—California. *People v. Flynn*, 73 Cal. 511, 15 Pac. 102.

Colorado. *Matthews v. People*, 6 Colo. App. 456, 41 Pac. 839.

Illinois. *Farrell v. People*, 133 Ill. 244.

Indiana. *Foxwell v. State*, 63 Ind. 539.

Kansas. *State v. Goff*, 62 Kan. 104, 61 Pac. 683; *State v. Evans*, 9 Kan. App. 889, 58 Pac. 240.

Louisiana. *State v. Carr*, 25 La. Ann. 408.

Maine. *State v. Landry*, 85 Me. 95.

Mississippi. *Haynes v. State* (Miss.) 27 So. 601.

Nebraska. *Metz v. State*, 46 Neb. 547.

New York. *People v. Rose*, 52 Hun 33.

Contra, *State v. Pearce*, 56 Minn. 226; *State v. Robinson*, 117 Mo. 663.

45—*Farrell v. People*, 133 Ill. 244.

46—*People v. Rose*, 52 Hun (N. Y.) 33.

47—*People v. Messer*, 148 Mich. 168.

48—*Stover v. People*, 56 N. Y. 320. See also, *Brashears v. State*, 58 Md. 563.

to decline going upon the stand, and that his refusal to testify can in no case be considered as evidence of his guilt or innocence;"⁴⁹ or to state: "That the fact that the defendant went voluntarily before the grand jury, and told his story, but has not taken the witness stand here, should not raise any presumption against him," and that "the jury are not to assume that he would deny or admit any of the evidence, but that the jury must consider that evidence as it stands, unaffected by the fact that the defendant does not take the stand."⁵⁰ Also, a charge that "you must not discuss his failure to go upon the stand and testify, nor can you consider his failure to testify upon the witness stand for any purpose whatever," is correct,⁵¹ and it is proper to charge that a failure to testify is "not even a circumstance against him [defendant], and no presumption of guilt can be indulged in by the jury on account of such failure on his part."⁵²

An objection to an instruction stating that "the law allows a defendant to testify in his own behalf, but a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part, and the jury will not mention, discuss or even refer to the fact that the defendant failed to testify," in that such charge does not in terms instruct that the jury cannot consider the defendant's failure to testify, is hypercritical.⁵³

An instruction that "you all know that the intent is a simple mental operation, and we cannot, unless the defendant himself speaks,—it is not possible to,—give any direct, positive proof of the intent of any person in the commission of any act. You cannot look into the human

49—*May v. People*, 8 Colo. 210, 6 Pac. 816.

50—*People v. Fitzgerald*, 20 App. Div. (N. Y.) 139.

51—*Herndon v. State*, 50 Tex. Cr. App. 552.

52—*Fulcher v. State*, 28 Tex. App. 465; *O'Hara v. State*, 57 Tex. Cr. App. 577.

53—*Singleton v. State*, 57 Tex. Cr. App. 560.

mind and see what its workings are. The prosecution can never in any case, unless the defendant himself sees fit to speak, give any direct or positive evidence of the intent," —is not erroneous as announcing to the jury "that any presumption should be indulged against the defendant because he did not give evidence as a witness in the cause."⁵⁴

It has also been held that where the court has charged that the jury were not to consider defendant's failure to testify as a circumstance against him, a refusal to further instruct that the jury were not to think of it was proper.⁵⁵ And where a charge of this nature has been given, it has been held not erroneous to charge, in addition, that the evidence of the state had not been contradicted. It was considered on appeal that the jury could not thereby have obtained the impression that they could consider the fact that the respondent had not testified as evidence against him.⁵⁶

On the other hand, where this charge has been given, it is erroneous to instruct the jury that the failure of a defendant to produce evidence which it was in his power to produce, to meet the evidence adduced by the state, is a proper matter for them to consider.⁵⁷

Where there is no direct evidence to convict the accused of the crime charged, it is error to instruct that "his mere silence * * * would justify a strong inference that he could not deny the charge, and therefore would not go upon the stand." And the court says, further, that such an inference is natural and irresistible, and that no instruc-

54—*People v. Morton*, 72 Cal. 62, 13 Pac. 150.

55—*State v. Cameron*, 40 Vt. 555, in which it was said: "Such instructions would not be sensible. The jury could not think of the charge without thinking of the subjects of the charge, and one of the subjects of the charge was re-

spondent's omission to testify. Such a charge would be violated by the jurors bearing it in mind to follow it. It was the duty of the jury to think on this subject enough to see they did not allow it to prejudice the respondent."

56—*State v. O'Grady*, 65 Vt. 66.

57—*Com. v. Harlow*, 110 Mass. 411.

tion will prevent honest jurymen from making the inference.⁵⁸

Where there are two defendants, and one of them testifies but the other does not, an instruction prefaced with the statement, "one accused and on trial charged with the commission of a crime may testify in his own behalf or not, as he chooses," and which then proceeds to state that if he does not testify the same rules apply to him as to other witnesses, is not ground for reversal.⁵⁹ But it has also been held that an instruction that codefendants are disqualified from testifying and that the jury should not draw any unfavorable inferences from the fact that they were not witnesses for a defendant, need not be given.⁶⁰

It has been held that it is not erroneous to employ the words, "no inference of guilt should arise in the minds of the jury," instead of the words, "no inference of guilt shall arise," etc.⁶¹ And a charge that "there is no presumption to be taken against a defendant by reason of the fact that he does not take the witness stand," and that defendant could say to the prosecution: "Prove your case against me. It is my judgment that the situation is such that I am not bound to take the witness stand, and the law gives me that right, and the law gives me that privilege,"—has been held not erroneous, as conveying an insinuation that it would be detrimental to defendant's interest to take the stand.⁶²

Where the court has instructed that defendant "has a right to go upon the witness stand and testify in his own behalf if he chooses to do so. If he does not choose to do so, the law expressly provides that no presumption adverse to him is to arise from the mere fact that he does not place himself upon the witness stand. So, in this case, the mere fact that this defendant has not availed himself of the

58—State v. Wines, 65 N. J. L. 31.

59—People v. Spira, 264 Ill. 243.

60—State v. White, 48 Ore. 416,
87 Pac. 137.

61—State v. Krug, 12 Wash. 288,

41 Pac. 126.

62—People v. Hayes, 140 N. Y.
496.

privilege which the law gives him should not be permitted by you to prejudice him in any way,"—it is not error to refuse to instruct that the jury are absolutely bound by their own oaths to see that they do not allow their minds to be prejudiced in the slightest degree against the defendant by the fact that he did not testify in his own behalf.⁶³

An instruction directing the jury to pass upon the evidence as though the accused was not by law allowed to testify, has been held erroneous.⁶⁴

An instruction that the failure of the accused to testify does not relieve the state from the obligation to produce evidence which will establish guilt beyond a reasonable doubt, is not an error for which a verdict of guilty will be reversed.⁶⁵

63—*People v. Watson*, 54 Hun (N. Y.) 637.

64—*People v. Enright*, 256 Ill. 221, Ann. Cas. 1913 E 318n.

65—*Tate v. State*, 76 Ohio St. 537, 10 Ann. Cas. 949.

CHAPTER XXX.

INSTRUCTIONS ON THE CREDIBILITY OF WITNESSES AND THE PROBATIVE FORCE OF EVIDENCE.

- § 334. Right and duty to give cautionary instructions.
- § 335. Credibility of witnesses and effect of evidence in general.
- § 336. Conflicting evidence.
- § 337. Instructions as to positive and negative testimony in jurisdictions where charge on weight of evidence is prohibited.
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- § 340. Corroboration of witnesses.
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- § 342. Same—Instructions giving undue weight to this class of evidence.
- § 343. Instructions as to admissions of record.
- § 344. Admissions and confessions in criminal cases.
- § 345. Same—What instructions may properly be given.
- § 346. Admissions and confessions in criminal cases to be received and weighed with caution.
- § 347. Same—Instructions giving undue weight to evidence.
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- § 350. Sufficiency of instructions as to credibility of party and weight of evidence in civil cases.
- § 351. Same—Criminal cases.
- § 352. Instructions tending to disparage testimony of accused.
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- § 355. Instructions as to credibility of other witnesses.
- § 356. Credibility of particular classes of persons.
- § 357. —Police officers and detectives.
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- § 361. Unsworn statement of defendant in criminal cases.
- § 362. Testimony of accomplices.
- § 363. Instructions that jury may convict on testimony of accomplice.
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- § 365. Advising jury to acquit unless corroborated.
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- § 367. Explaining nature of corroboration required.
- § 368. Instructing as to who are accomplices.
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- § 376. Instructions with regard to hypothetical questions.
- § 377. Necessity and propriety of instructions as to testimony of impeached witnesses.
- § 378. Sufficiency of instructions as to impeached witnesses.
- § 379. Same—Instructions held erroneous.
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clear proof of guilt.
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§ 334. Right and duty to give cautionary instructions.

It has already been noted that it is within the exclusive province of the jury to pass upon the weight and sufficiency of evidence introduced to prove or disprove the existence of a fact, and that the credibility of witnesses is exclusively a question for the jury.¹ But, in general, it is proper for the court to instruct as to the considerations

1—See ch. VII, *ante*, “Province of Court and Jury,” §§ 57-60, *et seq.*

by which the jury may or should be controlled in weighing evidence or determining credibility. Such instructions are frequently given, but, in so doing, care should be taken not to invade the province of the jury. This is the most important limitation on the right and power of the court, and, as will be seen in other sections of this chapter, is most frequently violated.

In general, the giving of proper cautionary instructions is largely within the discretion of the court;² and, though great care should be exercised as to the time, manner and form of giving such instructions, lest they impress the jury that the court has convictions on one side or the other, the discretion of the court will not be limited unless it has been grossly abused.³

Where a question submitted to a jury on a special finding is so clear and unambiguous as not to require, for the protection of either party, any qualifying charge, the failure to caution the jury in the line suggested by request of a party is not prejudicial, although such caution, if given, would not have been improper.⁴

§ 335. Credibility of witnesses and effect of evidence in general.

It is proper to instruct the jury that they are the sole judges of the credibility of witnesses and the weight of evidence.⁵ Such an instruction is frequently given, is cal-

2—*Burchard-Hulburt Inv. Co. v. Hanson*, 143 Ill. App. 97; *Dinsmore v. State*, 61 Neb. 418.

3—*Rayburn v. State*, 69 Ark. 177.

4—*Lyle v. McCormick Harvesting Mach. Co.*, 108 Wis. 81, 51 L. R. A. 906.

5—*Illinois*. *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614; *Chicago Union Traction Co. v. Giese*, 130 Ill. App. 608, rev'd 229 Ill. 260; *Illinois Cent. R. Co. v. Smith*, 111 Ill. App. 177, rev'd 208 Ill. 608.

Michigan. *Dibble v. Northern As-*

sur. Co., 70 Mich. 1, 14 Am. St. Rep. 470.

Missouri. *State v. Adair*, 160 Mo. 391; *State v. Kelly*, 73 Mo. 608.

Nebraska. *Clary v. State*, 61 Neb. 688.

Pennsylvania. *Com. v. Bubnis*, 197 Pa. St. 547; *McClurkan v. Byers*, 74 Pa. St. 405.

Utah. *People v. Chadwick*, 7 Utah 134, 25 Pac. 737.

Wisconsin. *Lampe v. Kennedy*, 60 Wis. 110.

culated to impress jurors with a sense of their responsibility, and will go far towards preventing other instructions from invading the province of the jury.⁶ The court may instruct the jury what circumstances may be considered as affecting the "credibility of witnesses."⁷ And usually an instruction on this subject should refer to the number of witnesses, the consistency of their testimony, its conformity with experience and its coincidence with collateral circumstances.⁸ The instructions should not in any case limit the jury to the consideration of matters particularly and specifically mentioned and pointed out in the instruction.⁹ Care must be taken not to hamper the jury in passing on the credibility,¹⁰ and it is improper to direct what the jury are or are not to believe from the testimony.¹¹ To instruct that the jury must or should consider circumstances affecting credibility is an invasion of the province of the jury,¹² although, in one case at least, such an instruction was held not to be reversible error.¹³

An instruction that the jury in determining the credibility of witnesses may consider "surrounding circumstances appearing on the trial" is improper,¹⁴ but an instruction that the jury are the judges of the weight of evidence and the credibility of the witnesses, and telling them that they may "consider the opportunities for knowledge of

6—See *Stewart v. Anderson*, 111 Iowa 329.

7—*Wabash R. Co. v. Biddle*, 27 Ind. App. 161.

The following instruction is not erroneous: "You have a right to consider the circumstances and condition of any witness as proven to have been at the time of the incidents about which said witness testifies. You may consider such condition of any witness as to sobriety, the surroundings of such witness, with reference to determining whether or not such wit-

ness was in a condition to see and understand what was occurring."

Wheeler v. State, 112 Ga. 43.

8—*Foulkes v. Steward*, 182 Ill. App. 193.

9—*Lyons v. Chicago City Ry. Co.*, 258 Ill. 75.

10—*Illinois Cent. R. Co. v. Burke*, 112 Ill. App. 415.

11—*Ryan v. People*, 122 Ill. App. 461.

12—*Wabash R. Co. v. Biddle*, 27 Ind. App. 161.

13—*State v. Fisher*, 162 Mo. 169.

14—*People v. Terrell*, 262 Ill. 138.

the facts about which they have testified, the extent, if at all, that they have been corroborated or contradicted by other evidence in the case, together with such other facts as will aid you in weighing the testimony," relates to such other facts as are shown by the evidence.¹⁵

An instruction that a credible witness is "one who, being competent to give evidence, is worthy of belief," is proper and sufficient where no special charge defining such term is requested.¹⁶

It is for the jury to say "what part of the evidence of a witness should be given most weight, * * * and it is error for the trial judge to charge that one part of the testimony is to be given more weight than another."¹⁷ An instruction that the jury cannot "weigh" the testimony is improper,¹⁸ and an instruction that certain evidence is to be treated "with like effect" as certain other evidence, is erroneous, since it is the province of the jury to determine, in view of all the circumstances, how much credence they will give to any particular evidence.¹⁹ An instruction that the jury are the sole judges of the "weight and importance" of the testimony of the various witnesses is erroneous, as it makes the jury the judges of the materiality of the testimony.²⁰

In a prosecution for the rape of a female under the age of consent, an instruction that testimony as to the reputation of the complaining witness for truth and veracity is immaterial, is erroneous as invading the province of the jury.²¹

It is proper to instruct that the jury are not bound to

15—Cincinnati, C., C. & St. L. Ry. Co. v. Simpson, — Ind. —, 104 N. E. 301.

16—Hart v. State, — Tex. Cr. App. —, 166 S. W. 152.

17—Owen v. Palmour, 111 Ga. 885.

18—Barrow v. State, 71 Tex. Cr. App. 549.

19—Connecticut Mut. Life Ins. Co. v. Hillmon, 46 C. C. A. 668, 107 Fed. 834.

20—Hansberger v. Sedalia Elec. Railway, Light & Power Co., 82 Mo. App. 566.

21—People v. Gray, 251 Ill. 431.

believe a thing to be a fact merely because testified to be so by a witness, if they believe from the evidence that the witness was mistaken or had sworn falsely.²² So it is proper to refuse to instruct that the testimony of a certain witness should be considered with great distrust, since the weight to be given thereto is a question for the jury.²³ The reputation of a witness is presumed to be good until impeached, but there is no presumption that his testimony is true, and it is reversible error to so instruct.²⁴

An instruction that "if the jury are satisfied either from all the facts and circumstances proven on the trial, that such witness or witnesses are mistaken in material matters testified to by them, or that from any other reason their testimony is untrue or unreliable," is fatally erroneous.²⁵

An instruction that the jury are the exclusive judges of the credibility, of the weight of the evidence, and all the facts proved, is not open to the objection that it omits to tell "the jury that they are the judges of the credibility of the 'witnesses.' " ²⁶

An instruction directing that the same consideration be given depositions as is given evidence in open court, is proper.²⁷ Where the evidence consists partly of depositions and partly of oral testimony, an instruction "that the jury are the sole judges of the credibility of the several witnesses that had appeared before them," is erroneous, as the jury might infer that the credibility of the depositions was not open to question.²⁸

§ 336. Conflicting evidence.

Instructions as to conflicting evidence have been referred

22—Goss Printing Press Co. v. Lempke, 90 Ill. App. 427, aff'd 191 Ill. 199.

23—Tarbell v. Forbes, 177 Mass. 238.

24—State v. Taylor, 57 S. C. 483, 76 Am. St. Rep. 575.

25—Poole v. State, 100 Miss. 158.

26—Binyon v. State (Tex. Cr. App.), 56 S. W. 339.

27—Coburn v. Moline, E., M. & W. Ry. Co., 149 Ill. App. 132.

28—Hansberger v. Sedalia Electric Railway, Light & Power Co., 82 Mo. App. 566.

to in the chapter dealing with instructions as to the burden of proof.²⁹ Thus it has been held that an instruction that the jury should find for the defendant if the evidence is equally balanced, is proper,³⁰ but an instruction requiring the jury to find for the defendant if the evidence is evenly balanced and the jury are in doubt, has been held misleading.³¹

An instruction requiring the adoption of a theory leading to acquittal if as reasonable as that leading to conviction, has been held properly refused.³²

It has been held that the court need not call attention to a conflict in the evidence, unless a request for an instruction of that character has been made,³³ but if there is a conflict in the evidence, it is not improper to state rules for weighing such testimony.³⁴

The refusal of instructions on the credibility of witnesses who make conflicting statements is error.³⁵ In a criminal case no error is committed in instructing the jury in the general charge that "if there are conflicts between the witnesses, which you cannot reconcile, you have the right to believe one witness and disbelieve the other,"³⁶ and an instruction requiring the jury to reconcile evidence and attribute contradictions to lack of memory rather than falsehood, is not prejudicial.³⁷

It is proper to charge the jury that, "in considering and weighing the evidence, you should use the same judgment, reason, common sense, and general knowledge of men and affairs as you have in everyday life,"³⁸ and that

29—See § 281, *et seq.*, *ante*.

30—Stephens v. Neilson, 142 Ill. App. 263; Dehlinger v. City of Chicago, 100 Ill. App. 314.

31—Sears, Roebuck & Co. v. Winchester Repeating Arms Co., 178 Ill. App. 318.

32—Parsons v. People, 218 Ill. 386.

33—Balph v. Liberty Nat. Bank, 179 Pa. St. 430.

34—Steen v. Sanders, 116 Ala. 155; Farley v. Ranck, 3 Watts & S. (Pa.) 554; McGhee v. Smith, 6 Heisk. (Tenn.) 316; Young v. State, 2 Yerg. (Tenn.) 292.

35—Conlon v. Chicago Great Western R. Co., 139 Ill. App. 555.

36—Marshall v. State, 54 Fla. 66.

37—Bleick v. People, 227 Ill. 80.

38—Morrison v. State, 42 Fla. 149.

the jury must decide who of the witnesses is entitled to the greater credit.³⁹ So it is proper to instruct "that the credibility of the witnesses is a question exclusively for the jury, and the law is that, where a number of witnesses testify directly opposite to each other, the jury is not bound to regard the weight of evidence as equally balanced. The jury have the right to determine, from the appearance of witnesses on the stand, their manner of testifying, and their apparent candor and fairness, their apparent intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are more worthy of credit, and to give credit accordingly."⁴⁰

It has also been held proper to instruct: "It is the duty of the jury to look at all the material evidence in the case in order to determine what is the real and true state of facts; and they will weigh all the evidence in the case, so as to reconcile all the evidence where it may seem to conflict, or apparently conflict, if you can do so. You will not capriciously reject any evidence, but reconcile it all, if you can do so;"⁴¹ but that, if this cannot be done, they may believe or disbelieve any witnesses, according as they may or may not consider them entitled to credit.⁴²

On the other hand, in case the evidence is conflicting, it is not proper to charge that the jury should endeavor to reconcile the evidence with the theory of defendant's innocence;⁴³ or that the jury must believe the testimony of a particular witness;⁴⁴ or that the case depends solely on the veracity of a designated witness.⁴⁵

Where the plaintiff and principal defendant contradicted each other, it is not error to refuse to instruct that, "in estimating the value of the plaintiff's services, the jury are not bound by his testimony, even though it is not

39—*Rideus v. State*, 41 Tex. 200.

40—*Horton v. Com.*, 99 Va. 848.

41—*Steen v. Sanders*, 116 Ala. 155.

42—*Liverpool & L. & G. Ins. Co.*

v. Ende, 65 Tex. 118.

43—*People v. Madden*, 76 Cal. 521, 18 Pac. 402.

44—*State v. Parker*, 66 N. C. 624.

45—*Fullam v. Rose*, 160 Pa. St. 47.

contradicted or controlled by the evidence. Upon such questions, the jury are to be guided by their own skill and knowledge, as well as by the testimony which is given by witnesses at the trial.”⁴⁶ So it is error to instruct the jury that if there is a conflict in the evidence of the witnesses, and the jury cannot reconcile that evidence, they should believe that witness or those witnesses who have the best opportunity of knowing the facts about which they testify, and the least inducement to swear falsely, since the credibility of the witnesses, and the weight to be given the evidence of each, is a matter which must be left solely to the jury.⁴⁷

Where the evidence conflicts as to the name “Matt” or “Max,” an instruction that the law does not favor extreme technicalities, where names have the same sound, is erroneous and misleading.⁴⁸

§ 337. Instructions as to positive and negative testimony in jurisdictions where charge on weight of evidence is prohibited.

It is a rule of evidence well supported by the decisions of the courts,⁴⁹ “that the positive testimony of one credible witness to a fact is entitled to more weight than that of several others [equally credible] who testify negatively, or * * * to circumstances merely persuasive in their character,” from which a negative will be inferred.⁵⁰ There are exceptions to the rule,⁵¹ but as was said in one

46—Wyman v. Whicher, 179 Mass. 276.

47—Southern Mut. Ins. Co. v. Hudson, 113 Ga. 434.

48—Vincendeau v. People, 219 Ill. 474, rev’g 119 Ill. App. 603.

49—Alabama. Kennedy v. Kennedy, 2 Ala. 616.

Illinois. Frizell v. Cole, 42 Ill. 362.

Louisiana. State v. Chevallier, 36 La. Ann. 83.

Missouri. Isaacs v. Skrainka, 95 Mo. 517; Henze v. St. Louis, K. C. & N. Ry. Co., 71 Mo. 639.

Wisconsin. Hinton v. Cream City R. Co., 65 Wis. 337.

United States. Rhodes v. United States, 25 C. C. A. 186, 79 Fed. 740; Au v. New York, L. E. & W. R. Co., 29 Fed. 72.

50—3 Greenl. Ev., § 375.

51—“Evidence of a negative na-

well-considered decision: "When one witness swears positively that he saw or heard a fact, and another, who was present, merely swears that he did not see or hear it, and the witnesses were equally faithworthy, the general principles would, in ordinary cases, create a preponderance in favor of the affirmative, where the position can be reconciled with the negative."⁵²

Considerable conflict of authority exists as to whether instructions embodying this principle should be given to the jury; but an investigation of the cases shows that this is largely due to the conflict of authority as to charging with respect to matters of fact or commenting on the weight of evidence, a subject which has been treated in a prior chapter.⁵³

In the jurisdictions where statutory or organic provisions exist, prohibiting the trial court from expressing any opinion as to the weight of evidence, such an instruction

ture may, under particular circumstances, not only be equal, but superior, to positive evidence. This must always depend upon the question whether the negative testimony can be attributed to inattention, error, or defect of memory, and whether the witnesses had equal means and opportunities for ascertaining the facts to which they testify and exercised the same. Suppose six persons, whose sense of hearing is excellent, and who are otherwise equally competent, were placed in a room and told to watch whether the clock found in it strikes, or not, the hour; that, faithful to their instructions, they had so watched when the large hand passed over twelve, and had so continued watching for five minutes or more, and that, when interrogated, two were to swear that the clock had struck, and four that it had not, it is manifest that it

could not be claimed that the preponderance should be in favor of the testimony of the affirming witnesses. The principle is further inapplicable where a negative depends on the establishment of an opposite fact, such as an alibi, for instance. 1 Starkie, Ev., § 82, p. 516. [See also, *Atkinson v. State*, 112 Ga. 411.] It has been often held that it is not true, as a matter of law, that negative evidence may not be sufficient to overbalance positive testimony. *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Coughlin v. People*, 18 Ill. 266 [68 Am. Dec. 541]; *Reeves v. Poindexter*, 53 N. C. 308." *State v. Chevallier*, 36 La. Ann. 83.

52—*State v. Chevallier*, 36 La. Ann. 84.

53—See ch. XII, *ante*, "Charging with Respect to Matters of Fact, or Commenting on Weight of Evidence."

is erroneous, but in other jurisdictions it is proper. Accordingly, such an instruction has been held erroneous in Arkansas, Illinois, Indiana, Missouri and Texas,⁵⁴ it being held that the credibility of witnesses and the weight to be given their testimony are always questions for the jury,⁵⁵ and that it is not the province of the court to tell the jury which evidence is the strongest, or entitled to the most weight.⁵⁶ In Illinois, however, there are some decisions which apparently conflict with the general rule,⁵⁷ and in one of these cases the following instruction was approved: "When one witness testifies that a certain fact took place, or that certain words were spoken, and several other witnesses, equally credible, testify that they were present at the time and place where the fact took place, or where

54—**Arkansas.** Keith v. State, 49 Ark. 439. See also, Sibley v. Ratliffe, 50 Ark. 477, in which a request for an instruction attempting to apply the rule as to positive and negative testimony was condemned as falling short of stating the full position, but the court, citing Keith v. State, *ante*, said: "It may be doubted whether, if proper in any case to instruct the jury on the weight to be given to evidence, it cannot be said to be error to refuse to do so."

Illinois. Indiana, I. & I. R. Co. v. Otstot, 212 Ill. 429, *aff'g* 113 Ill. App. 37; Louisville, N. A. & C. Ry. Co. v. Shires, 108 Ill. 619; Frizell v. Cole, 42 Ill. 362; Rockwood v. Poundstone, 38 Ill. 201; Preston v. Moline Wagon Co., 44 Ill. App. 342. See also, Atchison, T. & S. F. R. Co. v. Feehan, 149 Ill. 202, where a request for an instruction as to the relative weight of positive and negative testimony was refused, because, as drawn, it was not applicable to the facts of the case. Compare Chicago & N. W. Ry. Co. v.

Dunleavy, 129 Ill. 132, which is apparently in conflict with the other Illinois decisions.

Indiana. Ohio & M. Ry. Co. v. Buck, 130 Ind. 300; Louisville, N. A. & C. Ry. Co. v. Stommel, 126 Ind. 35.

Missouri. Johnson v. Springfield Traction Co., — Mo. —, 161 S. W. 1193; Chubbuck v. Hannibal & St. J. R. Co., 77 Mo. 591; Milligan v. Chicago, B. & Q. R. Co., 79 Mo. App. 393; State v. Kansas City, Ft. S. & M. R. Co., 70 Mo. App. 634.

Texas. Sparks v. Dawson, 47 Tex. 138; Haskew v. State, 7 Tex. App. 107.

55—Louisville, N. A. & C. Ry. Co. v. Stommel, 126 Ind. 35.

The weight of positive and negative evidence is for the jury. Johnson v. Springfield Traction Co., — Mo. —, 161 S. W. 1193.

56—Louisville, N. A. & C. Ry. Co. v. Shires, 108 Ill. 617.

57—Chicago & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132, *aff'g* 27 Ill. App. 438; Frizell v. Cole, 42 Ill. 362.

the words were spoken, and had the same means of information, and further testify that such fact did not exist, or that the words were not spoken, it is their province to weigh the testimony, and give a verdict according to the weight of testimony, as it may preponderate on either side.”⁵⁸ This instruction does not state that the jury are to give more weight to positive than to negative testimony, however, and it is therefore not objectionable to the rule against charging on the weight of evidence.

In Alabama it has been held, without deciding on the propriety of instructing on this rule, that a failure of a request to hypothesize equal means of knowledge on the part of the witnesses whose testimony the court is asked to compare, and to draw certain conclusions from the comparison for the enlightenment of the jury, warrants its refusal.⁵⁹

In Kansas it has been held to be the duty of the court, upon request, to call the attention of the jury to the relative value of positive evidence that signals were given by a railway train approaching a crossing, and merely negative testimony that they were not given.⁶⁰

In Georgia, although the court is prohibited from charging on the weight of the evidence, an instruction that, everything else being equal, “positive testimony is to be believed rather than negative testimony,” has been approved.⁶¹

Where only one witness was sworn for the state and one for defendant, and the testimony of defendant’s witness was in part positive and in part negative, a charge on the rule as to positive and negative testimony, as to the negative part of such witness’ testimony, was held proper.⁶² And where witnesses in behalf of the state swore positively

58—*Frizell v. Cole*, 42 Ill. 362.

61—*Atlanta & W. P. R. Co. v.*

59—*Louisville & N. R. Co. v. Newton*, 85 Ga. 517.

Miller, 109 Ala. 500.

62—*Neill v. State*, 79 Ga. 779.

60—*Missouri Pac. Ry. Co. v. Moffatt*, 56 Kan. 667, 44 Pac. 607.

to the commission of the crime, and the evidence in behalf of the defendant consisted of testimony tending to show an alibi, and to impeach the state's witnesses, it was held that a charge on the law as to the relative value of positive and negative testimony was not applicable.⁶³

In Maine it has been held that after explaining to the jury the difference between positive and negative testimony, the court may designate certain testimony as not positive.⁶⁴ In jurisdictions where the court is not prohibited from charging on the weight of evidence, it has been held that instructions embodying the rule mentioned in the previous section are proper.⁶⁵ It has been held, however, that such an instruction may with equal propriety be refused.⁶⁶ And although the court did not state any reason for its holding, it is sanctioned by the rule that it is entirely within the discretion of the trial judge whether he shall express an opinion as to the weight of the evidence, even in jurisdictions where such a charge is permissible, and that he can under no circumstances be required to do so.⁶⁷

Where much of the testimony was of a negative char-

⁶³—*Atkinson v. State*, 112 Ga. 411.

⁶⁴—*Knight v. Thomas* (Me.) 7 Atl. 538.

⁶⁵—*Hess v. Williamsport & N. B. R. Co.*, 181 Pa. St. 492; *Urias v. Pennsylvania R. Co.*, 152 Pa. St. 326; *Olsen v. Oregon Short Line & U. N. Ry. Co.*, 9 Utah 129, 33 Pac. 623; *Hildman v. City of Phillips*, 106 Wis. 611; *Hinton v. Cream City R. Co.*, 65 Wis. 337; *Rhodes v. United States*, 25 C. C. A. 186, 79 Fed. 741; *Denver & R. G. R. Co. v. Lorentzen*, 24 C. C. A. 592, 79 Fed. 291; *Au v. New York, L. E. & W. R. Co.*, 29 Fed. 72.

⁶⁶—*Olsen v. Oregon Short Line & U. N. Ry. Co.*, 9 Utah 129, 33 Pac. 623. Compare *Urias v. Pennsylvania*

R. Co., 152 Pa. St. 326, where it was held that, in case of "conflicting testimony as to whether a bell was rung or not before a train approached a grade crossing, the court should positively call the attention of the jury to the difference between positive and negative testimony upon a question of this kind." See also, *Hildman v. City of Phillips*, 106 Wis. 611, wherein it was held error to refuse to give an instruction as to the relative weight to be given positive and negative testimony.

⁶⁷—See ch. XII, *ante*, "Charging with Respect to Matters of Fact, or Commenting on Weight of Evidence."

acter, it has been held that an instruction "that it was for the jury to consider how much this testimony was worth as against positive testimony, and that, ordinarily, the evidence of a witness who swears positively to a thing, or emphatically says that he saw something, is more valuable than that of witnesses who say they did not see," was proper.⁶⁸ So it has been held proper to instruct that "where there is a conflict of testimony, and one testifies positively to a thing within his peculiar knowledge or information, and the testimony of the other is a mere denial of that which is not within his peculiar knowledge or information, the positive testimony will generally prevail over the negative testimony; but it is always a question for the jury to determine whether the witness who testifies about a given fact, although it may be in denial of it, had the opportunity of knowing, seeing, and hearing as well as the other witness had."⁶⁹ And the following instruction has also been approved: "The positive testimony of one credible witness to a fact is entitled to more weight than the testimony of several witnesses, equally credible, who testify negatively, or to collateral circumstances merely persuasive in their character, from which a negative may be inferred."⁷⁰

An instruction "that the positive testimony of a witness to the existence of a certain thing, and the testimony of another witness that such a thing does not exist, are equally credible," has been held erroneous, as a misstatement of the rule,⁷¹ and an instruction "that negative testimony was confined to that of a witness who, though present at a transaction, says that he did not see or did

68—Rhodes v. United States, 25 C. A. 186, 79 Fed. 740.

69—Au v. New York, L. E. & W. R. Co., 29 Fed. 72.

70—Hinton v. Cream City R. Co., 65 Wis. 337.

71—Smith v. Milwaukee Builders' & Traders' Exchange, 91 Wis. 360, 30 L. R. A. 504, 51 Am. St. Rep. 912.

not hear," was erroneous, because testimony positive in form may amount merely to negative testimony.⁷²

Where the plaintiff testified that after the accident she said to the conductor, "It is all your fault," and the conductor denied that she made such remark to him, it is error to instruct that the presumption is that the plaintiff made the remark, rather than that she did not, though the jury are also told that it is for them to say whether it is of any importance.⁷³ And an instruction as follows: "It is sometimes said that affirmative testimony is of more value than negative testimony. But I charge you that, where one man affirms a fact and another positively denies it, the denial is not negative testimony, within the rule just stated,"—has been condemned on the ground that such a denial was clearly negative testimony.⁷⁴

In an action for injuries caused by a collision at a grade crossing, where five persons on the locomotive testified positively that lights were displayed, the bell rung, and whistle blown, and two persons on the track testified that they did not see the light, nor hear the bell or whistle, an instruction that most of plaintiff's testimony was negative, that his witnesses merely testified that they did not see any lights or hear any bell or whistle, "negative testimony of this kind has much less weight than positive testimony," was held erroneous, as being inadequate and too meager.⁷⁵

§ 338. Appearance and information of witnesses.

It is proper to direct the jury to consider the appearance and conduct of the witnesses,⁷⁶ and it is proper to direct the jury to consider the intelligence and capacity of the witnesses.⁷⁷ So an instruction authorizing greater weight

72—*Smith v. Milwaukee Builders' & Traders' Exchange*, 91 Wis. 360, 30 L. R. A. 504, 51 Am. St. Rep. 912.

73—*Metropolitan R. Co. v. Martin*, 15 App. Cas. (D. C.) 552.

74—*Kelley v. Schupp*, 60 Wis. 86.

75—*Hess v. Williamsport & N. B. R. Co.*, 181 Pa. St. 492.

76—*Chicago Union Traction Co. v. Browdy*, 108 Ill. App. 177, rev'd 206 Ill. 615.

77—*Manufacturers' Fuel Co. v. White*, 228 Ill. 187, aff'g 130 Ill.

to be given to the testimony of witnesses having superior means of information is not misleading.⁷⁸ But an instruction on the number, appearance and veracity of witnesses is erroneous when the tests for determining the credit due such witnesses are omitted.⁷⁹

§ 339. Manner of testifying, bias, etc.

It is proper to instruct that the jury may consider any bias, feeling or partiality exhibited by the witnesses.⁸⁰ The conduct of a witness on the stand may be properly commented upon by the court as affecting the credibility of the witness. So, where witnesses exhibit much feeling, the trial judge has a right to notice and comment upon a fact so transpiring in the presence of the court and jury.⁸¹ Instructions upon this subject, as in other cases, must not be confused and misleading,⁸² and must not invade the province of the jury.⁸³ An instruction that the jury are

App. 29; North Chicago St. R. Co. v. Wellner, 206 Ill. 272, aff'g 105 Ill. App. 652.

78—Grabill v. Ren, 110 Ill. App. 587.

79—Jones v. Sampsell, 148 Ill. App. 158.

80—Arkansas. Felker v. State, 54 Ark. 489.

California. People v. Wheeler, 65 Cal. 77, 2 Pac. 892; People v. Cronin, 34 Cal. 192.

Connecticut. State v. Fiske, 63 Conn. 392.

Illinois. Bevelot v. Lestrade, 153 Ill. 625.

Indiana. Young v. Gentis, 7 Ind. App. 199; Goodwine v. State, 5 Ind. App. 63.

Iowa. Little v. McGuire, 43 Iowa 450.

Kansas. State v. Bohan, 19 Kan. 35.

Minnesota. State v. Hogard, 12 Minn. 293 (Gil. 191).

Missouri. State v. Adair, 160 Mo. 391.

Nevada. State v. Streeter, 20 Nev. 403, 22 Pac. 758; State v. Hymer, 15 Nev. 51.

North Carolina. State v. Nat, 51 N. C. 115.

Pennsylvania. Cridland v. Crow, 221 Pa. 618.

Washington. Klepsch v. Donald, 4 Wash. 436, 31 Am. St. Rep. 936, 30 Pac. 991.

Contra, Oliver v. State (Tex. Cr. App.), 42 S. W. 554; Isham v. State (Tex. Cr. App.), 41 S. W. 622.

81—People v. Benc, 130 Cal. 159, 62 Pac. 404; Morton v. O'Connor, 85 Ill. App. 273; State v. Adair, 160 Mo. 391; State v. Nat, 51 N. C. 114.

82—Morton v. O'Connor, 85 Ill. App. 273, wherein an instruction set out was condemned upon this ground.

83—People v. Benc, 130 Cal. 159,

the judges of the weight to be given to the testimony of a witness from his manner of testifying, as from his evasiveness when questioned by one party, and his willingness to answer questions favorable to the other, is proper.⁸⁴

The demeanor and conduct of the defendant in a criminal case during the progress of the trial, and while he is not on the witness stand, are no part of the evidence in the case, and it is substantial error to instruct the jury that they have a right, in determining the degree of credibility that shall be accorded to the testimony of defendant, to consider his demeanor and conduct on the witness stand and during the trial. It is easily conceivable that various circumstances, not growing out of the orderly development of the trial, may arise which will cause an innocent man to do things indicative, to an ordinary observer, of guilt.⁸⁵ But an instruction that the jury may determine from the demeanor of witnesses and from all the surrounding circumstances on the trial what witnesses are worthy of credit is not erroneous as calling attention to the demeanor of the defendant during the trial.⁸⁶

§ 340. Corroboration of witnesses.

Where the unsworn testimony of a child is received in evidence under a statute which provides that no person shall be convicted on such testimony unsupported by other evidence, it is reversible error to refuse to charge that,

62 Pac. 404; *Morton v. O'Connor*, 85 Ill. App. 273. In the former case a charge that "the degree of credit due to a witness should be determined by his character and conduct, by his demeanor on the stand, his relation to the controversy and the parties, his hopes, his fears, his bias, and his partiality, the reasonableness of the statements he makes, the strength or weakness of his recollection, viewed in the light of all the testimony, the facts, and circumstances in the case," is not erro-

neous in that it tells the jury how they should determine the degree of credit due to a witness, and therefore constitutes an invasion of the province of the jury, as such an instruction cannot do any harm, for it merely tells the jury to do certain things, which jurors would evidently do without being so told.

84—*Brown v. Stacy*, 5 Ark. 403.

85—*Vale v. People*, 161 Ill. 309; *Purdy v. People*, 140 Ill. 46.

86—*People v. Curtright*, 258 Ill. 430.

before a conviction can be had, the evidence not only must tend to support, but "must support, the story of the witness."⁸⁷

An instruction that "a witness is only valuable to the extent that his evidence establishes some material fact or circumstance which aids in making clear and plain to your minds some question involved in this litigation," is erroneous, as it is not incumbent on litigants to make points involved clear and plain.⁸⁸

Where, on trial for perjury, an instruction was given: "There must be the direct testimony of at least one credible witness, and that testimony, to be sufficient, must be positive and directly contradictory of the defendant's oath. In addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence; otherwise, the defendant must be acquitted,"—and in another instruction the court said: "The additional evidence must be at least strongly corroborative of the testimony of the accusing witness,"—it was proper to refuse to instruct, on the question of corroboration, that "there must be something in the corroborative evidence which makes the facts sworn to by defendant not true if the corroborative evidence be true also. If the corroboration does not go to that extent, the defendant must be acquitted."⁸⁹

§ 341. Admissions in civil cases to be received with caution.

There is much conflict of authority as to the propriety of instructing that admissions in civil cases should be received with caution, and this conflict is also found in criminal cases dealing with such instructions.⁹⁰ Such in-

87—*People v. Gralleranzo*, 54 App. Div. (N. Y.) 360.

89—*People v. Rodley*, 131 Cal. 240, 63 Pac. 351.

88—*Endowment Rank of Order of K. P. v. Steele*, 107 Tenn. 1.

90—See § 344, *post*.

structions have been condemned as disparaging this class of evidence,⁹¹ and have also been held improper as an instruction upon the weight of the evidence.⁹²

Thus it has been said: "Statements in the nature of or tending to prove admissions * * * should be considered and given such weight by the jury as they may think them entitled to, without any advice of the court as to their force."⁹³ And in another case it was held that "the reasons which are to be urged in favor of receiving such statements with caution are based upon human experience, and vary in strength and conclusiveness with the facts and circumstances of each case, and their sufficiency in any particular case is an inference which the reason of the jury makes from those facts and circumstances; but there is no rule of law which directs the jury to invariably make such an inference from the mere fact that the proof of the admission is by oral testimony. * * * To weigh the evidence and find the facts in any case is the province of the jury, and that province is invaded by the court whenever it instructs them that any particular evi-

91—**California.** Kauffman v. Maier, 94 Cal. 269, 18 L. R. A. 124n, 29 Pac. 481.

Illinois. Mauro v. Platt, 62 Ill. 450; Frizell v. Cole, 29 Ill. 465.

Indiana. Zenor v. Johnson, 107 Ind. 69; Lewis v. Christie, 99 Ind. 377; Newman v. Hazelrigg, 96 Ind. 73.

Mississippi. Johnson v. Stone, 69 Miss. 826.

Montana. Knowles v. Nixon, 17 Mont. 473, 43 Pac. 628; Wastl v. Montana Union R. Co., 17 Mont. 213, 42 Pac. 772.

92—**Arkansas.** Shinn v. Tucker, 37 Ark. 580.

California. Kauffman v. Maier, 94 Cal. 269, 18 L. R. A. 124n, 29 Pac. 481.

Illinois. Mauro v. Platt, 62 Ill. 450; Frizell v. Cole, 29 Ill. 465.

Indiana. Tobin v. Young, 124 Ind. 507; Zenor v. Johnson, 107 Ind. 69; Unruh v. State, 105 Ind. 117; Morris v. State, 101 Ind. 560; Shorb v. Kinzie, 100 Ind. 429; Lewis v. Christie, 99 Ind. 377; Newman v. Hazelrigg, 96 Ind. 73; Finch v. Bergins, 89 Ind. 360; Davis v. Hardy, 76 Ind. 272.

Mississippi. Johnson v. Stone, 69 Miss. 826.

Montana. Knowles v. Nixon, 17 Mont. 473, 43 Pac. 628; Wastl v. Montana Union R. Co., 17 Mont. 213, 42 Pac. 772.

Texas. Castleman v. Sherry, 42 Tex. 59.

93—Shinn v. Tucker, 37 Ark. 580.

dence which has been laid before them is or is not entitled to receive weight or consideration from them.”⁹⁴

On the other hand, there are a large number of decisions which hold that it is not improper for the court to caution the jury against placing too much reliance upon testimony as to admissions. Accordingly, it has been held proper to instruct: That “admissions are regarded as weak testimony;”⁹⁵ that, “with respect to verbal admissions, they ought to be received with great caution;”⁹⁶ that admissions of a party are “the weakest kind of evidence that could be produced;”⁹⁷ that “evidence of casual statements or admissions by a party, made in casual conversations, and to disinterested persons, is regarded by law as very weak testimony, owing to the liability of the witness to misunderstand or forget what was really said or intended by the party;”⁹⁸ that “admissions should be scanned with care,—the jury should look to them carefully to see what they mean, and see that they are not being used to imply and to carry with them more meaning than they are justly entitled to;”⁹⁹ or “that the verbal admissions of a party to a suit, when made understandingly and deliberately, often afford satisfactory evidence; yet, as a general rule, the statements of a witness as to verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to imperfection and mistake.”¹

The following charge on this subject has also been approved: “Evidence consisting of the mere repetition of oral statements, and being therefore subject to much imperfection and mistake, through misunderstanding, excitement, or impulse of the party, and want of proper under-

94—*Kauffman v. Maier*, 94 Cal. 269, 18 L. R. A. 124n, 29 Pac. 481. See also, *Castleman v. Sherry*, 42 Tex. 59.

95—*Nash v. Hoxie*, 59 Wis. 384.

96—*Tozer v. Hershey*, 15 Minn. 257 (Gil. 197).

97—*Dreher v. Town of Fitchburg*, 22 Wis. 680.

98—*Haven v. Markstrum*, 67 Wis. 493.

99—*Stewart v. De Loach*, 86 Ga. 729.

1—*Allen v. Kirk*, 81 Iowa 658.

standing of the words by the hearers, and their imperfection of memory, should be cautiously received; but when such admissions are deliberately made, or often repeated, and are correctly given, they are often the most satisfactory evidence; that the jury should consider all the circumstances under which such admissions were made and introduced in evidence, and give them such weight as they were justly entitled to receive."²

It is not error not to caution the jury in regard to verbal admissions where the statements of defendant seem to have been made deliberately and understandingly in a conversation in which his purpose was to state the particular facts of his connection with the crime.³ So it has been held proper, after suggesting that evidence of verbal admissions should be received with great caution, to charge that the reasons stated constitute a very strong argument, but that it was for the jury to determine the weight of such evidence according to the way in which it affected their own minds.⁴

An instruction that the "confessions or declarations of a party, in evidence before them, is the weakest and most unsatisfactory kind of evidence, on account of the facility with which it may be fabricated, and the difficulty of disproving it when false," has been held erroneous, for the reason that it confounds the evidence of the admissions with the admissions themselves, and fails to observe the distinction between them.⁵

§ 342. Same—Instructions giving undue weight to this class of evidence.

Instructions as to evidence of admissions should not be worded so as to cause the jury to attach undue importance

2—*Martin v. Town of Algona*, 40 Iowa 392.

3—*State v. Jackson*, 103 Iowa 702.

4—*Moore v. Dickinson*, 39 S. C. 441.

5—*Higgs v. Wilson*, 3 Metc. (Ky.) 338. To the same effect, see *Botts v. Williams*, 17 B. Mon. (Ky.) 687.

to such evidence. It is not error to refuse to instruct that, "while proof of the fact that admissions were made, and the terms on which they were made, ought to be cautiously scanned, yet, when deliberately made and precisely identified, they are usually received as satisfactory. Admissions by parties are not to be regarded as an inferior kind of evidence. On the contrary, when satisfactorily proved, they constitute a ground of belief on which the mind reposes with strong confidence." The weight to be given to admissions of a party depends upon the circumstances under which they are made, and the effect of such circumstances is to be judged by the jury alone, and therefore such instruction invades the province of the jury.⁶

In one decision, however, it has been held that it is not improper for the court to charge that admissions made before the controversy arose were entitled to great weight.⁷ But ordinarily it is error to instruct: That testimony against interest is to be taken as true;⁸ "that the admissions and declarations of a party are legal and sufficient evidence against him, but not in his favor;"⁹ or "that the admissions of a party to a civil suit are strong evidence against him."¹⁰

§ 343. Instructions as to admissions of record.

Upon request of either party, the court must instruct the jury what facts are admitted of record.¹¹

§ 344. Admissions and confessions in criminal cases.

Where a general instruction as to the credibility of witnesses and the weight of evidence fairly protects the rights

6—Phoenix Ins. Co. v. Gray, 113 Ga. 424.

7—Buford v. McGetchie, 60 Iowa 298.

8—Epland v. Missouri Pac. Ry. Co., 57 Mo. App. 147.

9—Baker v. Kelly, 41 Miss. 696, 93 Am. Dec. 274n.

10—Westbrook v. Howell, 34 Ill. App. 571; Earp v. Edgington, 107 Tenn. 23.

11—Evans v. Foreman, 60 Mo. 449.

of a defendant, it is not error to refuse a special instruction as to the law relating to a confession.¹² But, in general, evidence of confessions, like any other evidence, ought to be the subject of appropriate instructions to the jury, so that they can consider and pass upon the weight of the evidence, and determine whether or not it is entitled to any weight. There may be many circumstances surrounding the making of a confession which may very much affect it, and these are for the consideration of the jury.¹³

If two or more defendants are jointly indicted and tried, the jury should be instructed that admissions or confessions made by one defendant, not in the presence of the other, should not be considered as evidence against the defendant who did not make them.¹⁴ And in instructing on this question, a general charge "that the jury should not consider any admission or declaration of one prisoner against the others, unless they were present when made," will not be sufficient. The attention of the jury should be directed to the specific admission, and they should be cautioned not to give it any weight in determining the guilt or innocence of the party who is not bound by it.¹⁵

Where no issue is presented by the testimony as to the voluntary character of the confessions of defendant, it is proper to refuse to charge the jury that, before they could consider confessions made by defendant, they must believe the same were made voluntarily, and not under promise, or induced by improper influence.¹⁶

Where defendant, when on the stand, denies that the confessions are freely and voluntarily made, and claims that he was induced to make same by promises to him by an officer, the court should instruct the jury on this

12—Hardesty v. State, 95 Neb. 839.

13—Lismore v. State, 94 Ark. 207; Williams v. State, 63 Ark. 527; State v. Montgomery, 26 S. D. 539.

14—State v. Talbott, 73 Mo. 348; State v. Oxendine, 107 N. C. 783;

Wilkerson v. State (Tex. Cr. App.), 57 S. W. 956. See also, Givens v. State, 103 Tenn. 648.

15—State v. Oxendine, 107 N. C. 783.

16—Bailey v. State, 42 Tex. Cr. App. 289.

point, and inform them that if they do not believe that said confessions are freely and voluntarily made by the defendant, but on compulsion or promises on the part of the officer, they may wholly disregard the same; and this, notwithstanding no exception is taken to the failure of the court to so charge.¹⁷

Where two theories are presented by the evidence, one of which renders the confession admissible, and the other excludes it, if the court, after hearing the testimony, should, in a case where such confession is very material, conclude to admit it, it then becomes the duty of the court to instruct the jury, if they believe that the confession was not freely and voluntarily made, after having been warned by the officer, as the statute requires, but that same was induced by duress, threats or coercion on the part of the officer, to wholly disregard and not consider such confession.¹⁸

Though there is evidence of a conspiracy between defendant and others to do the acts for which defendant is prosecuted, yet the court should grant a request to charge that the jury will disregard the testimony of the acts of the alleged co-conspirators unless a conspiracy is shown.¹⁹

Where the confession of the defendant is not disputed, or its meaning, there is no necessity of calling the attention of the jury to it, for it is not likely that they will forget it. To predicate error on refusal to instruct concerning confessions, it should appear that it was either necessary, or that it was the duty of the court to instruct the jury on that subject.²⁰

Where the admissibility of a confession is the dominant

17—*Paris v. State*, 35 Tex. Cr. App. 82. In this case it was further held that a failure of defendant to take any exception made no difference. See also, *State v. Moore*, 160 Mo. 443.

18—*Sparks v. State*, 34 Tex. Cr. App. 86.

19—*Segrest v. State* (Tex. Cr. App.), 57 S. W. 845; *Casner v. State*, 42 Tex. Cr. App. 118.

20—*Bernhardt v. State*, 82 Wis. 23.

question before the jury, it is error to refuse a request to charge on the subject of confessions, though the request is faulty.²¹

An instruction that, "if you [the jury] find and believe that any statements of the defendant have been proven by the state, and not denied by the defendant, then they are to be taken as admitted as true," is erroneous, as charging in effect that defendant must specifically deny every statement attributed to him.²²

Where independent of the confessions or admissions of a defendant there is evidence proving the *corpus delicti* beyond a reasonable doubt, it is unnecessary to give an instruction concerning the weight to be given confessions.²³ An instruction which does not confine the jury to the consideration of confessions made as to the crime charged is improper,²⁴ and it is also erroneous to intimate an opinion as to whether an admission was made seriously.²⁵ So, instructions on the subject of confessions or admissions which are not based on any evidence in the case should not be given;²⁶ as, for instance, where, on a criminal trial, there is other evidence against the prisoner besides his confessions, it is proper to refuse an instruction that confessions not corroborated will not warrant a conviction.²⁷ It is also error to charge that defendant has made an admission, when such is not the case,²⁸ or to assume that the defendant has made an admission or confession;²⁹ and an instruction as to a confession is error when it causes the jury to be-

21—State v. Moore, 160 Mo. 443.

22—State v. Hollingsworth, 156 Mo. 178.

23—Lee v. Com., 155 Ky. 62.

24—Lismore v. State, 94 Ark. 207.

25—People v. Brow, 90 Hun (N. Y.) 509.

26—Com. v. McCann, 97 Mass. 580; Com. v. Tarr, 4 Allen (Mass.) 315; Gentry v. State, 24 Tex. App. 80.

Where there is no evidence of a

confession, but simply evidence of an admission of a fact which might tend to criminate, it is error to charge the jury as to the law in regard to confessions. *Suddeth v. State*, 112 Ga. 407.

27—Com. v. Tarr, 4 Allen (Mass.) 315; *Bailey v. State*, 42 Tex. Cr. App. 289.

28—*Andrews v. State*, 21 Fla. 598.

29—*Hogan v. State*, 46 Miss. 274.

lieve that admissions criminating in nature amount to a confession.³⁰

It is improper to charge that, "the fact that the person who is charged with the commission of a crime says nothing, but remains silent, is a circumstance to which the jury may look as a confession of guilt." It is often a circumstance, the significance of which may be misunderstood, and it ought, therefore, always to be questioned very carefully, if not distrustingly, by a jury."³¹

§ 345. Same.—What instructions may properly be given.

The court may instruct that verbal statements of defendant may be considered with the other facts in the case;³² and a charge that the jury could believe the confession, or any part thereof, as true or false, has been approved.³³ So it has been held that the court may properly charge that evidence of admissions may be subject to much imperfection and mistake, and that the jury may, if they think proper, give great, little, or no weight at all to such admissions.³⁴

The following charge has also been approved: "When the admissions or confessions of a party are introduced in evidence by the state, then the whole of the admissions or confessions are to be taken together, and the state is bound by them unless they are shown to be untrue by the evidence. Such admissions or confessions are to be taken into consideration by the jury as evidence, in connection with all other facts and circumstances of the case."³⁵ So it has been held proper to charge that, in considering what the defendant said, "the jury must consider it all together. The defendant is entitled to the benefit of what he said for himself, if true, as the state is to anything he said against

30—*Michaels v. People*, 208 Ill. 603.

31—*Campbell v. State*, 55 Ala. 80.

32—*State v. Davis*, 226 Mo. 493;
State v. Tobie, 141 Mo. 547.

33—*State v. Gunter*, 30 La. Ann. 537.

34—*Koerner v. State*, 98 Ind. 20.

35—*Pharr v. State*, 7 Tex. App. 478.

himself in any conversation proved by the state. What he said against himself in any conversation the law presumes to be true, because against himself; but what he said for himself the jury are not bound to believe, because said in a conversation proved by the state. They may believe or disbelieve it, as it is shown to be true or false by all the evidence in the case.”³⁶

An instruction that all statements by a witness, who was also indicted as an accomplice, made to other witnesses, not in the presence of defendant, were admitted solely upon the issue of the guilt or innocence of the accomplice, and cannot be considered for any other purpose, if for any purpose, is not erroneous, in that it assumes as a fact proven that the accomplice did make statements to other witnesses, which tended to establish the guilt or innocence of said accomplice.³⁷

§ 346. Admissions and confessions in criminal cases to be received and weighed with caution.

The better rule is that it is not necessary to give a cautionary instruction against the statements of a defendant,³⁸ and in many jurisdictions it is held improper for the court to instruct the jury that evidence of alleged admissions and confessions should be received with caution, or to otherwise disparage such evidence.³⁹ According to the views of some courts, such an instruction invades the province of a jury as to matters of which jurors are the exclusive judges,⁴⁰ and it has been said that an instruction that “evidence of oral admissions of a defendant ought to be viewed

36—*State v. Peak*, 85 Mo. 190; *State v. Vansant*, 80 Mo. 67; *State v. Curtis*, 70 Mo. 594. See also, *Jackson v. People*, 18 Ill. 269, where an instruction almost identical with the above was approved, and *Hedendorff v. State*, 85 Neb. 747.

37—*Wilkerson v. State* (Tex. Cr. App.), 57 S. W. 956.

38—*State v. Smith*, 250 Mo. 350.

39—*Koerner v. State*, 98 Ind. 7; *Garfield v. State*, 74 Ind. 60; *Com. v. Galligan*, 113 Mass. 202; *Collins v. State*, 20 Tex. App. 400; *Thuston v. State*, 18 Tex. App. 26; *White v. Territory*, 3 Wash. T. 397, 19 Pac. 37.

40—*Garfield v. State*, 74 Ind. 63; *Collins v. State*, 20 Tex. App. 400.

with caution," if not in violation of the constitutional injunction against charging on matters of fact, is one that may be properly refused as a mere commonplace.⁴¹

It has also been said that the processes of reasoning by which a conclusion is reached, rarely, if ever, should be delivered in the form of instructions; that the teachings of experience on questions of fact are not doctrines of law, which may be announced as such from the bench; that they may well enter into the arguments of attorneys, one side claiming that experience teaches one thing, and the other asserting another conclusion; but the jury, not the judge, is the arbiter of such contentions, as of all questions of fact.⁴² Accordingly, it has been held proper to refuse an instruction that "the confessions of a defendant are to be received with caution,"⁴³ or that "it is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it;"⁴⁴ and an instruction that it is the duty of the jury "to view with distrust evidence of the oral admissions of defendant * * * is at variance with the Code provision which declares that evidence of the oral admissions of a party is to be viewed with caution."⁴⁵ Where an instruction is given at defendant's request, cautioning the jury against verbal admissions and statements, though such instruction is in disregard of "the provision of the constitution that 'judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law,' " the defendant cannot afterwards ask for other similar instructions.⁴⁶

According to other decisions, however, it is not improper for the court to caution the jury against placing too much reliance upon this kind of evidence.⁴⁷ And one decision

41—*People v. Raber*, 168 Cal. 316, 143 Pac. 317.

42—*Garfield v. State*, 74 Ind. 63.

43—*Collins v. State*, 20 Tex. App. 420.

44—*Garfield v. State*, 74 Ind. 60.

45—*People v. Sternberg*, 111 Cal. 11, 43 Pac. 201.

46—*People v. Rodley*, 131 Cal. 240, 63 Pac. 351.

47—*Hunter v. State*, 43 Ga. 483; *State v. Shelledy*, 8 Iowa 477;

holds that the trial judge "may so charge, or not, in the exercise of a wise discretion, to be guided by the circumstances of each particular case."⁴⁸ So it has been held that a failure to include in the charge as to confessions, the qualification that "a confession alone, uncorroborated by other evidence, will not justify a conviction," will render the charge erroneous.⁴⁹ It is error to refuse to instruct that, if the jury "believe from the evidence that the prisoner made any confessions or admissions of guilt, such confessions or admissions are to be received by them with great caution, and, unless supported by other proof in the case, are not sufficient to convict."⁵⁰ When verbal statements of a defendant are casually made in the course of an ordinary conversation and form part of the evidence, and it appears that such statements were made on occasions more or less remote from the time when they were disclosed, a cautionary instruction should be given as a corollary to an instruction as to the weight of the verbal statements.⁵¹

§ 347. Same—Instructions giving undue weight to evidence.

It is error to give instructions as to this kind of evidence when the tendency is to cause the jury to attach undue weight to it. Thus it is improper to charge: That, if the jury believe that defendant confessed he was guilty, they may find him guilty as charged;⁵² that the "admissions of the defendant against himself are to be taken as true;"⁵³ "that the voluntary confessions of a defendant are evidence against him, and are to be regarded as the strongest

Haynes v. State (Miss.), 27 So. 601;
State v. Hardee, 83 N. C. 619.

48—State v. Hardee, 83 N. C. 619.

49—Lucas v. State, 110 Ga. 756.

50—Haynes v. State (Miss.), 27 So. 601. In this case, the evidence relied on as an admission was that, when asked why he killed deceased,

defendant replied that he did not know what he was doing.

51—State v. Smith, 250 Mo. 350.

52—Long v. State, 1 Tex. App. 466.

53—Grant v. State, 2 Tex. App. 164.

proof in the law;"⁵⁴ that a confession is of the most weighty nature in law;⁵⁵ "that the confessions of the accused of his guilt, when confirmed by circumstances, become the highest evidence of his guilt;"⁵⁶ or that "confessions made by a prisoner charged with an offense, when made voluntarily, and not obtained by force, fraud, or threats, are regarded by the law as the highest and most satisfactory character of proof."⁵⁷

§ 348. Testimony of parties and interested witnesses.

While there are some states where the rule is different,⁵⁸ the weight of authority is to the effect that the court may properly instruct the jury that they may consider the interest of the person testifying, whether as a party or witness, in determining his credibility.⁵⁹ In fact, most

54—*Morrison v. State*, 41 Tex. 520.
See also, *Harris v. State*, 1 Tex. App. 79.

55—*Ledbetter v. State*, 21 Tex. App. 344.

56—*Hogsøtt v. State*, 40 Miss. 522.

57—*Brown v. State*, 32 Miss. 433.

58—See § 349, *post*.

59—*Arkansas*. *Lancashire Ins. Co. v. Stanley*, 70 Ark. 1; *Hamilton v. State*, 62 Ark. 543; *Felker v. State*, 54 Ark. 489.

California. *People v. Knapp*, 71 Cal. 1, 11 Pac. 793.

Georgia. *Davis v. Central R. Co.*, 60 Ga. 329.

Illinois. *Lauth v. Chicago Union Traction Co.*, 244 Ill. 244, rev'g 146 Ill. App. 584; *Chicago & A. R. Co. v. Anderson*, 166 Ill. 572; *Siebert v. People*, 143 Ill. 571; *Bressler v. People*, 117 Ill. 439; *Rider v. People*, 110 Ill. 11; *Bulliner v. People*, 95 Ill. 407; *Croupp v. Garfield Park Sanitarium*, 147 Ill. App. 7.

Indiana. *Randall v. State*, 132 Ind. 539; *Lake Erie & W. Ry. Co. v. Parker*, 94 Ind. 91; *Wabash R. Co.*

v. Biddle, 27 Ind. App. 161; *Young v. Gentis*, 7 Ind. App. 199; *Goodwine v. State*, 5 Ind. App. 63.

Kansas. *State v. Bohan*, 19 Kan. 35.

Michigan. *McDonell v. Rifle Boom Co.*, 71 Mich. 61.

Missouri. *Quinn v. Metropolitan St. R. Co.*, 218 Mo. 545; *State v. Wells*, 111 Mo. 533; *State v. Patterson*, 98 Mo. 283; *State v. Miller*, 93 Mo. 263; *State v. Wisdom*, 84 Mo. 190; *State v. McGinnis*, 76 Mo. 326; *State v. Zorn*, 71 Mo. 415; *State v. Maguire*, 69 Mo. 197; *State v. Morse*, 66 Mo. App. 303; *State v. Parker*, 39 Mo. App. 116; *State v. Kelly*, 9 Mo. App. 512, aff'd 73 Mo. 608.

Montana. *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182.

Nebraska. *Clary v. State*, 61 Neb. 688; *City of Harvard v. Crouch*, 47 Neb. 133; *Dixon v. State*, 46 Neb. 298; *Barmby v. Wolfe*, 44 Neb. 77; *Clark v. State*, 32 Neb. 246.

New Mexico. *Faulkner v. Terri-*

decisions go further than this and hold that it is proper for the court to instruct "that, in weighing and determining the truth of defendant's testimony, they should take into consideration the interest he must necessarily have in the result of the trial."⁶⁰

This rule is applicable whether the person testifying is the defendant in a criminal suit;⁶¹ or any party to a civil suit;⁶² or any witness either in a civil suit or a criminal prosecution other than the parties thereto,⁶³ as, for instance, the wife of the defendant in a criminal prosecution;⁶⁴ or of

tory, 6 N. M. 464, 30 Pac. 905; Territory v. Romine, 2 N. M. 114.

Washington. State v. McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; State v. Carey, 15 Wash. 549, 46 Pac. 1050; State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; Klepsch v. Donald, 4 Wash. 436, 31 Am. St. Rep. 936, 30 Pac. 991.

Wisconsin. See Novak v. Nordberg Mfg. Co., 141 Wis. 298.

Wyoming. Haines v. Territory, 3 Wyo. 167, 13 Pac. 8.

60—**California.** People v. Knapp, 71 Cal. 1, 11 Pac. 793; People v. O'Neal, 67 Cal. 378, 7 Pac. 790.

Colorado. Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369.

Connecticut. State v. Fiske, 63 Conn. 392.

Georgia. Rogers v. King, 12 Ga. 229.

Illinois. West Chicago St. R. Co. v. Estep, 162 Ill. 130; Johnson v. People, 140 Ill. 350.

Iowa. State v. Viers, 82 Iowa 397; Hatfield v. Chicago, R. I. & P. Ry. Co., 61 Iowa 440.

Michigan. People v. Calvin, 60 Mich. 114; People v. Herrick, 59 Mich. 563.

Minnesota. State v. Hogard, 12 Minn. 293 (Gil. 191).

Missouri. State v. Lingle, 128 Mo. 537; State v. Renfrow, 111 Mo. 589; State v. Turner, 110 Mo. 196; State v. Young, 105 Mo. 634; State v. Morrison, 104 Mo. 642; State v. Brown, 104 Mo. 374; State v. Young, 99 Mo. 666; State v. Cook, 84 Mo. 40.

Nebraska. Johnson v. State, 34 Neb. 257; Murphy v. State, 15 Neb. 389; St. Louis v. State, 8 Neb. 418.

Nevada. State v. Streeter, 20 Nev. 403, 22 Pac. 758; State v. Slingerland, 19 Nev. 135, 7 Pac. 280; State v. Hymer, 15 Nev. 51.

Contra, Wabash R. Co. v. Biddle, 27 Ind. App. 161; State v. Fairlamb, 121 Mo. 139.

61—People v. Knapp, 71 Cal. 1, 11 Pac. 793; People v. Cronin, 34 Cal. 192; State v. Fisk, 63 Conn. 392; State v. Ryan, 113 Iowa 536; State v. Sterrett, 71 Iowa 386; State v. Miller, 162 Mo. 253, 85 Am. St. Rep. 498; State v. Mounce, 106 Mo. 226.

62—West Chicago St. R. Co. v. Estep, 162 Ill. 130.

63—Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369; People v. Herrick, 59 Mich. 563; State v. Hogard, 12 Minn. 293 (Gil. 191); State v. Lingle, 128 Mo. 528.

64—State v. Napper, 141 Mo. 401;

any other person related to him;⁶⁵ or of a prosecuting witness in a criminal case.⁶⁶

§ 349. Same—Rule in Alabama, Indiana, Kentucky, Mississippi and Texas.

In Alabama, it has been held that the court may properly instruct the jury that they may consider the interest of the person testifying, in determining his credibility,⁶⁷ but it is error to instruct that the jury “must” consider the fact that the defendant is interested.⁶⁸

In Indiana, the decisions on this question are very conflicting. In a number of cases it has been held that an instruction that the jury “should” consider the interest of parties and other witnesses related to them in testing their credibility is an invasion of the province of the jury, because it indicates, as a matter of law, that the testimony of such witnesses was entitled to less weight than that of others.⁶⁹ But other decisions hold to the contrary;⁷⁰ and it has been held that the use of “should” for “may” does not invade the province of the jury.⁷¹ The following instruction has been approved: “In determining the weight to be given the testimony of the different witnesses, you should take into account the interest or want of interest they have in the case, their manner on the stand,” etc.⁷² In sustaining a similar instruction, the court considered

State v. Lingle, 128 Mo. 528; State v. Strattman, 100 Mo. 540; State v. Young, 99 Mo. 666.

65—State v. Hogard, 12 Minn. 293 (Gil. 191); State v. Fisher, 162 Mo. 169.

66—State v. Hogard, 12 Minn. 293 (Gil. 191).

67—Norris v. State, 87 Ala. 85; Descrippo v. State, 8 Ala. App. 85.

68—Descrippo v. State, 8 Ala. App. 85.

69—Lynch v. Bates, 139 Ind. 210; Bird v. State, 107 Ind. 154; Unruh

v. State, 105 Ind. 118; Dodd v. Moore, 91 Ind. 522; Woollen v. Whitacre, 91 Ind. 502.

70—Pittsburg, C., C. & St. L. Ry. Co. v. Chappell, — Ind. —, 106 N. E. 403; Deal v. State, 140 Ind. 354; Anderson v. State, 104 Ind. 467.

71—Pittsburg, C., C. & St. L. Ry. Co. v. Chappell, — Ind. —, 106 N. E. 403.

72—Anderson v. State, 104 Ind. 467.

that the use of the word "should" "does not tell them [the jury] how much, if any, that interest ought to detract from their testimony, but leaves that wholly to the exclusive determination of the jury. To consider evidence is one thing, and to determine its weight and force is another and quite a different thing. If the court may not tell the jury that it is a legal obligation resting on them, under their oaths, to consider all the evidence adduced before them, then it follows, as a logical sequence, that they are not bound to give any consideration whatever to the evidence introduced before them under the permission of the court." ⁷³

In Kentucky, it has been held that the court has no right to direct attention to the interest of witnesses in the result or character of statements made by them, the jury being the sole judges of the weight of the evidence, and of the credibility of the witnesses.⁷⁴

In Mississippi, a trial court has no right to instruct a jury that they may take into consideration the interest of the defendant in determining his credibility, since such an instruction bears directly on the weight of the evidence and constitutes reversible error.⁷⁵

Accordingly, it has been held erroneous to instruct that, "in weighing the defendant's testimony, they [the jury] should consider the interest he has in the result, and they may disregard it altogether;" ⁷⁶ or that, "if the jury believe from the evidence that any witness who has testified in this case has any feeling or interest in the result of this trial, then the jury should consider such feeling or interest in connection with all the evidence in the case in determining how far, if at all, they will believe such witness or consider such testimony." ⁷⁷ In one of these decisions it was

73—Deal v. State, 140 Ind. 368.

76—Buckley v. State, 62 Miss. 705.

74—Wright v. Com., 85 Ky. 123.

77—Woods v. State, 67 Miss. 575.

75—Smith v. State, 90 Miss. 111,
122 Am. St. Rep. 313; Woods v.
State, 67 Miss. 575.

To the same effect, see Townsend v.
State (Miss.), 12 So. 209.

said: "A defendant has the right to submit his testimony to the jury to be judged of by it, uninfluenced by any suggestions of its probable falsity, or an authorization to the jury to throw it aside as unworthy of belief because of the strong temptation to the defendant to swear falsely. There is little danger that juries will be unduly influenced by the testimony of defendants in criminal cases. They do not need any cautioning against too ready credence to the exculpation furnished by one on trial for a felony. The accused should be allowed to exercise his right to testify, unimpaired by any suggestions calculated to detract from its value in the estimation of the jury."⁷⁸

In Texas, the decisions in civil cases are unanimous to the effect that it is improper to tell the jury that they may or should consider the interest of the witnesses in the matter in controversy in determining their credibility.⁷⁹ In criminal cases, there seems to be some diversity of opinion, and, while there are some cases in which instructions of this nature have been approved,⁸⁰ later decisions overrule the former cases and hold that it is erroneous to give such an instruction.⁸¹ It is held that the same rule applies whether the witness be pointed out and named in the charge, or whether the charge does not in terms point out the witness by name, but states conditions that can only apply to a certain witness or witnesses.⁸² It is proper to refuse a charge that, in weighing the testimony of defend-

78—Buckley v. State, 62 Miss. 705.

79—Willis v. Whitsitt, 67 Tex. 673; Kellogg v. McCabe, 14 Tex. Civ. App. 598; Eddy v. Lowry (Tex. Civ. App.), 24 S. W. 1076.

80—Brown v. State, 2 Tex. App. 115; Cockerell v. State, 32 Tex. Cr. App. 585; Adam v. State (Tex. Cr. App.), 20 S. W. 548.

81—Shields v. State, 39 Tex. Cr. App. 13; Oliver v. State (Tex. Cr. App.), 42 S. W. 554; Penny v. State (Tex. Cr. App.), 42 S. W. 297; Har-

rell v. State, 37 Tex. Cr. App. 612; Muely v. State, 31 Tex. Cr. App. 155.

82—Harrell v. State, 37 Tex. Cr. App. 612, criticising Muely v. State, 31 Tex. Cr. App. 155, where it was held improper to instruct that, "in determining the credibility of the defendant, who testifies in his own behalf, his interest in the issues involved is to be considered." In this case the court intimated that an instruction, generally, that the jury might consider the interest of the

ant, the jury should treat him as any other witness, judging his appearance, demeanor, etc.⁸³

§ 350. Sufficiency of instructions as to credibility of party and weight of evidence in civil cases.

It is proper to direct the jury to consider a plaintiff's interest in the suit,⁸⁴ and the jury may be instructed to give defendant's "testimony such weight, in connection with the other evidence as you think it entitled to, and no more."⁸⁵

Where the right to recover is based almost entirely upon the testimony of plaintiff, the defendant has a right to have the jury told specifically that they may consider the interest of any of the witnesses in the result of the suit, and it is error to refuse an instruction that "the jury are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, and, in passing upon the testimony of any witness, the jury have a right to take into consideration the interest any such witness may have in the result of this trial, the manner of testifying, and the former life or history any such witness may have given of him or herself in this case."⁸⁶ To direct the jury's attention to the interest of a defendant in a bastardy proceeding, without referring to the plaintiff's interest therein, is not error.⁸⁷ But in an action for rent, where both parties testified, an instruction that while the law makes the plaintiff a competent witness, the jury have

witnesses in determining their credibility, would not have been improper. The instruction given was condemned on the ground that it singled out defendant for special comment.

⁸³—Clark v. State (Tex. Cr. App.), 59 S. W. 887.

⁸⁴—Chicago & E. I. R. Co. v. Burrige, 211 Ill. 9, rev'g 107 Ill. App. 23; Mansfield v. Chicago, B. & Q. R. Co., 132 Ill. App. 552; Larsen v. Chicago Union Traction Co., 131

Ill. App. 286; Scanlan v. Chicago Union Traction Co., 127 Ill. App. 406; Chicago Union Traction Co. v. Hansen, 125 Ill. App. 153. But see, Pennsylvania Co. v. Burton, 130 Ill. App. 573.

⁸⁵—Meyer v. Blakemore, 54 Miss. 570.

⁸⁶—Lancashire Ins. Co. v. Stanley, 70 Ark. 1.

⁸⁷—People v. Bibb, 155 Ill. App. 371.

a right to consider his situation and interest in the result and the circumstances which surround him, and give to his testimony only such weight as in their judgment it is fairly entitled to, is erroneous as singling out the testimony of one party.⁸⁸

A charge that the jury are not bound to believe a defendant's evidence or treat it as that of other witnesses has been held erroneous,⁸⁹ and it is error to instruct: "That the weight to be given to the testimony of the plaintiff and defendant, as witnesses, depends upon the interest each may have in the result of the suit;"⁹⁰ that, if the plaintiff swears one way and defendant another, the jury should leave the parties as it finds them;⁹¹ that the testimony of the party in interest should "be disregarded, unless corroborated by other witnesses, or by documentary evidence;"⁹² that "the evidence of parties to the action, and of those related to them, * * * is not entitled to as much weight as the evidence of disinterested witnesses;"⁹³ or that, "in weighing the evidence, the jury are to remember that the plaintiff is the most interested party in the controversy. They are to receive his evidence, therefore, with caution, as being that of a partial witness, and they are empowered to reject any evidence which is uncorroborated, even though it be uncontradicted."⁹⁴

It has been held proper to refuse an instruction which is not clear in its statement of the legal principle, and which

88—Hartshorn v. Hartshorn, 179 Ill. App. 421.

89—First Nat. Bank of Herrin v. Sobosky, 186 Ill. App. 545.

90—Dodd v. Moore, 91 Ind. 522. Compare Hess v. Lowrey, 122 Ind. 234, where it was held that an instruction "that the credit and weight that should be attached to the testimony of the witness depends upon his disinterestedness in the result of the suit, and his freedom

from bias or prejudice," was not ground for reversal where there was nothing to show that it was more prejudicial to one party than the other.

91—McLean v. Clark, 47 Ga. 24.

92—Prowattain v. Tindall, 80 Pa. St. 297.

93—Nelson v. Vorce, 55 Ind. 455.

94—Coloritype Co. v. Williams, 24 C. C. A. 163, 78 Fed. 450.

impresses "the jury that they must consider any interest, 'either financial or otherwise,' that each witness may have in the event of the suit."⁹⁵ Where a delay in bringing suit is most unusual, and the parties are the only witnesses, it is proper to instruct that, as bearing upon the credibility of the witnesses and probabilities of the case, the jury may take into consideration the delay of the plaintiffs in bringing the suit.⁹⁶

§ 351. Same—Criminal cases.

In regard to the testimony of the accused in a criminal prosecution, the court may properly charge that the accused is by law made a competent witness in his own behalf, and that the jury are bound to consider his testimony.⁹⁷

It is proper to charge that the jury must consider the defendant's testimony,⁹⁸ and that the jury have no right to disregard defendant's testimony merely because he is the defendant.⁹⁹ The jury may also be instructed to give defendant's "testimony such weight, in connection with the other evidence in the case, as you think it entitled to, and no more;"¹ that, "if convincing, and carrying with it a

95—*City of Lincoln v. Beckman*, 23 Neb. 677.

96—*Walker v. Harvey*, 47 C. C. A. 655, 108 Fed. 741.

97—*Rider v. People*, 110 Ill. 13; *Creed v. People*, 81 Ill. 569; *State v. Sterrett*, 71 Iowa 386. See *State v. Miller*, 162 Mo. 253, 85 Am. St. Rep. 498; *State v. Adair*, 160 Mo. 391; *State v. Miller*, 159 Mo. 113.

98—*State v. Sterrett*, 71 Iowa 386.

99—*Creed v. People*, 81 Ill. 565. Compare *Lang v. State*, 42 Fla. 595. An instruction that "the defendant is a competent witness in his own behalf, and his evidence should not be discarded by the jury for the reason alone that he is the defendant on trial, but such fact may be considered by the jury in determin-

ing the credit to be given to his testimony; and the jury are further instructed that they are the sole judges of the credibility of the witnesses and the weight of testimony, and, if they believe that any witness has intentionally testified falsely as to any material fact in the case, they may disregard the whole or any part of the testimony of such witness,"—is erroneous, as telling the jury that they may discard the testimony of accused on some ground. The jury should not be invited to discard the testimony of defendant, but to weigh it. *State v. Miller*, 162 Mo. 253, 85 Am. St. Rep. 498; *State v. Austin*, 113 Mo. 543.

1—*Solander v. People*, 2 Colo. 48;

belief in its truth," the jury may act upon it, and, if not, they have a right to reject it;² that the jury are "to consider the testimony of the defendant in connection with all the other evidence," but that, if they are not satisfied that it is true, they may disregard it;³ that the plaintiff's testimony should be judged by the same tests as are applied to other witnesses,⁴ or that the jury are under no obligation to believe it if they consider it unreliable;⁵ and an instruction calling the jury's attention to attendant circumstances which might bias testimony but leaving the jury to judge what weight and effect they should give it, is proper.⁶ The jury may also be instructed that, while they should not disregard the testimony of the defendant, they should consider his interest;⁷ or that "the defendant is competent to testify as a witness in this case, but the fact that he is the defendant may be shown for the purpose of affecting his credibility."⁸

So, also, an instruction that "the defendant is a competent witness in his own behalf, but the fact that he is a witness testifying in his own behalf may be considered by the jury in determining the credibility of his testimony;"⁹ or that "the defendant has a right to be a witness in his own behalf, yet, in weighing his evidence, and the weight to be given thereto, they have a right to take into consideration the interest that he has at stake in this case," is proper.¹⁰ Similarly instructions that, "in case of the defendant, you have a right to take into consideration the

Barber v. State, 13 Fla. 675; State v. Sterrett, 71 Iowa 386.

2—People v. O'Neal, 67 Cal. 378, 7 Pac. 790; People v. Morrow, 60 Cal. 147; People v. Cronin, 34 Cal. 195.

3—Lewis v. State, 88 Ala. 11.

4—Dickerson v. Henrietta Coal Co., 158 Ill. App. 454.

5—Creed v. People, 81 Ill. 569; State v. Elliott, 90 Mo. 350.

6—State v. Fogleman, 164 N. C. 458.

7—State v. Ryan, 113 Iowa 536.

8—State v. Zorn, 71 Mo. 415.

9—State v. Maguire, 69 Mo. 197. See also, State v. Wisdom, 84 Mo. 190, in which an instruction almost identical with the one set out above was approved.

10—State v. McGinnis, 76 Mo. 326.

great interest he has in your verdict;"¹¹ that "the fact that such witness is specially interested in the result of the action or of your deliberations may be taken into account by you;"¹² that "it will be proper for you to consider the fact that he is the defendant, and that greatest possible temptation is presented to him to testify in his own favor, if he is really guilty;"¹³ or "that, in determining the weight and credibility to be attached to the testimony of defendants, they should consider the fact that they are the defendants," have been approved.¹⁴

The principle is further illustrated by the following excerpts from instructions which have met with the approval of the courts: "In weighing his [the defendant's] testimony, they [the jury] should consider his position, the manner in which he might be affected by the verdict, and the very grave interest he must feel in it, and whether this position and interest might not affect his credibility and color his testimony, but that they should weigh the testimony fairly, and give it such credit as they thought it ought to receive;"¹⁵ that the jury should "consider his [defendant's] relation and situation under which he gives his testimony, the consequences to him relating from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation. * * * If convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it;"¹⁶ that, "above all, you are to take into consideration the fact that he [defendant] is the accused in the case; and, taking

11—State v. Bohan, 19 Kan. 35.
See also, People v. Dumas, 161 Mich. 45.

12—Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905.

13—Territory v. Romine, 2 N. M. 114. This case was decided before the statutory provision against charging on the weight of the evidence was passed.

14—State v. Brown, 104 Mo. 374.

15—People v. Knapp, 71 Cal. 1, 11 Pac. 793.

16—People v. Cronin, 34 Cal. 192. See also, People v. Wheeler, 65 Cal. 77, 2 Pac. 892; People v. Morrow, 60 Cal. 142; State v. Streeter, 20 Nev. 403, 22 Pac. 758, in which instructions substantially the same were upheld.

those facts into consideration, you are to give to his statements in court, or any statements made by him out of court, such effect and such force as you think they justly should have;"¹⁷ or that "the defendant has offered himself as a witness on his own behalf in this trial, and, in considering the weight and effect to be given his evidence, in addition to noticing his manner and the probability of his statements, taken in connection with the evidence in the cause, you should consider his relation and situation under which he gives his testimony, the consequences to him relating from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation."¹⁸ The jury may be instructed that, in determining the credit to be given to the testimony of defendants, "you may consider the very great interest which they must have and feel in the result of this case, and the effect which a verdict would have upon them, and determine to what extent, if at all, such interest may color their testimony or affect their credibility. If their statements be convincing, and carry with them belief in their truth, you have the right to receive and act upon them; if not, you have a right to reject them."¹⁹ Where the defendant testifies in his own behalf, he is entitled, on request, to an instruction "that the fact that he is the defendant is not of itself sufficient to impeach or discredit his testimony," especially where the requested instruction contains the further statement that the jury may take into consideration the fact that the witness is the accused.²⁰ And it has been held error to refuse defendant's request for an instruction that

17—State v. Fiske, 63 Conn. 392.

18—State v. Hymer, 15 Nev. 51.

19—Alabama. Norris v. State, 87 Ala. 85.

Arizona. Halderman v. Territory, 7 Ariz. 120, 60 Pac. 876.

Illinois. Siebert v. People, 143 Ill. 571; Bressler v. People, 117 Ill. 439; Rider v. People, 110 Ill. 1.

Missouri. State v. Adair, 160 Mo. 391; State v. Miller, 159 Mo. 113.

Montana. State v. Metcalf, 17 Mont. 417, 43 Pac. 182.

20—State v. Metcalf, 17 Mont. 417, 43 Pac. 182. Compare Lang v. State, 42 Fla. 595.

the jury "have the right to disbelieve the evidence of any interested witness upon no other ground than the fact of interest," and that they "have the right to disbelieve the evidence of any noninterested witness if his evidence appears impossible or improbable."²¹

It has been held, however, that the court need not, of its own motion, instruct the jury as to the credit to be given to the testimony of defendant in a criminal case, where he takes the stand in his own behalf, and gives testimony tending to exonerate himself.²² On the other hand, it has been held that an instruction that the jury "must give it [the testimony of defendant] the same consideration they would any other witness" should be refused.²³ So, a similar instruction that defendant's testimony is to be received and weighed as that of any other witness, and that his statement of any fact of his own which the jury believe to be wrong should not be considered for the purpose of punishing him for the crime charged, was considered too broad in not being limited to any act not connected with the crime charged. In one decision it was held proper to charge that "they [the accused] do not stand in the same position as a witness who is entirely disinterested. The time has not yet come when men who confess themselves guilty of crime are to stand alongside of and made equal to men who have lived upright and honest lives; but the value of their testimony is to be entirely estimated by you [the jury];" but the court said that it was "just on the verge of error."²⁴

In a prosecution for maintaining a nuisance, the refusal to instruct that the testimony of defendants should be

21—*Hunter v. State*, 29 Fla. 486.

22—*People v. Rodundo*, 44 Cal. 538.

23—*McKee v. State*, 82 Ala. 32; *People v. Calvin*, 60 Mich. 114. Where defendant offers himself as a witness, he stands the same as any other witness, and the court may instruct that his testimony should be

weighed like that of any other, though the state succeeded in having his answers to questions excluded, and the state was refused permission to cross-examine. *State v. Ulsemer*, 24 Wash. 657, 64 Pac. 800.

24—*People v. Ferry*, 84 Cal. 31, 24 Pac. 33.

judged by the same rules as other witnesses is error.²⁵ Where no question is made but that the defendant has an absolute right to testify in his own behalf, an instruction that, "under the statute of this state, a defendant in a criminal action is permitted to be a witness in his own behalf, and the jury are to be exclusive judges of the weight and credibility to be given his testimony," is not erroneous for the use of the word "permitted."²⁶

Instructions that the interest of defendants in a criminal case is a proper matter for the consideration of the jury have been held not erroneous as singling out such witnesses for special comment.²⁷ But an instruction which singles out the defendant alone and calls the jury's attention to his interest or to some other circumstance affecting his credibility ought not to be given unless the jury is told that the same test applies to other witnesses.²⁸

Where an accused is the only witness testifying in his own behalf, it is fatal error to give charges authorizing the jury to consider the interest of the witnesses and the fact that they had sworn falsely as to some material fact, as such charges are pointed directly at the defendant.²⁹ An instruction as to the credibility of witnesses referring to "the position and interest of such defendant" is objectionable as calling particular attention to the testimony of the defendant, the danger being that the jury may possibly infer that the court intends to discredit the testimony of the defendant.³⁰

In instructing the jury that they may consider the interest of a defendant as affecting his credibility, it is erroneous to give this statement undue weight by repetition.³¹ An instruction as to the interest of a plaintiff may be re-

25—*People v. Archibald*, 258 Ill. 383.

26—*State v. Porter*, 32 Ore. 135, 49 Pac. 964.

27—*Chicago & A. R. Co. v. Anderson*, 166 Ill. 572; *Haines v. Territory*, 3 Wyo. 167, 13 Pac. 8.

28—*People v. Harrison*, 261 Ill. 517.

29—*Gaines v. State*, — Miss. —, 48 So. 182.

30—*People v. Bartol*, 24 Cal. App. 659, 142 Pac. 510.

31—*Clark v. State*, 32 Neb. 246.

fused where the facts are not in dispute,³² and an instruction that the jury have no right to disregard the defendant's testimony merely because he is the defendant is properly refused, where the court has given full instructions as to how the jury should weigh the testimony of witnesses generally.³³

An instruction that the jury need not receive testimony of a defendant blindly, and to give it only such weight as they believe it entitled to is erroneous,³⁴ and an instruction that the jury "must bear in mind the tendency on the part of the guilty, when accused of crime, to fabricate some story or stories which they think may effect their acquittal," is erroneous, and prejudicial to the defendant.³⁵

It is improper to instruct that the jury may remember that a defendant testifying is interested in the result of the prosecution, and that they may, if they think that fact sufficient, entirely disregard his testimony if it is in conflict with the other evidence, as such instruction authorizes the jury to disregard the testimony, though they may believe it;³⁶ or that, where a "defendant is a witness in his own behalf, * * * the jury * * * may believe or disbelieve" his testimony, according as it is or is not corroborated.³⁷ Where an instruction was asked, "that, under the law, the evidence of the defendants is just as proper for your consideration in determining their guilt or innocence as the evidence of other witnesses," it was held proper to modify "the same by striking out the words, 'as the evidence of other witnesses,' and adding, 'and should receive such weight as you think it entitled to.'"³⁸ So, a request for an instruction that the jury should weigh, examine, and test defendant's testi-

32—*Glaich v. Hogan Envelope Co.*,
162 Ill. App. 261.

33—*Lang v. State*, 42 Fla. 595.

34—*People v. Barkas*, 255 Ill. 516.

35—*State v. Hoy*, 83 Minn. 286.

36—*Allen v. State*, 87 Ala. 107.

37—*State v. Patterson*, 98 Mo. 283.

38—*Bulliner v. People*, 95 Ill. 407.

mony, "the same as it does the testimony of all the other witnesses in the case," was properly modified by striking therefrom the words quoted.³⁹

An instruction that defendant's statements of his innocence of the charge, which were brought out by the state on the examination of the state's witnesses, are evidence to be considered by them as any other evidence in the case, is objectionable, as importing to the jury that they were bound, as matter of law, to give to the defendant's declarations of innocence the same weight they give to other evidence.⁴⁰ Where the only evidence of the character of the defendant is that he was a quiet and peaceable man, it is proper to refuse an instruction that the jury "may look to the fact, if it be a fact, that defendant is a man of good character, in determining what weight they will give to the testimony of the defendant."⁴¹ The court does not err in failing to instruct the jury that evidence of defendant's bad character went only to his credibility as a witness, and was not evidence of his guilt. Where no such evidence is adduced, and even if there is such evidence, the court cannot be convicted of error in failing to instruct with respect to it, in the absence of a request to do so by defendant, or of its attention being called in time to its failure to instruct upon the law of the case.⁴²

An instruction that the jury "shall not capriciously reject the testimony of the defendant simply because he is interested, but, unless the jury have good reason to believe, under all the circumstances, that the defendant has sworn falsely, then the jury should believe his testimony, and consider it along with all other testimony in the case in making up their verdict," is faulty in that it is

39—*People v. Cowgill*, 93 Cal. 596, 29 Pac. 228. See also, *Clark v. State* (Tex. Cr. App.), 59 S. W. 887.

40—*Childress v. State*, 86 Ala. 77.

41—*Bodine v. State*, 129 Ala. 106.

42—*State v. Furgerson*, 162 Mo. 668.

argumentative, and also invades the province of the jury in instructing them as to what they should believe.⁴³

An instruction "that the jury were not bound to believe the evidence of the defendant in a criminal case, and treat it the same as the evidence of other witnesses, but the jury may take into consideration the fact that he [the witness] is defendant," has been held to be in violation of a statute which provides that "no person shall be disqualified as a witness in any criminal case * * * by reason of his interest in the event of the same."⁴⁴

§ 352. Instructions tending to disparage testimony of accused.

The court has no right to disparage the testimony of an accused person,⁴⁵ and in instructing as to the credibility of the testimony of the accused, the court should refrain from making hostile comments upon such testimony.⁴⁶ It is erroneous to draw a comparison between the testimony of the accused and the circumstances against him, and tell the jury that "they [the circumstances] cannot be bribed, that they cannot be dragged into perjury, they cannot be seduced by bribery into perjury, but they stand as bloody, naked facts before you, * * * in opposition to and confronting this defendant, who stands before you as an interested party."⁴⁷

It is also improper to instruct that "something more tangible, real, and certain than a simple declaration of the accused is necessary to show self-defense on a murder trial."⁴⁸

So, it is error for the court to place the defendant in a separate and inferior class from all other wit-

43—Bodine v. State, 129 Ala. 106.

44—Chambers v. People, 105 Ill.

412. See also, Hughes v. State, 3 Okla. Cr. 387, 106 Pac. 546, as to the vice of singling out a defendant.

45—People v. Arnold, 248 Ill. 169.

46—Hicks v. United States, 150 U. S. 442, 37 L. Ed. 1137.

47—Hickory v. United States, 160 U. S. 408, 40 L. Ed. 474.

48—Allison v. United States, 160 U. S. 203, 40 L. Ed. 395.

nesses, by instructing that the jury are not bound to treat his evidence the same as that of other witnesses.⁴⁹ Thus, an instruction that the jury have no right to disregard the testimony of the defendant on the ground alone that he is charged with crime, but that the law presumes him innocent until he is proved guilty, and that his testimony should be fairly weighed, is properly refused as directing the jury to weigh his testimony by an arbitrary standard.⁵⁰

§ 353. Instructions as to contradictory statements of accused and corroboration.

The rules that govern other witnesses apply to the accused when he goes upon the stand and it is proper to call attention to corroboration or contradiction of his testimony by other credible evidence.⁵¹ A statement of the legal effect of contradictory statements may properly be given to the jury in relation to the testimony of a defendant in a criminal trial,⁵² and it is proper for the court to instruct that, if the testimony of the accused is contradicted, the jury ought to take the fact of such contradiction into consideration in determining the weight of his testimony.⁵³

So, it is proper to tell the jury that a particular test of credibility may be applied to the defendant's testimony, such as the fact that he has been contradicted by other witnesses or that his testimony may be rejected if he has wilfully sworn falsely to a material fact.⁵⁴

49—Hellyer v. People, 186 Ill. 550, wherein it was held error to instruct that, while defendant is a competent witness, yet his credibility and the weight of his evidence are exclusively for the jury, and, while the jury should not disregard his evidence through mere caprice, yet they are not bound to believe him, but may take into consideration his interest in the result.

50—Lang v. State, 42 Fla. 595.

51—People v. Zajicek, 233 Ill. 198; Miller v. People, 229 Ill. 376; Maguire v. People, 219 Ill. 16; State v. Winney, 21 N. D. 72.

52—Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905.

53—Rider v. People, 110 Ill. 13; Hatfield v. Chicago, R. I. & P. Ry. Co., 61 Iowa 434; Hinton v. Cream City R. Co., 65 Wis. 335.

54—People v. Harrison, 261 Ill. 517.

An instruction that "the testimony [of the accused] * * * is subject to the same tests as the testimony of any other witness," and that, if "the testimony of the prisoner * * * is contradictory of itself, it cannot be true," is proper.⁵⁵ So, an instruction that the jury "should consider whether it is consistent with the other facts proven to their satisfaction, and whether it is corroborated or not by the other proofs, facts, or circumstances of the case," has been approved.⁵⁶

It has also been held proper to charge "that if, after considering all the evidence in the case, they [the jury] find that the accused has willfully and corruptly testified falsely to any fact material to the issue, * * * they have the right to entirely disregard his testimony, excepting in so far as his testimony is corroborated by other credible evidence."⁵⁷ This instruction, however, it is believed, violates the rule against singling out a witness, and applying to him alone the maxim, *falsus in uno*, etc.⁵⁸

When an instruction calls attention to the consideration of contradictory evidence, an accused is entitled to an instruction requiring the jury to consider corroborating evidence also.⁵⁹

§ 354. Instructions as to testimony of accused and wife or other relations, etc.

It has been held proper to charge "that, in considering the weight of the evidence given by both the defendant and his wife, they [the jury] will take into consideration the fact that he is the defendant testifying in his own behalf, and that she is his wife, and you may consider their interest

55—People v. Petmecky, 99 N. Y. 421.

56—People v. Jones, 24 Mich. 216. See also, Durant v. People, 13 Mich. 355.

57—Rider v. People, 110 Ill. 11; People v. Petmecky, 99 N. Y. 415.

58—See § 380, *post*, instructions as to maxim, "Falsus in uno, falsus in omnibus."

59—McElroy v. People, 202 Ill. 473.

in the case, and the marital relation, in passing upon the credibility of their testimony;"⁶⁰ or "that the jury should consider and decide whether such relationship (of any of the witnesses to the complaining witness or defendant) acted upon the witnesses, * * * to make false statements in their evidence, or whether such relationship influenced said witnesses and swerved them from the truth."⁶¹ So, it has been held that where the wife of a defendant is a witness, the court may instruct that, in weighing her testimony, the jury may take into consideration the fact that the defendant is the accused, and is on trial, the statute expressly providing that the fact of the relationship may be shown as affecting credibility.⁶² But, it has also been held that an instruction as to the credibility of a defendant and his wife, that the jury may consider "the fact that he is the defendant, and that she is his wife, and the interest that they have in the result of the trial," while not erroneous, has been severely criticised as singling out evidence, as being of little value and as being indefinite.⁶³

The court may properly direct the jury to scrutinize with caution the testimony of relations,⁶⁴ but the omission to give this caution cannot be assigned as error.⁶⁵ It has been held proper to charge "that the law regarded with suspicion the testimony of near relations."⁶⁶ A statement that the court admitted the testimony of a witness with great doubt as to its admissibility, on account of her relationship to a party, has been held erroneous;⁶⁷ and it has been said that, "Where the witness, from motives of

60—State v. Napper, 141 Mo. 401. See also, State v. Strattman, 100 Mo. 540, where an instruction almost identical in language was approved.

61—State v. Hogard, 12 Minn. 295 (Gil. 192).

62—State v. Parker, 39 Mo. App. 116.

63—State v. Hyder, 258 Mo. 225,

and cases cited approving and criticising this charge.

64—State v. Byers, 100 N. C. 512; Ferrall v. Broadway, 95 N. C. 551.

65—Wiseman v. Cornish, 53 N. C. 218.

66—State v. Nash, 30 N. C. 35.

67—Potts v. House, 6 Ga. 324.

friendship or from family ties, makes statements favorable to those in whom he is interested, the suggestion by the court, in an instruction, that they should give to the testimony of each witness such weight as they may deem it entitled to, is in effect saying to the jury that the statement of such a witness is entitled to less weight than statements made by those entirely disinterested in the result.”⁶⁸ So, an instruction to the jury: “In estimating the value of the defendant’s testimony, you have a right to consider what he has at stake in this case, the gravity of the charge against him, and the motives which might induce him to misrepresent or speak falsely in regard to it; and you have a right to consider the motives of the other members of the family, and, after considering these, not only in their own intrinsic light, but in the light of all the testimony in the case, give such testimony the value you consider, under all the circumstances of the case, it is entitled to in coming to a final conclusion,”—is objectionable, as telling the jury, in effect, that the wife and daughter had strong motives for giving the most favorable coloring possible in behalf of the accused to the facts which they were called to delineate.⁶⁹

It has been held proper to instruct that the jury should consider the relations which the prosecuting witness and the defendant bore to the case, in determining what weight to give their testimony.⁷⁰ But, an instruction: “While it is the law that the testimony of the prosecutrix should be carefully scanned, still this does not mean that such evidence is never sufficient to convict. If you believe the prosecutrix, it is your duty to render a verdict accordingly,”—is not open to the objection that it tells the jury that they may act on the testimony if they believe it, although it may not be sufficient in substance, though true, to establish the offense.⁷¹ The court should, on request,

68—*Barnard v. Com.* (Ky.) 8 S. W. 444.

69—*State v. Pomeroy*, 30 Ore. 16, 46 Pac. 797.

70—*People v. Herrick*, 59 Mich. 563.

71—*People v. Wessel*, 98 Cal. 352, 33 Pac. 216.

charge "that any money offered or promise made to the accomplice, to induce him to testify, is material, as bearing on the credibility of the witness," if there is evidence on which to base such an instruction.⁷²

§ 355. Instructions as to credibility of other witnesses.

It is competent for the court to caution the jury to consider whether the interest or bias of a witness is apparent, and, if so, to weigh and credit the testimony accordingly,⁷³ but a general instruction to the effect that it is proper to consider the interest and bias or prejudice of witnesses in judging of their credibility is sufficient unless some good reason appears for specially cautioning the jury.⁷⁴ Thus, it has been said that a failure to comment on all the circumstances tending to discredit or corroborate the witnesses is not error, as there is no rule of law requiring such comments.⁷⁵ And an instruction that the testimony of interested witnesses is to be examined with greater care than that of disinterested witnesses has been approved.⁷⁶

In charging as to the credibility of witnesses other than parties, it has been held proper to instruct that the jury may consider the interest of the witnesses in the event of the suit;⁷⁷ that the jury should "look at all the facts and

72—*People v. Butler*, 62 App. Div. (N. Y.) 508.

73—*White v. Chicago, M. & P. S. R. Co.*, 49 Mont. 419, 143 Pac. 561.

74—*State v. Gray*, 90 Kan. 486, 135 Pac. 566.

75—*Faulkner v. Paterson Ry. Co.*, 65 N. J. L. 181.

76—*Hinton v. Cream City R. Co.*, 65 Wis. 335.

77—*City of Harvard v. Crouch*, 47 Neb. 133; *Klepsch v. Donald*, 4 Wash. 436; 31 Am. St. Rep. 936, 30 Pac. 991. Instruction directing consideration of witness' interest in case held proper. *Pittsburg, C., C.*

& *St. L. R. Co. v. Gates*, 137 Ill. App. 309; *Eckhardt v. People ex. rel. Holbert*, 116 Ill. App. 408. See also, *McDonell v. Rifle Boom Co.*, 71 Mich. 61. In the last case, the instruction approved was as follows: "Now, it is said that some of these witnesses are interested in or in the employ of the boom company, and you are to consider that circumstance in weighing your testimony. You have a right to do that, gentlemen, and if you think that any circumstance of that kind has operated upon their judgment, so that they have not been able to form an impartial judgment, you must consider

circumstances of the case, the character of the witnesses, * * * their relationship to the parties, * * * and thus determine upon which side the credibility preponderates, and render a verdict accordingly;"⁷⁸ or "that, in determining the weight of the testimony [concerning material matters in controversy], * * * the jury have the right, and it is their duty as jurors, to take into consideration the interest which any witness may have in the subject-matter involved."⁷⁹ So, also, it is proper to instruct that "it is the duty [of the jury] to reconcile and harmonize the evidence, if possible;" to "take into consideration the appearance of the witness on the stand, his interest in the result of the suit, or the want of it."⁸⁰ The court may properly instruct "that you, the jury, are the sole judges of the credibility of witnesses and the weight of evidence; but you should be circumspect in the consideration of evidence given by either side which it is impossible, in the nature of things, for the other side to disprove,—such as conversations or transactions with one deceased,—and give to such evidence only such weight as, in view of the interest of the witness and all circumstances, you may deem it fairly entitled to."⁸¹ It is proper to refuse an instruction that the testimony of a witness is to be distrusted because, if the suit or prosecution should terminate in a certain way, he would be benefited pecuniarily.⁸² If the mode of obtaining admissions indicates that a skilled and experienced person has unduly influenced or unfairly induced admissions, such facts should be closely scanned by the jury, and should greatly affect the weight to be given to the admissions, and the jury may be told to closely examine such evidence.⁸³

their testimony for what it is worth."

78—Rogers v. King, 12 Ga. 229.

79—Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369.

80—Little v. McGuire, 43 Iowa 447.

81—Meyer v. Blakemore, 54 Miss. 575.

82—Com. v. Pease, 137 Mass. 576.

83—Fidelity Mut. Life Ass'n v. Jeffords, 46 C. C. A. 377, 107 Fed. 402, 53 L. R. A. 193n.

The instructions should not single out a particular witness and call attention to his testimony,⁸⁴ and when the judge designates a particular witness and instructs the jury that they should consider his interest in the case in determining his credibility he invades the province of the jury.⁸⁵ It is also proper to refuse an instruction which tells the jury that the credibility of the witnesses on one side is affected by their interest in the event of the suit, while the instructions ignore similar facts affecting the credibility of the witnesses on the other side.⁸⁶ So, an instruction calling the jury's attention to the plaintiff's interest in the suit as affecting his credibility is properly refused if the test of interest is applicable to other witnesses in the case.⁸⁷

The instructions should not intimate that the witness is interested or biased or that he is to be discredited.⁸⁸ So, in instructing as to the credibility of interested witnesses generally, whether parties or not, it is improper to instruct that a witness' interest affects his credit,⁸⁹ or that, "if the witness is interested in the result of the prosecution, this tends to discredit him."⁹⁰ So, the court should not charge that "one interested will not usually be as honest and candid as one not so;"⁹¹ or that, where two adverse "witnesses appear to be equally credible in every other respect, the one who appears to have the greater interest in the result of the case is to have the less weight of the two;"⁹²

84—*White v. Chicago, M. & P. S. R. Co.*, 49 Mont. 419, 143 Pac. 561; *Hughes v. State*, 3 Okla. Cr. 387, 106 Pac. 546.

85—*State v. King*, 135 La. 117.

86—*Phenix Ins. Co. v. La Pointe*, 118 Ill. 389.

87—*Pennsylvania Co. v. Versten*, 140 Ill. 637.

88—*White v. Chicago, M. & P. S. R. Co.*, 49 Mont. 419, 143 Pac. 561.

89—*Davis v. Central R. Co.*, 60 Ga. 329, in which it was said the better instruction is "that it may

affect his credit, and that it is for the consideration of the jury, they being the judges of whether it does or does not influence his testimony, and, if so, to what extent."

90—*Pratt v. State*, 56 Ind. 179.

91—*Veatch v. State*, 56 Ind. 584, 26 Am. Rep. 44; *Greer v. State*, 53 Ind. 420.

92—*Lee v. State*, 74 Wis. 45, in which it was alleged, as a reason, that such instruction leaves out any consideration of surrounding

or to state "that an important witness * * * on the material question at issue was 'apparently interested';"⁹³ or "that witnesses who are disinterested are entitled to more weight than those who, for any reason, are shown to have an interest in the determination of the case;"⁹⁴ or that the testimony of a disinterested witness is entitled to more weight than that of plaintiff.⁹⁵ And it has been held erroneous to charge that "the jury are not bound to believe the testimony of any of the witnesses," where there were several disinterested witnesses whose testimony was not contradicted, and was not inherently improbable.⁹⁶ An instruction that "the jury have the right, and may take the liberty, of disregarding the witnesses of the defendant, if they consider them interested, even though they be not contradicted or impeached," is improper, and is too broad, as making the criterion whether the jury considers the witness interested, and giving to the jury a discretion to refuse to consider evidence which is competent.⁹⁷

§ 356. Credibility of particular classes of persons.

§ 357. —Police officers and detectives.

Instructions cautioning the jury in weighing the testimony of police officers are countenanced by the courts in behalf of a defendant to call the attention of the jury to the fact that the hunting instinct still exists, and that men whose duty it is to prosecute criminals sometimes allow their zeal, perhaps unconsciously, to color or bias their

circumstances, or of the effect of corroborative testimony.

93—*Lellyett v. Markham*, 57 Ga. 13.

94—*Omaha Belt Ry. Co. v. McDermott*, 25 Neb. 714.

95—*Platz v. McKean Tp.*, 178 Pa. 601, in which it was said: "The fact that the witness has an interest in the case may and should be considered in determining what weight

should be given to his testimony, but we know of no legal warrant for an instruction from the court that the testimony of a disinterested witness is entitled to 'more weight' than his."

96—*Tyler v. Third Ave. R. Co.*, 18 Misc. Rep. (N. Y.) 165.

97—*Berzevizy v. Delaware, L. & W. R. Co.*, 19 App. Div. (N. Y.) 309.

testimony in the effort to procure a conviction. That is the only reason why such instructions are permitted.⁹⁸

It has been held that the defendant in a criminal case is entitled to an instruction that greater care should be exercised in weighing the testimony of informers, detectives, or other persons employed to hunt up evidence against him than in the case of witnesses who are wholly disinterested.⁹⁹

Instructions seeking to discredit the testimony of detectives may be refused,¹ especially when they invade the province of the jury,² and it has been held proper to refuse an instruction that "greater care should be exercised in weighing the testimony of informers, detectives and other parties specially employed to hunt up evidence against a defendant."³ It is also error to instruct that testimony of a detective may be disregarded except when corroborated,⁴ and an instruction that the business of policeman or detective is a lawful one, that the jury should not through mere caprice or prejudice reject their testimony, etc., is faulty in singling out and calling attention to the testimony of particular witnesses.⁵

§ 358. Same—Employees.

Former or present employment is not an element in determining the credibility of witnesses, unless it is shown that such witnesses have an interest in the result of the

98—Shellenberger v. State, 97 Neb. 498, L. R. A. 1915 C. 1163.

99—Sandage v. State, 61 Neb. 240, 87 Am. St. Rep. 457. But compare Cooney v. State, 61 Neb. 342.

1—People v. Gardt, 175 Ill. App. 80, aff'd 258 Ill. 468.

2—People v. Dressen, 158 Ill. App. 139.

3—People v. Newbold, 260 Ill. 196.

An instruction that the evidence of a private detective should be received with a large degree of caution may be properly refused. Peo-

ple v. Gardt, 258 Ill. 468, aff'd 175 Ill. App. 80.

In a prosecution for selling intoxicating liquors in anti-saloon territory, an instruction referring to the testimony of private detectives, which tells the jury that such evidence should be received with care and caution, is improper. People v. Carter, 188 Ill. App. 22.

4—Riesen v. Riesen, 148 Ill. App. 460.

5—People v. Mendelson, 264 Ill. 453, L. R. A. 1915 C 627n.

suit.⁶ And an instruction as to considering the interest of a witness should not be given where no witness having any interest in the suit has testified, and it is apparent that such instruction is directed against a witness who was in the defendant's employ.⁷ So, an instruction as to the bias of an employee has been held improper where the only witnesses within such class were those called by the defendant.⁸ An instruction suggesting that "suspicion attaches to the testimony of agents or servants of a corporation or individual by reason of their employment, or that they have any such interest as requires them to be dealt with differently from other witnesses," should not be given.⁹ Where a case is extremely close upon the facts an instruction which improperly informs the jury as to the rule to be applied in weighing the testimony of witnesses who are the employees of one of the parties, cannot be held to be merely harmless error.¹⁰ An instruction that the jury have no right to disregard the testimony of an unimpeached witness simply on the ground that he is an employee, is proper,¹¹ and an instruction on the interest of a witness as an employee is proper where the liability of the defendant depends on the negligence of such witness.¹²

6—*Dowd v. Chicago City Ry. Co.*, 153 Ill. App. 85.

7—*Roberts v. Chicago City Ry. Co.*, 262 Ill. 228.

8—*Ovens v. Chicago City Ry. Co.*, 171 Ill. App. 647.

9—*West Chicago St. R. Co. v. Raftery*, 85 Ill. App. 319; *Marquette, H. & O. R. Co. v. Kirkwood*, 45 Mich. 51, 40 Am. Rep. 453. An instruction that the jury "will consider the interest of the parties; consider the relationship as well as the employment, as calculated to bias, whether it biased in this case," is not erroneous as intimating "that

employment would necessarily bias a witness." *Central of Georgia Ry. Co. v. Bernstein*, 113 Ga. 175.

10—*Powers v. Chicago City Ry. Co.*, 185 Ill. App. 158.

11—*Randall v. Sterling, D. & E. Elec. Ry. Co.*, 158 Ill. App. 56.

The refusal of an instruction stating that the jury have no right to disregard testimony simply because the witness is an employee, is error. *Olsen v. Chicago City Ry. Co.*, 153 Ill. App. 75.

12—*Pusateri v. Chicago City Ry. Co.*, 156 Ill. App. 578.

§ 359. Same—Attorneys.

The practice of attorneys appearing as witnesses in a case is not regarded with professional propriety, and the jury may be instructed that they may consider their interest in the case as attorneys in determining their credibility, but it is not proper to instruct the jury as to the professional propriety of their becoming witnesses.¹³

§ 360. Same—Experts.

It is improper to cast discredit upon a medical witness because he may have attended the trial from an adjoining state, with the expectation that his expenses would be paid. Presumably, the witness was actuated by humane motives.¹⁴

§ 361. Unsworn statement of defendant in criminal cases.

In some states the defendant in a criminal case is authorized to make an unsworn statement before the jury, and though he is not subject to cross-examination and is not, strictly speaking, a witness, his statement is in the nature of evidence to be considered by the jury.¹⁵

The jury may be instructed that they may give the unsworn statement of defendant more weight than the sworn testimony of unimpeached witnesses, if they honestly believe it to be entitled to such weight;¹⁶ and they may be told that the statement of the prisoner is entitled to such weight as the jury may think it worthy of.¹⁷ "In determining the credit to which they [the jury] may think it entitled, they

13—*Judy v. Judy*, 261 Ill. 470.

14—*Bradley v. State*, 31 Ind. 492.

15—*Beasley v. State*, 71 Ala. 328;
Letson v. State, 7 Ga. App. 745;
People v. Arnold, 40 Mich. 715.
Compare Vaughn v. State, 88 Ga. 731,
in which it was said that "the jury
trying a criminal case are sworn to
give a true verdict according to evi-
dence. It is important for them not
to confound the prisoner's statement
with the evidence, or the evidence

with the statement. * * * The
jury are to deal with it on the plane
of statement, and not on the plane
of evidence, and may derive from it
such aid as they can in reaching the
truth. The law fixes no value upon
it. It is a legal blank. The jury
may stamp it with such value as they
think belongs to it."

16—*Harrison v. State*, 83 Ga. 129;
People v. Jones, 24 Mich. 226.

17—*Blackburn v. State*, 71 Ala.

are not to be precluded by any artificial rule from giving full weight to every consideration, or to any feature of such statement, which may tend in any way to produce belief or disbelief, either of the statement itself, or of the evidence of witnesses to which it relates.”¹⁸

And an instruction that the issues are to be determined “by looking to the testimony of the witnesses that have sworn in the case” was held not erroneous, even though the defendant has made a statement giving his version of the transaction, and denying his guilt. It is said, however, to be the better practice in such case to authorize the jury to consider his statement in connection with the evidence, and to give it such force as they think it is entitled to receive.¹⁹

It is proper to refuse a request that defendant’s statement “is to be given no less credence on account of its not being made under oath.”²⁰ It cannot be assumed by the judge that the statement is not to be believed;²¹ but the jury’s attention may be called to the fact that the statement is not made under oath, and that the failure to tell the truth will not subject accused to any penalty.²²

It has been held improper for the judge to say that “he did not think such statement would warrant them in setting aside unimpeached sworn evidence;”²³ or that the jury should not receive such statement unless corroborated;²⁴ or that “his statement, to avail him, must be in those parts that are in conflict with the evidence * * * in material matters.”²⁵

A charge that certain matters bearing upon the guilt of defendant are to be determined by the jury under

319; *Poppell v. State*, 71 Ga. 277; *Durant v. People*, 13 Mich. 355. See also, *Harker v. State*, 8 Ga. App. 93.

18—*De Foe v. People*, 22 Mich. 226.

19—*Sledge v. State*, 99 Ga. 684.

20—*Blackburn v. State*, 71 Ala. 319.

21—*People v. Arnold*, 40 Mich. 715.

22—*Poppell v. State*, 71 Ga. 276; *Harker v. State*, 8 Ga. App. 93.

23—*Durant v. People*, 13 Mich. 351.

24—*People v. Arnold*, 40 Mich. 710.

25—*Lovejoy v. State*, 82 Ga. 87.

the evidence, and that "the reasonable doubt that is spoken of * * * should arise out of the case, either from the testimony in the case, or from the lack of testimony, or from a conflict of testimony," is not erroneous as excluding from the jury the prisoner's statement.²⁶ A charge that "the law declares, in all criminal cases in this state, defendant shall make to the court and jury just such statement in his defense as he thinks proper to make. Such statement is not to be under oath, and is to have just such force and effect only as the jury think proper to give it; but the jury may believe it in preference to the sworn testimony, if they think proper to believe it, provided the defendant shall not be subject to cross-examination, except by his own consent,"—is not erroneous because of the use of the word "shall" instead of the words "shall have the right to," and so calculated to raise the impression in the minds of the jury that the defendant is required to make a statement.²⁷

§ 362. Testimony of accomplices.

At common law,²⁸ and as a general rule, a conviction of a defendant may be had on the uncorroborated testimony of an accomplice;²⁹ although there are statutory provi-

26—Vaughn v. State, 88 Ga. 731.

27—Smith v. State, 94 Ga. 591.

28—At common law, a jury could convict on the uncorroborated testimony of an accomplice. *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54; *In re Hardenbrook*, 135 App. Div. (N. Y.) 634.

29—*Arkansas*. *Flanagin v. State*, 25 Ark. 96.

Connecticut. *State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223.

District of Columbia. *United States v. Neverson*, 1 Mackey 154.

Florida. *Knight v. State*, 60 Fla. 19; *Tuberson v. State*, 26 Fla. 472.

Illinois. *Schulz v. Schulz*, 138 Ill.

665; *Friedberg v. People*, 102 Ill. 160; *Collins v. People*, 98 Ill. 589; *Earll v. People*, 73 Ill. 333. But see, *People v. Feinberg*, 237 Ill. 348.

Indiana. *Ulmer v. State*, 14 Ind. 52.

Louisiana. *State v. Mason*, 38 La. Ann. 476; *State v. Prudhomme*, 25 La. Ann. 525.

Maine. *State v. Litchfield*, 58 Me. 267.

Massachusetts. *Com. v. Bosworth*, 22 Pick. 398.

Mississippi. *Fitzcox v. State*, 52 Miss. 923.

Missouri. *State v. Shaffer*, 253 Mo. 320; *State v. Dawson*, 124 Mo. 418.

sions in a number of states to the contrary, and requiring the testimony of an accomplice to be supported by corroborating evidence. While "the source of this evidence is so corrupt that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation,"³⁰ it is not a rule of law that accomplices must be corroborated in order to render a conviction valid.³¹

The degree of credit to be given an accomplice is a matter exclusively within the province of the jury. They may, if they see fit, act upon an accomplice's testimony, even in a capital case, without any confirmation of his statements.³² "The evidence of an accomplice is undoubtedly competent, and may be acted on by the jury" as a sufficient basis for a conviction, although entirely unsupported.³³ However this may be, such evidence is considered very unsafe upon which to base a conviction, and it is usual for the court to give certain cautionary instructions in regard to it.³⁴ Yet

But see, *State v. Wilkins*, 221 Mo. 444.

Nebraska. *Olive v. State*, 11 Neb. 1.

New Jersey. *State v. Hyer*, 39 N. J. L. 603.

New York. *Lindsay v. People*, 63 N. Y. 143; *People v. Costello*, 1 Denio 83.

North Carolina. *State v. Barber*, 113 N. C. 711; *State v. Hardin*, 19 N. C. 407.

Pennsylvania. *Cox v. Com.*, 125 Pa. St. 94.

South Carolina. *State v. Sowell*, 85 S. C. 278; *State v. Brown*, 3 Strob. 508.

Virginia. *Brown v. Com.*, 2 Leigh 769.

West Virginia. *State v. Betsall*, 11 W. Va. 704.

Wisconsin. *Ingalls v. State*, 48 Wis. 647.

United States. *Richardson v. United States*, 104 C. C. A. 69, 181

Fed. 1; *Steinham v. United States*, 2 Paine 68, Fed. Cas. No. 13,355.

English. *Rex v. Wilkes*, 7 Car. & P. 272; *Rex v. Durham*, 1 Leach 478; *Rex v. Atwood*, 1 Leach 464.

Contra, *Shelly v. State*, 95 Tenn. 152, 49 Am. St. Rep. 926.

An instruction that the jury should not convict on the uncorroborated testimony of an accomplice is erroneous. *State v. Kimmell*, 156 Mo. App. 461.

30—*Com. v. Bosworth*, 22 Pick. (Mass.) 399.

31—*Reg. v. Stubbs*, 33 Eng. Law & Eq. 551.

32—*United States v. Neverson*, 1 Mackey (D. C.) 154.

33—*State v. Hardin*, 19 N. C. 407; *United States v. Sykes*, 58 Fed. 1000.

34—*Com. v. Bosworth*, 22 Pick. (Mass.) 398; *State v. Barber*, 113 N. C. 711; *State v. Hardin*, 19 N. C. 407.

the court cannot go beyond the usual cautions, "and, if the jury really yield faith to it [the testimony of an accomplice], it is not only legal, but obligatory on their consciences, to found their verdict upon it."³⁵

§ 363. Instructions that jury may convict on testimony of accomplice.

Unless there is a statute providing that there can be no conviction on the uncorroborated testimony of an accomplice, the jury may be instructed that they may legally convict on such testimony,³⁶ but where this instruction is given, it is always in conjunction with other instructions, warning the jury of the suspicious nature and unreliability of such testimony.³⁷

The jury may be instructed that an accomplice is a competent witness,³⁸ and an instruction that "the fact that a witness was an accomplice may affect his credibility, but not his competency,—that is, he is a legal witness, and you must determine what credit you think his testimony is entitled to, whether corroborated or uncorroborated,"—has been approved.³⁹ An instruction that an accomplice is a competent witness, and if the jury,

35—State v. Hardin, 19 N. C. 407.

36—Colorado. Wisdom v. People, 11 Colo. 170, 17 Pac. 519.

Illinois. Collins v. People, 98 Ill. 584, 38 Am. Rep. 105; Earll v. People, 73 Ill. 333. But see, People v. Feinberg, 237 Ill. 348.

Massachusetts. Com. v. Price, 10 Gray 472, 71 Am. Dec. 668n; Com. v. Brooks, 9 Gray 299.

Missouri. State v. Dawson, 124 Mo. 418; State v. Crab, 121 Mo. 554. See State v. Wilkins, 221 Mo. 444.

Nebraska. Olive v. State, 11 Neb. 1.

New Jersey. State v. Hyer 39 N. J. L. 603.

North Carolina. State v. Barber 113 N. C. 711.

United States. United States v. Babcock, 3 Dill. 619, Fed. Cas. No. 14,487.

English. Rex v. Wilkes, 7 Car. & P. 272; Reg. v. Stubbs, 33 Eng. Law & Eq. 551.

37—See § 364, *post*, Instructing jury to receive accomplice testimony with caution, and § 365, *post*, "Advising jury to acquit unless corroborated."

38—Wisdom v. People, 11 Colo. 170, 17 Pac. 519.

39—State v. Banks, 40 La. Ann. 736.

weighing the probabilities of his evidence, think him worthy of belief, a conviction, supported by such testimony alone, is legal, is correct, the jury being further instructed that evidence from an accomplice should be received with great caution.⁴⁰ So, an instruction that, "while it is a rule of law that a person may be convicted upon the uncorroborated testimony of an accomplice, still a jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all other evidence in the case; and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, you are satisfied beyond all reasonable doubt of its truth,"—is not erroneous in a jurisdiction which does not absolutely require, in all cases, that the testimony of an accomplice shall be corroborated. All that is necessary is to caution the jury to carefully examine the testimony of the accomplice before accepting it.⁴¹

It is not proper to charge "that the only chance to bring offenders to justice, and to protect the lives and property of honest citizens, is often that which is offered by allowing one offender to turn state's evidence and to escape, that another may be convicted and punished." The policy of using the evidence of an accomplice should not be discussed in the instructions to the jury.⁴²

§ 364. Instructions that evidence of accomplice is to be received with caution.

It seems to be the well-settled and almost universal practice for the court to instruct that the testimony of accomplices should be viewed by the jury with great care and caution,⁴³ although a somewhat different rule prevails in

40—*Wisdom v. People*, 11 Colo. 170, 17 Pac. 519.

41—*State v. Coates*, 22 Wash. 601, 61 Pac. 726.

42—*Long v. State*, 23 Neb. 33.

43—*Illinois*. *People v. Feinberg*, 237 Ill. 348.

Kansas. *State v. Kellerman*, 14 Kan. 135.

Massachusetts. *Com. v. Price*, 10 Gray 472, 71 Am. Dec. 668n.

Missouri. *State v. Donnelly*, 130 Mo. 642; *State v. Dawson*, 124 Mo. 418; *State v. Minor*, 117 Mo. 302;

one state.⁴⁴ It has been held, however, that, in the absence of a request, failure to give such an instruction cannot be assigned as error.⁴⁵ There is some diversity of opinion as to whether a refusal to give an instruction of this nature, when requested, will be ground for reversal. There are rulings both ways on this point.⁴⁶ It has been held error to refuse to charge "that the evidence of an accomplice is to be viewed * * * with caution and distrust," where a statute provides that the evidence of an accomplice is to be viewed with distrust, and that an instruction to that effect should be given when applicable to the case.⁴⁷ But

State v. Jackson, 106 Mo. 174; State v. Harkins, 100 Mo. 666; State v. Walker, 98 Mo. 95.

Nebraska. Long v. State, 23 Neb. 33; Olive v. State, 11 Neb. 1.

New York. People v. Costello, 1 Denio 87.

North Carolina. State v. Miller, 97 N. C. 484; Ferrall v. Broadway, 95 N. C. 551; State v. Hardin, 19 N. C. 407.

South Carolina. State v. Brown, 3 Strober. 508.

Vermont. State v. Dana, 59 Vt. 614.

Washington. State v. Coates, 22 Wash. 601, 61 Pac. 726.

Wyoming. Arnold v. State, 5 Wyo. 439, 40 Pac. 967.

United States. United States v. Harries, 2 Bond 311, Fed. Cas. No. 15,309; United States v. Babcock, 3 Dill. 619, Fed. Cas. No. 14,487; United States v. Sykes, 58 Fed. 1004.

44—In West Virginia it seems that no caution as to accomplice testimony is proper. In that state it has been said that, while such testimony is suspicious, and emanates from a bad source, yet the jury may believe it, although it is

wholly uncorroborated. And it is not proper for the court to give any instructions to the jury as to the weight of such or any other evidence. State v. Betsall, 11 W. Va. 704.

45—State v. Rook, 42 Kan. 419, 22 Pac. 626.

46—A refusal is ground for reversal: Solander v. People, 2 Colo. 48; Cheatham v. State, 67 Miss. 335, 19 Am. St. Rep. 310. A refusal is not ground for reversal: Hoyt v. People, 140 Ill. 588, 16 L. R. A. 239n. See also, State v. Jones, 64 Mo. 391.

47—People v. Sternberg, 111 Cal. 11, 43 Pac. 201; People v. Strybe (Cal.), 36 Pac. 3. To the same effect, see People v. Bonney, 98 Cal. 278, 33 Pac. 98, in which it was held that, where the only evidence to justify a verdict against the defendant was the testimony of an admitted accomplice and that of a third person as to defendant's oral admissions, the refusal of the court to instruct the jury that "the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a

it has also been held that where an accomplice is called as a witness in behalf of defendant, it is not proper to instruct that his testimony should be viewed with caution and distrust, on the ground that such instruction tends to discredit a witness for the defendant, and charges the jury with respect to matters of fact.⁴⁸

An instruction that the jury are the judges of the credibility of an accomplice, and that while the testimony of an accomplice must be received with great caution, still, if the jury are convinced of its truth they have a right to believe it, and it is their duty to do so, is free from any misleading tendency.⁴⁹

§ 365. Advising jury to acquit unless corroborated.

It is proper to advise the jury to acquit, where there is no evidence other than the uncorroborated testimony of an accomplice, and it is almost the universal practice to do so.⁵⁰ It was said in one case that the fact that one may be

party with caution," is prejudicial error.

48—*People v. Bonney*, 98 Cal. 278, 33 Pac. 98; *People v. O'Brien*, 96 Cal. 171; 31 Pac. 45.

49—*People v. Harris*, 263 Ill. 406.

50—*Arkansas. Flanagan v. State*, 25 Ark. 96.

Connecticut. State v. Williamson, 42 Conn. 263.

District of Columbia. United States v. Neverson, 1 Mackey 154.

Illinois. Hoyt v. People, 140 Ill. 588, 16 L. R. A. 239n; *Schulz v. Schulz*, 30 N. E. 317; *Collins v. People*, 98 Ill. 584, 38 Am. Rep. 105; *Earl v. People*, 73 Ill. 333.

Louisiana. State v. Mason, 38 La. Ann. 476; *State v. Prudhomme*, 25 La. Ann. 522.

Massachusetts. Com. v. Bishop, 165 Mass. 148; *Com. v. Brooks*, 9 Gray 299; *Com. v. Bosworth*, 22 Pick. 398.

Mississippi. Cheatham v. State, 67 Miss. 335; 19 Am. St. Rep. 310.

Missouri. State v. Walker, 98 Mo. 95; *State v. Chyo Chiagk*, 92 Mo. 415.

New Jersey. State v. Hyer, 39 N. J. L. 598.

North Carolina. State v. Barber, 113 N. C. 711; *State v. Haney*, 19 N. C. 390.

Ohio. Allen v. State, 10 Ohio St. 288.

Pennsylvania. Cox v. Com., 125 Pa. St. 94; *Watson v. Com.*, 95 Pa. St. 424.

South Carolina. State v. Green, 48 S. C. 136.

Texas. See Russell v. State, 55 Tex. Cr. App. 330.

Vermont. State v. Potter, 42 Vt. 496.

Wisconsin. Black v. State, 59 Wis. 471; *Ingalls v. State*, 48 Wis. 647.

convicted of a felony on the uncorroborated testimony of an accomplice makes it the more necessary the jury should be properly cautioned by the court in regard to such testimony.⁵¹ And as was said by a learned judge in another case: "It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance."⁵² Where an instruction of this nature is given, the judge does not thereby withdraw the case from the jury by positive direction to acquit, but merely advises them not to give credit to the testimony of the accomplice.⁵³

The practice of giving such instructions, however, rests in the discretion of the presiding judge;⁵⁴ and in one case the appellate court said that, although it did not approve of the trial judge's neglect to give the customary caution, they could not treat it as legal error.⁵⁵ It is the better practice to give the jury a caution of this nature, but it is nevertheless held by the majority of decisions that this is merely "a rule of practice, and not a rule of law," and therefore a failure of the judge to give such an instruction of his own motion, or even a refusal to do so on request, is not erroneous, or, if erroneous, is not ground for reversal.⁵⁶

Wyoming. *McNeally v. State*, 5 Wyo. 59, 36 Pac. 824.

United States. *Steinham v. United States*, 2 Paine 180 Fed. Cas. No. 13,355; *United States v. Sykes*, 58 Fed. 1004.

English. *Rex v. Jones*, 2 Camp. 132; *Rex v. Wilkes*, 7 Car. & P. 272; *Reg. v. Stubbs*, 33 Eng. Law & Eq. 551.

The judge may direct the jury not to return a verdict of guilty on the uncorroborated evidence of an accomplice. *Conley v. People*, 170 Ill. 587.

51—*State v. Jones*, 64 Mo. 391.

52—*Reg. v. Farler*, 8 Car. & P. 106.

53—*Flanagin v. State*, 25 Ark. 96; *United States v. Sykes*, 58 Fed. 1000.

54—*State v. Haney*, 19 N. C. 390.

55—*State v. Potter*, 42 Vt. 495.

56—**Connecticut.** *State v. Williamson*, 42 Conn. 263.

Illinois. *Collins v. People*, 98 Ill. 584, 38 Am. Rep. 105.

Louisiana. *State v. Prudhomme*, 25 La. Ann. 525.

Massachusetts. *Com. v. Wilson*, 152 Mass. 12; *Com. v. Holmes*, 127

§ 366. Binding instructions to acquit unless corroborated.

In jurisdictions where it is provided by statute that there can be no conviction on the uncorroborated testimony of an accomplice, it is, of course, proper to give the jury a binding instruction to this effect,⁵⁷ and a refusal to give such an instruction, when warranted by the evidence, is clearly erroneous.⁵⁸ The decisions are not harmonious as to whether or not it is necessary to give such an instruction, in the absence of a request therefor. Some courts hold that the general principle that an omission to charge on a particular point is not error, in the absence of a request, applies to the question of the necessity of corroborating the testimony of an accomplice.⁵⁹ Where the state does not seek to convict upon the evidence of the accomplice alone, but adduces other proof, almost, if not wholly, sufficient to warrant a verdict against defendant, it is not incumbent upon the court, without request, to charge as to necessity of corroboration.⁶⁰

In other jurisdictions, a failure to give such an instruction when the evidence warrants it has been held reversible error, the view being taken that, if "evidence is adduced tending to show that a witness * * * is an accomplice, * * * it becomes the duty of the trial court to give in charge to the jury the law

Mass. 424, 34 Am. Rep. 391n; Com. v. Price, 10 Gray 472, 71 Am. Dec. 668n.

Mississippi. Cheatham v. State, 67 Miss. 335, 19 Am. St. Rep. 310.

Missouri. State v. Watson, 31 Mo. 361.

Ohio. Allen v. State, 10 Ohio St. 287.

Pennsylvania. Cox v. Com., 125 Pa. St. 94.

Vermont. State v. Potter, 42 Vt. 495.

Wisconsin. Porath v. State, 90 Wis. 527, 48 Am. St. Rep. 954; Black v. State, 59 Wis. 471.

English. Reg. v. Stubbs, Dears. Cr. Cas. 555.

Contra, Hoyt v. People, 140 Ill. 588, 16 L. R. A. 239n; State v. Woolard, 111 Mo. 248.

57—Bernhard v. State, 76 Ga. 613.

58—State v. Patterson, 52 Kan. 335, 34 Pac. 784; Craft v. Com., 80 Ky. 349; Wicks v. State, 28 Tex. App. 448; Coffelt v. State, 19 Tex. App. 436; Sitterlee v. State, 13 Tex. App. 581; Brann v. State (Tex. Cr. App.), 39 S. W. 940; Martin v. State, 36 Tex. Cr. App. 632.

59—State v. Lawlor, 28 Minn. 224.

60—Robinson v. State, 84 Ga. 674.

governing the testimony of accomplices;"⁶¹ and in one of these last-named jurisdictions it is not even necessary to save an exception in order to make the error available on appeal.⁶² Where the court is bound to instruct on this point, whether requested or not, if the charge given by the court of its own motion sufficiently covers the point, special requested instructions thereon may be properly refused.⁶³

A statute requiring corroboration of an accomplice's testimony extends to accessaries, and, if the evidence strongly tends to show that a witness endeavored, after the crime, to screen and shield the accused, and to enable him to avoid arrest, the court should charge on the necessity of corroboration.⁶⁴ A charge upon accomplice testimony, which refers to only one witness, when other witnesses participated in the crime, or had guilty knowledge thereof, is erroneous.⁶⁵ Where a person jointly indicted with defendant only consents to testify on condition of exemption from prosecution, and is promised that exemption by the state, he must be regarded as an accomplice, and the defendant is entitled to an instruction that his uncorroborated testimony is not sufficient to convict. It is not the

61—*Ray v. State*, 1 G. Greene (Iowa) 316, 48 Am. Dec. 379; *Williams v. State*, 42 Tex. 392; *Stone v. State*, 22 Tex. App. 185; *Anderson v. State*, 20 Tex. App. 312; *Fuller v. State*, 19 Tex. App. 380; *Hunnicut v. State*, 18 Tex. App. 522; *Winn v. State*, 15 Tex. App. 169; *Miller v. State*, 4 Tex. App. 251; *Polk v. State*, 60 Tex. Cr. App. 150; *Tear v. State*, 60 Tex. Cr. App. 155; *Brace v. State*, 43 Tex. Cr. App. 48; *Brooks v. State* (Tex. Cr. App.) 56 S. W. 924; *Parr v. State*, 36 Tex. Cr. App. 493; *Stewart v. State*, 35 Tex. Cr. App. 174, 60 Am. St. Rep. 35; *Owens v. State* (Tex. Cr. App.) 20 S. W. 558.

The court may submit to the jury,

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as an issue of fact, the question as to whether a witness is an accomplice, though that the witness is an accomplice is unquestioned. In such a case, the court may charge that the witness is an accomplice, but it is not error not to do so. *Carroll v. State* (Tex. Cr. App.) 62 S. W. 1061.

62—*Coburn v. State*, 36 Tex. Cr. App. 257.

63—*Mercer v. State*, 17 Tex. App. 452; *Powell v. State* (Tex. Cr. App.) 44 S. W. 504.

64—*Hunnicut v. State*, 18 Tex. App. 500.

65—*Powell v. State*, 42 Tex. Cr. App. 12; *Powell v. State*, 42 Tex. Cr. App. 11.

fact that the witness has been indicted that is material, but the fact that he testifies to escape prosecution.⁶⁶

Where the court instructs the jury on what constitutes an accomplice, and then instructs them, if a certain witness comes within such requirements, to disregard his testimony, the court does not err in not specifically telling them to disregard his testimony, if he is not a credible witness.⁶⁷

It is reversible error not to tell the jury that they cannot convict the defendant upon the testimony of an accomplice or accomplices, unless such testimony be corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed, and circumstances thereof. While one accomplice may corroborate another, the testimony of an accomplice is not the corroboration of the testimony of another accomplice which is required to convict.⁶⁸

A federal judge, trying a case in a state whose laws forbid conviction upon the uncorroborated testimony of an accomplice, will charge the jury to return a verdict of not guilty if the case goes before them on the testimony of the accomplice alone.⁶⁹

§ 367. Explaining nature of corroboration required.

Where the state relies on the testimony of an accomplice to secure a conviction, the trial court, if requested, must instruct that they cannot find the defendant guilty unless such evidence is corroborated by other evidence which tends to connect the defendant with the commission of the offense.⁷⁰

If the statute requires that the corroborating evidence shall tend "to connect the defendant with the offense committed," an instruction that, "in order to con-

66—*Barrara v. State*, 42 Tex. 260.

69—*United States v. Van Leuven*,

67—*Beach v. State*, 32 Tex. Cr.

65 Fed. 78.

App. 240.

70—*Fairgrieve v. State*, 10 Okla.

68—*Powers v. Com.*, 110 Ky. 386,

Cr. 109, 134 Pac. 837.

53 L. R. A. 245.

vict a defendant upon the testimony of an accomplice, there must be sufficient corroborating testimony of his guilt to satisfy your minds of the truth of the charge against him," does not sufficiently comply with the statutory requirement, and is erroneous.⁷¹

Where a statute provides that "a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof," and the court charges: "The corroboration is not sufficient if it merely shows that the offense has been committed by some person,"—an omission to refer to the "circumstances" of the offense is error.⁷²

Where a statute requires corroboration as to "matters material to the issue," the instruction should tell the jury what is meant by these words;⁷³ and if the corroboration "required by the statute * * * must relate to material facts which go to the identity of defendant in connection with the crime," an instruction "that, if the testimony of a witness shows him to be an accomplice, the jury should not convict, unless his testimony is corroborated by testimony they believe to be true beyond a reasonable doubt," is erroneous, and properly refused.⁷⁴

If the corroboration of the testimony of the accomplice is required to go so far as to identify the person of the defendant, the jury should be so instructed.⁷⁵

In instructing on what corroboration is sufficient, the following charge has been approved: "The corroboration

71—Watson v. State, 9 Tex. App. 237.

72—State v. Smith, 102 Iowa 666.

73—State v. Pratt, 98 Mo. 482; State v. Chyo Chiagk, 92 Mo. 395.

74—Vaughan v. State, 58 Ark. 354.

75—State v. Pratt, 98 Mo. 482;

State v. Chyo Chiagk, 92 Mo. 395. In the former case it was held that if the other testimony was amply sufficient, and the identity of the offense was well established by evidence *aliunde*, the error was not prejudicial.

ought to be sufficient to satisfy the jury of the truth of the evidence of the accomplice. If the jury are satisfied that he speaks the truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing that he also speaks the truth in other parts, as to which there may be no confirmation; but the corroboration ought to be as to some fact or facts connecting the prisoner with the offense, the truth or falsehood of which would go to prove or disprove the offense charged against the prisoner.”⁷⁶ It is the exclusive function of the jury to determine whether or not evidence offered for that purpose corroborates the testimony of an accomplice.⁷⁷

An instruction that, “you are further instructed that the defendant in this case cannot be convicted on the unsupported evidence of the accomplice,” is erroneous, in that it does not define to the jury the nature of the corroborative testimony required.⁷⁸ Where, in a prosecution for arson, it is not claimed that defendant took any part in the burning, but that he procured it to be done by others, who testified at the trial, and evidence is introduced showing that defendant was seen talking with the witnesses, but the subject of their conversation is not shown, and, on all the evidence, the case is a very close one, it is error to refuse to charge “that evidence showing the defendant was in the society of the accomplices is not sufficient, and such relations are consistent with innocence.”⁷⁹ A requested charge that the testimony of an accomplice could not be “taken” unless corroborated by evidence going to show some fact, not only that a crime had been committed, but that the prisoner was implicated in it, is properly refused. Such refusal does not involve the question whether the judge

76—*Jackson v. State*, 64 Ga. 345.

79—*People v. Butler*, 62 App. Div.

77—*State v. Bunyard*, — Ore. —, (N. Y.) 508.
144 Pac. 449.

78—*Mitchell v. State*, 38 Tex. Cr.
App. 325.

should have warned the jury that they ought not to convict on the uncorroborated testimony of the accomplice.⁸⁰ An instruction which authorizes the conviction of an accused on the testimony of an accomplice, which "tends" to show that accused committed the offense, is erroneous.⁸¹

§ 368. Instructing as to who are accomplices.

It has been held in one state that "a defendant who claims that a witness [who testified] against him was an accomplice, * * * and must be corroborated, has the right to have the court instruct the jury what constitutes an accomplice; but if he fails to ask such an instruction, he cannot complain of the omission of the court to give it."⁸² But, ordinarily, a charge on the subject of the corroboration of accomplices should explain to the jury who are accomplices, in the sense requiring corroboration.⁸³

Where the court charges that a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect defendant with the offense charged, and that the corroboration is not sufficient if it merely shows the commission of the offense, and defines "an accomplice" in statutory language, it is not error, in the absence of a request, to fail to submit to the jury the necessity of corroboration of the testimony of the alleged accomplice, if they should find that he was an accomplice.⁸⁴

If there is any evidence to show that the witness is an accomplice, the court should not take the question from the jury.⁸⁵ Where there is evidence that a witness had

80—State v. Vicknair, 52 La. Ann. 1921.

81—Pace v. State, 58 Tex. Cr. App. 90.

As to instructions concerning evidence "tending" to connect defendant with offense, see Jordan v. State, 59 Tex. Cr. App. 208; Snelling v. State, 57 Tex. Cr. App. 416; Maples v. State, 56 Tex. Cr. App. 99.

82—Carroll v. State, 45 Ark. 539.

83—Suddeth v. State, 112 Ga. 407; Zollicoffer v. State, 16 Tex. App. 312; Myers v. State, 6 Tex. App. 1.

As to sufficiency of definition, see Pace v. State, 58 Tex. Cr. App. 90.

84—Lockhart v. State, 29 Tex. App. 35.

85—People v. Curlee, 53 Cal. 604.

guilty knowledge of the crime, and he aided the defendant in manufacturing a defense, the court should charge on accomplice's testimony with reference to this witness, and leave it to them to say whether or not he was an accomplice in the case.⁸⁶ "It is not allowable in a criminal prosecution, where a witness is claimed to have testified as an accomplice, to instruct the jury as to the matter of fact whether the witness was an accomplice of the defendant."⁸⁷ Where unequivocal and uncontradicted evidence shows that a certain witness was an accomplice, the court may assume that fact, and charge that a conviction cannot be had on his uncorroborated testimony.⁸⁸ Where defendant's principal turns state's evidence, an instruction that he is an accomplice, and must be corroborated, is not erroneous, as assuming that the principal committed the crime, in the absence of any evidence contradicting the principal's confession as to his part in the crime.⁸⁹ While declarations made by a prisoner out of court should be received with caution, it is proper for the court to refuse to caution the jury against giving credence to one, not an acknowledged accomplice, who has testified to such declarations.⁹⁰ But, of course, if a witness is admitted to testify solely as an accomplice, the court, in giving instructions, may properly assume that he is an accomplice.⁹¹

§ 369. Instructions giving undue weight to accomplice testimony.

It is improper to charge "that the jury are bound to accept and credit testimony of an accomplice, either standing alone or more or less corroborated. It is their province

86—*White v. State* (Tex. Cr. App.), 62 S. W. 749; *Powell v. State*, 42 Tex. Cr. App. 11; *Ballew v. State* (Tex. Cr. App.), 34 S. W. 616.

87—*People v. Sansome*, 98 Cal. 235, 33 Pac. 202.

88—*Torres v. State* (Tex. Cr. App.), 55 S. W. 828.

89—*Wilkerson v. State* (Tex. Cr. App.), 57 S. W. 956.

90—*Rafferty v. People*, 72 Ill. 37.

91—*Barrara v. State*, 42 Tex. 260; *Zollicoffer v. State*, 16 Tex. App. 312.

to determine whether he is to be credited at all, and, if so, to what extent.”⁹² So, in case of a dismissal of the indictment as to an accomplice jointly indicted with defendant, in order that he might testify for the state, it is error to charge “that this fact should not be taken into consideration in determining the credibility of the accomplice.”⁹³

§ 370. Evidence on which to base instructions as to accomplices.

In the absence of any evidence to show that a witness who has testified is an accomplice, instructions as to the effect of accomplice’s testimony should not be given,⁹⁴ and no instruction should be given as to the effect of testimony of accessaries when there is no evidence to show that any witness is an accessory.⁹⁵

But where the evidence as to whether a witness was an accomplice or not is conflicting, it is error to refuse an instruction defining an accomplice.⁹⁶ “Mere knowledge on the part of a witness that the defendant committed the crime does not render such witness an accomplice, so as to require corroboration of his testimony;”⁹⁷ and the mere fact that a witness of the crime charged remains silent concerning it will not warrant an instruction on accomplice’s testimony.⁹⁸ Where the testimony of an accomplice does not in the least contribute to a

92—*Hamilton v. People*, 29 Mich. 174.

93—*Gill v. State*, 59 Ark. 422.

94—*Tuberson v. State*, 26 Fla. 472; *Smith v. State*, 28 Tex. App. 309; *May v. State*, 22 Tex. App. 595; *Moseley v. State*, 36 Tex. Cr. App. 578; *Lawrence v. State*, 35 Tex. Cr. App. 114; *People v. Chadwick*, 7 Utah 134, 25 Pac. 737.

To invoke instructions on the law in regard to accomplice’s testimony, there must be evidence to which the instructions would be applicable. *Pitner v. State*, 23 Tex. App. 366;

Kerrigan v. State, 21 Tex. App. 487; *Brown v. State*, 6 Tex. App. 286.

95—*State v. Morgan*, 35 W. Va. 260.

96—*Suddeth v. State*, 112 Ga. 407.

97—*Smith v. State*, 28 Tex. App. 309.

98—*O’Connor v. State*, 28 Tex. App. 288. In this case, certain Mexicans were witnesses for the state. At the time of the murder, which they saw, they were several hundred miles from home, and did not know the English language and the person killed, and the defend-

conviction, it is unnecessary to instruct as to necessity of corroboration.⁹⁹

Where, in a prosecution for establishing a lottery, it appears that the lottery was operated by means of a slot machine, the fact that a witness who worked for defendant is shown to have put nickels in the machine does not constitute him an accomplice in the establishment of the lottery, and the court consequently does not err in failing to submit the question of accomplice testimony in connection with testimony of such witness.¹

Where, in a prosecution for murder, it is shown that a witness for the state accompanied the defendants to the body of deceased, which they reached after traveling several miles, some distance of the way on foot, through dense brush, and upon inquiring of the defendants, while en route to the body, their destination, and where they were taking him, this witness stated he was informed by them that they were going to bury deceased, and it is shown that the witness dug the grave, at the direction of the defendants, and was warned by them to say nothing of the affair, it is error to refuse a charge on accomplice testimony in connection with the testimony of such witness.²

It is beyond the scope of this book to consider fully what constitutes an accomplice; but any evidence which tends to connect the witness with the commission of the offense is sufficient to require or justify a charge on accomplice testimony.³ On defendant's "trial for incest with his step-daughter, where she was the principal witness for the state, and portions of her testimony tended to inculcate herself, it was held that the trial court should have given in charge

* * * the statutory provisions controlling accomplice

ants were Americans, and not known to the witnesses.

99—Waggoner v. State, 35 Tex. Cr. App. 199.

1—Prendergast v. State, 41 Tex. Cr. App. 358.

2—Conde v. State, 33 Tex. Cr. App. 10.

3—See Polk v. State, 60 Tex. Cr. App. 150; Brace v. State, 43 Tex. Cr. App. 48.

testimony, and its corroboration.”⁴ In a trial for attempting to produce an abortion, where the female’s father was a witness for the prosecution, and testified that the defendant informed him of his daughter’s pregnancy, and suggested that he (the defendant) could give her a drug that would remove it, whereupon he (the witness) replied, “All right; anything to save my child,”⁵ the facts were held sufficient to warrant an instruction as to the testimony of the accomplice.

§ 371. Testimony of expert witnesses.

The competency of an expert witness is a question to be determined by the court, but it is the exclusive province of the jury to determine what weight shall be given to his testimony, and the court, in giving its instructions, should not interfere with the right of the jury in this regard.⁶ In

4—*Freeman v. State*, 11 Tex. App. 92, 40 Am. Rep. 787.

5—*Watson v. State*, 9 Tex. App. 237.

6—*Alabama*. *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33; *Gunter v. State*, 83 Ala. 96.

Arkansas. *Tatum v. Mohr*, 21 Ark. 349.

Georgia. *Anderson v. Barksdale*, 77 Ga. 86.

Illinois. *Taylor v. Cox*, 153 Ill. 220; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290.

Indiana. *Johnson v. Thompson*, 72 Ind. 167, 37 Am. Rep. 152; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760n; *Humphries v. Johnson*, 20 Ind. 190.

Iowa. *Bever v. Spangler*, 93 Iowa 576; *State v. Cole*, 63 Iowa 695.

Kansas. *Kansas City, W. & N. W. R. Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108; *Atchison, T. & S. F. R. Co. v. Thul*, 32 Kan. 255, 49 Am. Rep. 484, 4 Pac. 352.

Massachusetts. *White v. Fitchburg R. Co.*, 136 Mass. 321.

Michigan. *Rivard v. Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566; *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676.

Minnesota. *Stevens v. City of Minneapolis*, 42 Minn. 136.

Mississippi. *Louisville, N. O. & T. Ry. Co. v. Whitehead*, 71 Miss. 451, 42 Am. St. Rep. 472.

Missouri. *St. Louis Gaslight Co. v. American Fire Ins. Co.*, 33 Mo. App. 348.

Nebraska. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724n.

New York. *Roberts v. Johnson*, 58 N. Y. 613; *Templeton v. People*, 3 Hun 360.

Pennsylvania. *Mewes v. Crescent Pipe Line Co.*, 170 Pa. St. 369; *Wells v. Leek*, 151 Pa. St. 431.

Vermont. *Tillotson v. Ramsay*, 51 Vt. 309.

“Its value may be very great, or

determining the credibility and weight of such evidence, the jury should consider it in connection with all the other evidence in the case,⁷ and they are not bound by such evidence, but are at liberty to reject it altogether if they do not consider it credible.⁸

§ 372. Necessity of requesting instructions as to expert witnesses.

Where the court, on request, charges correctly as to expert testimony, and counsel desire fuller instructions, they should request them.⁹ So, a charge to the effect that the jury will be governed by the weight of the evidence, without calling special attention to the testimony of experts, is not erroneous, especially where no request, written or verbal, is made calling attention to that species of evidence.¹⁰

§ 373. Instructions as to expert witnesses in general.

The court may properly instruct that "the opinions of medical experts are to be considered * * * in connection with all the other evidence in the case, but you [the jury] are not bound to act upon them, to the exclusion of all other evidence."¹¹ And, according to many decisions, an expert witness is to be judged from the same standpoint

it may be of little worth. It may be conclusive, or it may be not even persuasive. Its weight will be determined by the character, the capacity, the skill, the opportunities for observation, and the state of mind of the experts themselves, as seen and heard and estimated by the jury, and, it should be added, by the nature of the case and all its developed facts." Louisville, N. O. & T. Ry. Co. v. Whitehead, 71 Miss. 451, 42 Am. St. Rep. 472.

7—Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 30 Am. St. Rep. 65; Kil-

patrick v. Haley, 6 Colo. App. 407, 41 Pac. 508; Epps v. State, 102 Ind. 539; Guetig v. State, 66 Ind. 107.

8—Anthony v. Stinson, 4 Kan. 211; Flynt v. Bodenhamer, 80 N. C. 208; Aetna Life Ins. Co. v. Ward, 140 U. S. 76, 35 L. Ed. 371.

9—Bertody v. Ison, 69 Ga. 317.

10—City of Atlanta v. Champe, 66 Ga. 660.

11—Wagner v. State, 116 Ind. 181; Epps v. State, 102 Ind. 539; Goodwin v. State, 96 Ind. 550; Guetig v. State, 66 Ind. 107.

as any other witness, and the jury are to apply the same general rules to the testimony of experts as are applicable to the testimony of any other witness in determining its weight and credibility, and an instruction so directing the jury is not improper.¹² It is proper to instruct the jury to take into consideration the means and opportunity of acquiring knowledge possessed by experts, as shown by the evidence, in estimating the weight which they should give to other testimony.¹³

An instruction that the opinions of expert witnesses are not necessarily conclusive, and that the jury, from all the facts and circumstances, should determine an issue, giving the weight to the experts' testimony which they were deemed entitled to, in view of their knowledge and skill as disclosed by the evidence, is proper.¹⁴ But it is improper to charge that the jury should consider the skill of the expert, and value his testimony accordingly, as this gives undue prominence to the skill of the expert, and ignores his credibility as exhibited by his conduct on the witness stand.¹⁵ So, an instruction which

12—**Arkansas.** *Williams v. State*, 50 Ark. 511.

California. *Haight v. Vallet*, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897.

Indiana. *Epps v. State*, 102 Ind. 539; *Cuneo v. Bessoni*, 63 Ind. 524; *Eggers v. Eggers*, 57 Ind. 461.

Kansas. *Ball v. Hardesty*, 38 Kan. 540, 16 Pac. 808; *Shellabarger v. Thayer*, 15 Kan. 619.

Louisiana. *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701.

Michigan. *Rivard v. Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566; *Turnbull v. Richardson*, 69 Mich. 400; *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276n.

Mississippi. *Louisville, N. O. & T. Ry. Co. v. Whitehead*, 71 Miss. 451, 42 Am. St. Rep. 472.

Missouri. *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552n; *Hampton v. Massey*, 53 Mo. App. 501.

New York. *Brehm v. Great Western Ry. Co.*, 34 Barb. 256.

Oregon. *Langford v. Jones*, 18 Ore. 307, 22 Pac. 1064.

Vermont. *Thornton's Ex'rs v. Thornton's Heirs*, 39 Vt. 122.

United States. *Carter v. Baker*, 1 Sawy. 525, Fed. Cas. No. 2,472.

13—*State v. Hinkle*, 6 Iowa 380; *Wells v. Leek*, 151 Pa. St. 431; *Aetna Life Ins. Co. v. Ward*, 140 U. S. 76, 35 L. Ed. 371.

14—*Lang v. Marshalltown Light, Power & Railway Co.*, — Iowa —, 147 N. W. 917.

15—*Blough v. Parry*, 144 Ind. 463.

ignores the opportunities of the expert for knowledge, his aptitude, and his skill, and which places too much stress upon his experience, is also erroneous.¹⁶

An instruction that the testimony of certain experts is entitled to more weight than the testimony of other experts, should be refused.¹⁷ An instruction that a medical or scientific book introduced in evidence, "is entitled to as much authority as a witness," is in violation of a statute forbidding the judge to comment on the weight of evidence.¹⁸

Where some of the expert witnesses pointed out the facts upon which they based their opinions, and others did not, a refusal to charge that the facts have greater weight than the opinions is not erroneous, as such instruction was on the weight of the evidence, and would have invaded the province of the jury.¹⁹

Where the court disclaims any intention of expressing an opinion on the testimony, it is not error to call the attention of the jury to the testimony of experts on each side, and direct them to consider it and the reasons on which the experts based their opinions.²⁰ A general instruction given to aid the jury to know the value of, or weight to be given to, testimony of certain experts, where their opinions are based on facts drawn from other evidence, and not from their personal observation, is not objectionable as impliedly depreciating the value of the testimony of an expert of little experience, as compared with another witness in the case.²¹

It is error to say that, while the medical experts introduced by defendant were admissible in law as witnesses, they were not entitled to credit, while on the other hand, when experts are appointed by the state, or by referees agreed on by the parties, and

16—Cuneo v. Bessoni, 63 Ind. 524.

17—Bever v. Spangler, 93 Iowa 576.

18—Melvin v. Easley, 46 N. C. 386, 62 Am. Dec. 171.

19—Breck v. State, 2 Ohio Cir. Dec. 477.

20—Com. v. Barner, 199 Pa. 335.

21—Powell v. Chittick, 89 Iowa 513.

when such examinations made by such experts are not *ex parte*, but conducted with notice to the opposite party, then the testimony is entitled to great weight.²² If the opinions of experts are manifestly in conflict with the established facts of the case, they cannot overcome such facts, and the jury may be so instructed.²³ So, where a witness testified to seeing a note signed, there was no error in instructing that expert evidence as to the handwriting should not overcome the testimony of a credible witness who testified from personal knowledge.²⁴

It is error to instruct that the way for the accused "to contradict the testimony of experts is by the introduction of testimony of the same class of men,—that is, of experts,—to show the thing to be different; and, as a principle of law, you have no right to disregard the testimony of credible witnesses,—experts,—if the witnesses are credible, and substitute for them your own opinions or notions, without proof." Such an instruction in effect tells the jury that the accused, no matter what his financial circumstances are, must employ experts on penalty that the testimony of the experts for the state shall be considered binding upon the jury.²⁵

Where the question being considered is whether a defect in a plank was obvious, and whether proper inspection of the plank would have disclosed the defect, it is proper to instruct the jury that they have "a right, from all the circumstances in the case, and from their inspection of the piece exhibited, to determine what, in all probability, the other side or end of the plank would show if produced; that the jurymen had a right to use their experience of lumber of this kind, and supply, as far as that experience and their good judgment went, the missing portion of the plank; that they were not restricted to the testimony of

22—*Persons v. State*, 90 Tenn. 291.

23—*Treat v. Bates*, 27 Mich. 390;
Brown v. Busch, 45 Pa. St. 61.

24—*Bruner v. Wade*, 84 Iowa 698.

25—*People v. Vanderhoof*, 71 Mich. 158.

witnesses; that they might use their own intelligence, and their own experience with lumber, and the knowledge which they brought with them into the jury room; and that it was their duty to use that information as much as the information they got from the witnesses.”²⁶

§ 374. Instructions tending to discredit expert testimony.

There is some conflict of opinion as to whether it is proper to instruct the jury that the testimony of experts is to be received with caution and circumspection. In some cases, an instruction of this nature has been approved,²⁷ but the weight of authority is to the effect that such an instruction is erroneous, and should not be given.²⁸ In one of these cases, however, it was held that the judgment should not be reversed for this error, where “the record is otherwise free from error, and the case not close on the point upon which the expert evidence bore.”²⁹

There is a conflict of opinion as to whether it is proper to instruct that testimony of an expert is entitled to little weight. In one case, an instruction of this nature has been approved,³⁰ but in another case an instruction to this effect

26—*Lafayette Bridge Co. v. Olsen*, 47 C. C. A. 367, 108 Fed. 335, 54 L. R. A. 33n.

27—*Haight v. Vallet*, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897; *Buxly v. Buxton*, 92 N. C. 479. See also, dictum in *Templeton v. People*, 3 Hun (N. Y.) 357.

It has been held proper to refuse an instruction that expert testimony should be received with caution and scrutiny, where the court has instructed that the opinion of medical experts is not conclusive, “but that the purpose of the introduction is to supplement the general knowledge and experience of the jury in relation to the matters before them, and thereby to aid them in the exercise of their own judgment upon

the facts, which must be exercised independently of the opinion evidence.” *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596.

28—*Illinois*. *Kankakee & S. R. Co. v. Horan*, 23 Ill. App. 259.

Kansas. *Atchison, T. & S. F. R. Co. v. Thul*, 32 Kan. 255, 49 Am. Rep. 484, 4 Pac. 352.

Michigan. *People v. Seaman*, 107 Mich. 348, 61 Am. St. Rep. 326.

Mississippi. *Louisville, N. O. & T. Ry. Co. v. Whitehead*, 71 Miss. 451, 42 Am. St. Rep. 472.

Nebraska. *Weston v. Brown*, 30 Neb. 609.

29—*Kankakee & S. R. Co. v. Horan*, 23 Ill. App. 259.

30—*Whitaker v. Parker*, 42 Iowa 585.

has been held properly refused,³¹ and an instruction that expert testimony is usually of little value has been condemned.³²

An instruction characterizing expert testimony as "made up largely of mere theory and speculation, and which suggests mere possibilities, * * * is properly refused, as inaccurate in point of fact, and conveying a severe criticism of such evidence."³³ So, an instruction: "It may be further remarked, too, in regard to evidence which is made up largely of mere theory and speculation, and which suggests mere probabilities, that it ought never to be allowed to overcome clear and well-established facts, and, further, that the law recognizes expert testimony as the lowest order of evidence," is erroneous, as expert testimony may sometimes be of the highest character.³⁴ So, the following instructions, tending to discredit expert testimony, have been held erroneous: That the court "place no reliance whatever upon the expert testimony, except what is due to the testimony of a sensible and honest gentleman;"³⁵ that "it is your own opinion upon the matter, and the conclusion you draw from the facts proven, that should determine your verdict, and not what any other person says or thinks;"³⁶ that "we question very much whether you will realize much, if any, valuable aid from them [expert witnesses] in coming to a correct conclusion as regards the responsibility for crime by this prisoner;"³⁷ that "it is the most remarkable circumstance that you can always obtain an equal number [of experts], as a rule, to swear on both sides of any question;"³⁸ or that the court

31—*Rivard v. Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566.

32—*Gunter v. State*, 83 Ala. 96; *Eggers v. Eggers*, 57 Ind. 461.

33—*Long v. Travellers' Ins. Co.*, 113 Iowa 259.

34—*Brush v. Smith*, 111 Iowa 217, wherein veterinary surgeons had testified that certain hogs had hog cholera.

35—*Templeton v. People*, 3 Hun (N. Y.) 357.

36—*Ball v. Hardesty*, 38 Kan. 540, 16 Pac. 808.

37—*Pannell v. Com.*, 86 Pa. St. 260.

38—*People v. Webster*, 59 Hun (N. Y.) 398.

did not think that expert testimony "was worth one fig, given as it was;"³⁹ and instructions that the "evidence [of experts] is intrinsically weak, and ought to be received and weighed by the jury with great caution,"⁴⁰ or that, in regard to testamentary capacity, the opinions of testator's neighbors, if men and women of good common sense, were worth more than those of medical experts, are bad for the same reason. The relative weight of expert and nonexpert testimony must be left to the jury.⁴¹

An instruction that the opinions of expert witnesses are not admitted for the purpose of controlling the judgment of the jury, but to be considered for what they are worth in the opinion of the jury when considered with other evidence in the case, has been held erroneous as an invasion of the province of the jury.⁴²

§ 375. Instructions directing jury to attach great weight to expert testimony.

It has been held error to charge that "the opinion of physicians upon questions of mental competency is entitled to greater weight than that of ordinary laymen;"⁴³ or "that the testimony of experts is supposed to be the best that can be furnished;"⁴⁴ or that the testimony of experts as to professional services "is the guide of the jury in finding the amount justly due, and in this case you must take the testimony of these witnesses, and be governed by it;"⁴⁵ similarly instructions that, "when the experience, honesty, and impartiality of the experts are undoubted, their testimony is entitled to great weight;"⁴⁶ or "that, in questions involving science and skill, the opinions of scien-

39—*Reichenbach v. Ruddach*, 127 Pa. St. 564.

40—*Coleman v. Adair*, 75 Miss. 660.

41—*Taylor v. Cox*, 153 Ill. 220.

42—*Indianapolis Traction & Terminal Co. v. Taylor*, 55 Ind. App. 309.

43—*Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276n.

44—*Kansas City, W. & N. W. R. Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108.

45—*Anthony v. Stinson*, 4 Kan. 211.

46—*Wall v. State*, 112 Ga. 336.

tific men in professions or pursuits, to which such questions may pertain, are authoritative, and in all doubtful cases, in which such questions are involved, should control the jury, are improper.”⁴⁷

It is proper to refuse to instruct: “On the matter of insanity set up in this case, it is your duty, if you believe the testimony upon which the opinions testified to by the medical experts are based is true, to weigh and test those opinions; * * * and if you find that they are learned in their professions, and have, in giving their opinions, testified candidly, sincerely, honestly, and truthfully, you should give their testimony due weight, and, if such testimony is all on one side, you should return your verdict in accordance with it. If the jury believe the testimony of physicians and others who testified as to the mental condition of the defendant at the time of the commission of the act complained of to be true, and such testimony is all on one side, then the verdict should be in accordance with such testimony. If you believe that the medical experts—the physicians who have testified in this case—have testified to the truth, and also believe that the testimony of the witnesses on which their opinions, as testified to, are based, is true, you should acquit the defendant.” The jury are not bound to accept the conclusions of experts as their own.⁴⁸

In other cases a different view has been taken and it has been held proper to instruct that the opinion of medical experts is “entitled to great weight,” when given in connection with another instruction that the jury are not compelled to take such testimony as true;⁴⁹ “that the opinion

47—*Humphries v. Johnson*, 20 Ind. 190.

48—*Williams v. State*, 50 Ark. 511.

49—*St. Louis, I. M. & S. Ry. Co. v. Phillips*, 13 C. C. A. 315, 66 Fed. 35, in which the court took the view that this was a mere expression of

opinion, and not an obligatory rule for the jury's guide. See also, *Laffin v. Chicago, W. & N. R. Co.* (C. C.) 33 Fed. 422, in which the following charge was held proper: “Great weight should always be given to the opinions, honestly and candidly expressed, of those familiar with the

of experts ought to have weight with the jury, as they are familiar with these questions, but the jury are not concluded by their opinion;"⁵⁰ that "the law likewise attaches peculiar importance to the opinion of medical men who have an opportunity of observation upon a question of mental capacity, as by study and experience * * * they become experts in the matter of bodily and mental ailments;"⁵¹ that "the proof made by expert witnesses * * * is of much greater value than of other persons who have no scientific or experimental knowledge of the subject of insanity, and who can only speak from observation of outward signs or appearances."⁵² So, in one case it has been held improper to refuse the following instruction: "Considering the extraordinary character of the injuries alleged in this case, and the great difficulty attendant upon their proper investigation, great weight should be given by the jury to the opinion of scientific witnesses, accustomed to investigate the causes and effect of injuries to the eye, and a distinction should be made in favor of the opinion of those accustomed to use the most perfect instruments and processes, and who are acquainted with the most recent discoveries of science, and most improved methods of treatment and investigation."⁵³

§ 376. Instructions with regard to hypothetical questions.

There is some conflict of opinion as to whether the jury may be directed to disregard the opinion of an expert if any of the facts stated in the hypothetical case are not fully proved. In one case it was said: "It is true, as a

subject. They are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge, giving them force and control only to the extent that they are found to be reasonable."

50—State v. Owen, 72 N. C. 605.

51—Flynt v. Bodenhamer, 80 N. C. 205.

52—State v. Reidell, 9 Houst. (Del.) 479.

53—Tinney v. New Jersey Steam Boat Co., 12 Abb. Pr. (N. S.; N. Y.) 3.

general rule, that, where the opinion of an expert is founded upon a hypothetical case, his opinion cannot be considered of material value unless the hypothetical case put to him is fully sustained by the evidence. Yet exceptions to this rule may arise, where the hypothetical case is susceptible of division, and a part of it only is sustained by the evidence."⁵⁴

And in another case (citing the one mentioned as authority) it was held not improper to instruct "that the facts stated in a hypothetical case need not necessarily be always fully proven to give value to the testimony of an expert."⁵⁵ The following instruction has been sustained in two decisions: "An opinion based upon an hypothesis wholly incorrectly assumed, or incorrect in its material facts, and to such an extent as to impair the value of the opinion, is of little or no weight."⁵⁶

On the other hand, an instruction that, "if one fact supposed to be true, included in the question, is untrue, not supported by the evidence, then the opinion of the expert would be valueless," has been approved,⁵⁷ and the following instruction condemned: "If the facts stated as a basis for the hypothetical question propounded to the medical experts in this case were not substantially correct, as shown by the evidence introduced on the trial of the case, then the opinion given by the experts, based upon such assumed state of facts, is entitled to but little or no weight, as may be determined from the evidence. That is to say, the hypothetical facts upon which the question is based must be substantially correct to entitle the conclusion drawn by the expert to have any considerable weight." In condemning this instruction, the reviewing court said this instruction is erroneous as conveying the impression "that the opinion of the expert might have some weight, even though the jury

54—*Eggers v. Eggers*, 57 Ind. 461.

55—*Epps v. State*, 102 Ind. 539.

56—*Goodwin v. State*, 96 Ind. 550;

Gueting v. State, 66 Ind. 94, 32 Am. Rep. 99n.

57—*People v. Foley*, 64 Mich. 148.

should find that the facts assumed as a basis for the opinion were incorrect. * * * The sole value of the opinion must, of necessity, depend upon the correctness of the statement of facts upon which it is based. If that is incorrect, then the opinion can have no weight or value whatever.”⁵⁸ Under this rule, it has been held that if “there is evidence * * * tending to prove all the material elements contained in the said question hereinafter set forth, and asked the expert witness,” it is not error to refuse an instruction that, “if you find the evidence * * * does not fully sustain the facts inquired in the hypothetical question, you [the jury] will not give the answers to such questions any effect.”⁵⁹

It has been held proper to instruct that the facts stated in the hypothetical question asked an expert must be substantially proven to entitle his opinion to any weight.⁶⁰ And the jury may be instructed that, if the question asked the expert does not contain sufficient facts upon which the witness can form an intelligent opinion, his testimony is thereby weakened, if not wholly destroyed.⁶¹

It is proper to instruct the jury to disregard the evidence (opinions) of expert witnesses, based upon hypothetical questions, if the jury should find the hypothesis involved in the questions to be not in accordance with the facts.⁶² So it is always proper and commendable to instruct the jury not to take for granted the truth of the statements contained in the hypothetical questions asked the witnesses, and that they should carefully scrutinize the evidence, and determine from it what, if any, statements are not true.⁶³

58—Hall v. Rankin, 87 Iowa 261.

59—Turnbull v. Richardson, 69 Mich. 400.

60—Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514.

61—Quinn v. Higgins, 63 Wis. 664, 53 Am. Rep. 305n.

62—Loucks v. Chicago, M. & St. P. Ry. Co., 31 Minn. 526.

63—Goodwin v. State, 96 Ind. 550; Guetig v. State, 66 Ind. 107.

§ 377. Necessity and propriety of instructions as to testimony of impeached witnesses.

The court may, of its own motion, instruct on the subject of impeachment,⁶⁴ but whether a failure to give such instructions, in the absence of a request, would be erroneous, seems to be in some doubt. Of course, error could hardly be assigned to a mere omission to give such an instruction in jurisdictions when there is no statutory requirement that the court shall substantially state the law governing the case, whether requested or not.⁶⁵ In one state, where the court is required to instruct the jury to the extent of fully covering the substantial issues made by the evidence, whether requested or not, it has been held not a ground for reversal that the court did not, of its own motion, instruct the jury as to what constituted impeachment, by contradictory statements made under oath. The appellate court considered that this was a minor point, which the trial court need not charge on unless requested.⁶⁶

In another case in this state it was held that a correct charge in relation to impeachment of a witness, and the manner in which an impeached witness may be sustained, is not erroneous because it fails to state particular rules on the subject of impeachment, in the absence of a request for more particular instructions.⁶⁷ In another state it is held not

64—Harris v. State, 96 Ala. 24; Rose v. Otis, 18 Colo. 59, 31 Pac. 493; Ohio & M. Ry. Co. v. Craucher, 132 Ind. 275. In the Rose case it was held that evidence that a witness had made a statement out of court different from that given by him when testifying tends to impeach him, and that, when requested, the court should instruct the jury to consider this in estimating what his testimony would be worth.

65—See § 156, *et seq.*, *ante*, "Necessity of request as foundation for error."

66—Thomas v. State, 95 Ga. 484;

Merchants' & Planters' Nat. Bank v. Trustees of the Masonic Hall, 62 Ga. 272. See also, Lewis v. State, 91 Ga. 168, where it was held that a correct charge having been given on the manner in which the jury should deal with impeaching evidence, and the effect of such evidence, a failure to state the rules laid down in the statutes as to the modes of impeachment was not a ground for reversal, in the absence of requests for such instructions.

67—Wheelwright v. Aiken, 92 Ga. 394.

error for the court to fail to state to the jury the effect of impeaching evidence as to the credibility of a witness, where no instruction on that question is asked. It was said that the impeachment of a witness does not constitute a defense, but merely relates to the credibility to be given to the testimony, and that the failure to instruct as to the effect of an effort to impeach does not constitute a failure to state the issues of the case.⁶⁸ In other jurisdictions it has been held that, where a witness is impeached, it is the duty of the court to instruct the jury as to the application of the impeaching evidence.⁶⁹

It is often proper to give an instruction limiting the effect of impeaching testimony to the sole purpose of impeachment,⁷⁰ but, unless the jury can use impeaching testimony for some purpose injurious to defendant, it is not necessary to limit its effect by an instruction.⁷¹

It is error to give instructions on the law as to the impeachment of witnesses unless there is evidence on which to base them.⁷²

68—State v. Kirkpatrick, 63 Iowa 554.

69—State v. Davis, 78 N. C. 433; *Herstine v. Lehigh Valley R. Co.*, 151 Pa. St. 244; *Wolfe v. State*, 25 Tex. App. 698; *Henderson v. State*, 1 Tex. App. 432. In the latter case, "the verdict depended on the evidence of the prosecuting witness alone, and the defense, after laying the proper predicate, proved that on several occasions she had made statements materially conflicting with her testimony at the trial. The court should, as part of the law applicable to the case, have given in charge to the jury the legal principles controlling the application and effect of the impeaching evidence." But in another Texas case it was said that to give such a charge would not be necessary or

proper except under extraordinary or peculiar circumstances. *Thurmond v. State*, 27 Tex. App. 371. And, in another, that "it is only when a witness has been properly impeached" that such a charge is necessary. In this case it was held that an attempted impeachment by a single witness was not enough to render an instruction on impeachment necessary. *Rider v. State*, 26 Tex. App. 334.

70—*Bondurant v. State*, 125 Ala. 31. See generally, as to instructions limiting the effect of evidence, § 247, *ante*.

71—*Blanco v. State* (Tex. Cr. App.) 57 S. W. 828.

72—*Cauley v. State*, 92 Ala. 71. Compare *Sanders v. Illinois Cent. R. Co.*, 90 Ill. App. 582.

Instructions on the law as to the

§ 378. Sufficiency of instructions as to impeached witnesses.

Where the reputation of witnesses among their neighbors, for truth, is impeached, and the testimony of witnesses to the effect that they are acquainted with the character of the impeached witnesses, for truth, in their neighborhood, and that, from this acquaintance thus derived, they would believe those witnesses under oath, although, as they said, they had never heard that character spoken of, is then received, a charge to the jury that they may weigh this testimony, in their estimate of the credibility of the impeached witnesses, is not erroneous.⁷³

The jury may properly be instructed that they “ ‘should consider’ the impeaching evidence introduced, in estimating the weight which ought to be given to the testimony of the witness, and should also, for the same purpose, take into consideration the fact, if they should so find it, that the moral character of any witness had been successfully impeached;”⁷⁴ that, “where it is shown that the reputation for truth of a witness is bad, his evidence is not necessarily destroyed, but it is to be considered under all the circumstances described in the evidence, and given such weight as the jury believe it entitled to, and to be disregarded if they believe it entitled to no weight;”⁷⁵ that the jury are to determine the credibility of a witness against whom impeaching evidence has been introduced, under all the facts and circumstances as proved, and that, if he “gave a fair, candid, and honest statement of the whole

impeachment of witnesses are always proper, where evidence tending to impeach a witness has been introduced. *Ford v. State*, 92 Ga. 459.

It is error to state a certain mode of impeachment, when there is no evidence on which to base it. *City Bank of Macon v. Kent*, 57 Ga. 284.

Where no evidence tending to impeach any witness in any of the

modes prescribed by law was introduced, a failure to instruct as to the impeachment of witnesses is not erroneous. *Freeman v. State*, 112 Ga. 48.

As to instructions concerning the manner of impeaching, see *Brand v. Bagwell*, 133 Ga. 750.

73—*Taylor v. Smith*, 16 Ga. 7.

74—*Smith v. State*, 142 Ind. 288.

75—*State v. Miller*, 53 Iowa 210.

transaction in controversy, they should not disregard his testimony;"⁷⁶ or that, in connection with impeaching evidence, it is proper "for you [the jury] to consider whether they [the impeached witnesses] have been supported by evidence of good character for truth and veracity, whether they have been corroborated by other truthful witnesses, and whether their testimony is consistent with other facts in the case, which have been proven to your satisfaction;"⁷⁷ it has been held not improper to instruct that, "if a witness has come upon the stand, and testified to a different state of facts here to what he testified upon the preliminary trial, you have the right to look to this evidence as evidence tending to impeach the witness who has made such conflicting statements;"⁷⁸ or "that certain other evidence introduced tends to sustain the evidence, or that there is evidence tending in both directions, when such is the case;"⁷⁹ that "they [the jury] are at liberty to disregard the statements of such witnesses (if any there be) as may have been successfully impeached, either by direct contradiction, * * * unless the statements of such witnesses have been corroborated by other evidence, which has not been impeached;"⁸⁰ or that, "if you believe, from the evidence, that any witness, before testifying in this case, has made any statements out of court concerning any of the material matters, materially different and at variance with

76—*McCasland v. Kimberlin*, 100 Ind. 121.

77—*Haymond v. Saucer*, 84 Ind. 3.

78—*Harris v. State*, 96 Ala. 27.

79—*Harris v. State*, 96 Ala. 27.

80—*Miller v. People*, 39 Ill. 463; *White v. New York C. & St. L. R. Co.*, 142 Ind. 648; *Harper v. State*, 101 Ind. 113; *State v. Ormiston*, 66 Iowa 143. In this case, the following instruction was approved: "If you believe from the evidence that any witness has been successfully impeached, either by reason of bad

reputation for truth and veracity, or by reason of statements made out of court conflicting with statements made on the witness stand, or you so find that any witness has willfully sworn falsely in regard to any matter or thing material to the issues in the case, you will be justified in disregarding the whole testimony of such witness, except in so far as you may find it corroborated by other credible evidence in the case, or by facts and circumstances proved on the trial."

what he or she has stated on the witness stand, then the jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of the witness, and the jury should consider these facts in estimating the weight which ought to be given to his or her testimony, and, if the jury believe from the evidence that the moral character of any witness or witnesses has been successfully impeached on this trial, then that fact should also be taken into consideration in estimating the weight which ought to be given to the testimony of such witness or witnesses.”⁸¹

An instruction concerning the various modes of impeaching witnesses, and telling the jury that it does not follow that, because a witness may be impeached, his testimony should be entirely excluded from consideration; that in such case it is for the jury to decide for themselves what weight shall be given to the testimony of such witnesses, taking into consideration all corroborating circumstances and testimony, if any exist, is not objectionable in that it assumes that witnesses have been impeached, and that it withdraws from the jury the right to give full credence to the testimony of such witnesses.⁸²

Where evidence of contradictory statements made out of court has been introduced, it has been held not improper, in a jurisdiction where the court may charge on the weight of the evidence, to instruct that “the law regards this kind of impeaching testimony as uncertain and somewhat unreliable.”⁸³ “If the jury believe that the witnesses have made sworn contradictory statements upon matters material to the issue in this case, then the testimony of said witnesses may be wholly disregarded and rejected by the jury, * * * and, before they should receive and base a verdict upon it, they should carefully scrutinize the testimony.”⁸⁴

81—*Smith v. State*, 142 Ind. 288.

83—*State v. Roberts*, 63 Vt. 139.

82—*McDermott v. State*, 89 Ind.

84—*McConkey v. Com.*, 101 Pa. St.

187. This instruction is not objectionable, as assuming that any witness had been impeached.

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An instruction "that the jury were not to arbitrarily reject the testimony of the convict witnesses simply because they were convicts, but that their testimony should be considered and weighed in accordance with the rules of evidence," is not erroneous as "in effect telling that they are to disregard the fact that certain witnesses have been convicted of a felony, in weighing their testimony."⁸⁵

An instruction that the force and effect of certain testimony is to show that a certain witness has told things out of court different from in court, and that it therefore becomes a matter for their consideration, when weighing his testimony, how much credit they will give to a witness who stated things in that way, and that the only question is whether such testimony goes to the credibility of the witness, and which leaves entirely to the jury the question as to whether the witness made contradictory statements, is not objectionable as a charge on the effect of the evidence.⁸⁶

In relation to corroborating testimony, the following charge has been approved: "The corroboration ought to be sufficient to satisfy the jury of the truth of the evidence of the accomplice. If the jury are satisfied that he speaks the truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing that he also speaks the truth in other parts, as to which there may be no confirmation; but the corroboration ought to be as to some fact or facts connecting the prisoner with the offense, the truth or falsehood of which would go to prove or disprove the offense charged against the prisoner."⁸⁷

§ 379. Same—Instructions held erroneous.

An instruction pregnant with disparaging suggestions, not based upon the evidence, and invading the province of the jury by undertaking to fix for them the probative value

85—*People v. Putnam*, 129 Cal. 258, 61 Pac. 961.

86—*Parnell v. State*, 129 Ala. 6.

87—*Jackson v. State*, 64 Ga. 345.

of impeaching testimony, is erroneous.⁸⁸ An instruction as to disregarding the testimony of a witness who has been "successfully impeached" is improper if the terms are not defined.⁸⁹ It is error to instruct the jury that a witness is impeached, and is not to be believed;⁹⁰ or to instruct that, "if any witness, having testified in the cause, had been impeached to their satisfaction, they should disregard his testimony."⁹¹ It is proper to refuse an instruction that, "against the credibility of any witness, it is a strong circumstance, weighing heavily, that he is ascertained to have sworn falsely in regard to some material fact,"⁹² or that his testimony should be considered with "great distrust."⁹³ An instruction that deprives a defendant of the right of the jury to consider, for what it is worth, evidence affecting the credibility of the prosecuting witness, is erroneous.⁹⁴ By introducing the witness, the party represents him to be truthful, but does not warrant him to be so, under the penalty that, if he swear falsely, it shall be evidence against the defendant upon the issue on trial. A party cannot foresee that his witness will swear falsely, or prevent him from doing so.⁹⁵ It is error to instruct the jury "that when a party introduces a witness on the stand, he thereby indorses his credibility;"⁹⁶ or that, "where a defendant puts a witness on the stand, it is a declaration upon his part that the witness is a truthful one."⁹⁷ So, it is also erroneous to instruct that "if you believe from the evidence that either one or more of the witnesses has ill-will or unkind feelings to prisoner,

88—*Tarbell v. Forbes*, 177 Mass. 238; *Strong v. State*, 61 Neb. 35.

89—*People v. Blevins*, 251 Ill. 381, Ann. Cas. 1912 C 451n; *Simmons v. Clement*, 164 Ill. App. 477.

90—*Harris v. State*, 96 Ala. 27; *East Mt. L. Coal Co. v. Schuyler*, 3 Leg. Gaz. (Pa.) 106.

91—*Chester v. State*, 1 Tex. App. 703.

92—*Paul v. State*, 100 Ala. 136.

93—*Tarbell v. Forbes*, 177 Mass. 238.

94—*Dean v. State*, 130 Ind. 237.

95—*State v. Brown*, 76 N. C. 225.

96—*Jarnigan v. Fleming*, 43 Miss. 710, 5 Am. Rep. 514.

97—*State v. Brown*, 76 N. C. 225.

that is one of the methods of impeaching a witness, and that weakens the testimony of the witness.”⁹⁸ It is sufficient to say that a party cannot impeach his own witness.⁹⁹

After correctly instructing the jury as to how a witness may be impeached, it is not improper for the court to say to the jury that “it would be a virtual disregard of a juror’s duty to arbitrarily disregard the evidence of a witness.”¹ Since a witness can be impeached only in one way,—by a direct attack upon his testimony and character,²—it is erroneous to instruct that “a witness may be just as effectually impeached * * * by his manner of testifying, his feelings towards the parties, his want of intelligence, or the want of means of knowing the facts of which he testifies.”³ A charge that, “while it is the province of the jury to pass upon the credibility of a witness, nevertheless the law furnishes to juries certain rules to guide them in determining whether or not a witness spoke the truth, and the law authorizes a jury to discard altogether the testimony of a witness who has been impeached,” is properly refused as calculated to mislead the jury to believe that the credibility of the testimony referred to is to be tested alone by the extent to which the general credibility of the witnesses has been impeached. Whether a jury is authorized to discard altogether the testimony of a witness who has been impeached depends not alone upon the fact of impeachment, but upon that fact, considered in connection with other facts in evidence.⁴

An instruction: “If the jury believe from the evidence in this case that the reputation of any witness in this case for truth and veracity in the neighborhood where they reside is bad, then the jury have a right to disregard his whole testimony, and treat it as untrue,—* * * that is, * * * to treat it as untrue, except where it is corroborated by other

98—*Skipper v. State*, 59 Ga. 63.

2—*Hansell v. Erickson*, 28 Ill. 259.

99—*Jarnigan v. Fleming*, 43 Miss. 710, 5 Am. Rep. 514.

3—*Chicago West Division Ry. Co. v. Bert*, 69 Ill. 388.

1—*State v. Sutfin*, 22 W. Va. 771.

4—*Osborn v. State*, 125 Ala. 106.

credible evidence, or by facts and circumstances proved on the trial,"—is erroneous.⁵

It is proper to refuse to instruct that "proof of contradictory statements, declarations, or testimony on material points by a witness may be sufficient to raise a reasonable doubt in the minds of the jury of the truth of the witness' testimony, and, if the jury have such a reasonable doubt of the truth of her testimony, then they should reject her testimony, and should not consider it against the defendant in making up their verdict;"⁶ or that, where a witness for the prosecution is impeached by proof of his contradictory declarations on a material point, it is error to instruct that the jury must believe a witness for the state, unless they believe that the contradicting witness is entitled to more weight and credit than said witness for the state;⁷ or that "the testimony of a witness for the prosecution, who is shown to be unworthy of credit, is not sufficient to justify a conviction without corroborating evidence, and such corroborating evidence, to avail anything, must be of a fact tending to show the guilt of the defendant."⁸

So, it is proper to refuse to instruct that the jury cannot convict on the testimony of a witness against whom

5—Higgins v. Wren, 79 Minn. 462.

6—Green v. State, 97 Ala. 59.

7—Corley v. State, 28 Ala. 22.

8—Horn v. State, 98 Ala. 23; Moore v. State, 68 Ala. 360; Ray v. State, 50 Ala. 104. *Contra*, Cohen v. State, 50 Ala. 108. A curious state of affairs is presented by these last two cases. They were decided by the same tribunal, and are in direct conflict, yet the last in point of time was decided within a few days after the former, without any reference or allusion thereto. Though "the character of a witness is assailed, or he is otherwise impeached as being unworthy of credit, it is entirely within the province of the jury, as

the exclusive judges of the facts, to say what degree of weight or credibility shall be given to his testimony. It does not lie in the mouth of any court to instruct the jury, as matter of law, that they cannot convict on such testimony unless it is corroborated; * * * an instruction by the court defining the effect to be given their statements is an infringement upon the jury's province." Osborn v. State, 125 Ala. 106, citing Lowe v. State, 88 Ala. 8; Jordan v. State, 81 Ala. 20; Moore v. State, 68 Ala. 360; Grimes v. State, 63 Ala. 166; Addison v. State, 48 Ala. 478.

impeaching testimony has been offered,⁹ especially where there has been some corroborating testimony;¹⁰ or that, "when a witness was heard by a jury, who was neither impeached nor contradicted, whose story was credible, and in whose manner there was nothing to shake their confidence, they were bound to believe him;"¹¹ or that "the jury should throw aside the testimony of such witness [who had been successfully impeached], and not consider it, except in so far as it may be sustained or corroborated by other testimony in the case;"¹² or that "the testimony of an impeached witness is to be taken with great care by the jury, and, unless fully corroborated, the jury will be justified in giving to it no weight whatever, and it is only on such points as such witness may be corroborated that the witness is entitled to credence and weight with the jury."¹³

Where there was no corroboration of a witness whose testimony at the trial was contrary to that given by him before the grand jury, it was error to charge that, if the witness had been impeached and restored to the confidence of the jury, he should be believed in preference to the impeaching testimony.¹⁴ An instruction that, although the jury "may believe from the evidence, beyond a reasonable doubt, that the witness for the state may have a bad repu-

9—*Spicer v. State*, 105 Ala. 123.

10—*Gilyard v. State*, 98 Ala. 59.

11—*State v. Smallwood*, 75 N. C. 104; *Noland v. McCracken*, 18 N. C. 594. *Contra*, *Rowland v. Plummer*, 50 Ala. 182, where a similar charge was approved. This decision is palpably erroneous. The reviewing court considered that this was not a charge on the "effect of the evidence," but it is hard to conceive on what they based their opinion. According to this decision, the jury would be bound to believe the testimony of an unimpeached and uncontradicted witness, though it was in contradiction of some well-known

natural or physical law. See also, *Smith v. State*, 63 Ga. 168, where a charge similar to that set out in the text was approved.

12—*Addison v. State*, 48 Ala. 478.

13—*Green v. Cochran*, 43 Iowa 544. *Contra*, *White v. Cook*, 73 Ga. 169, where the following charge was approved: "Witnesses may be impeached by the proof of contradictory statements. Witnesses, when impeached, should not be believed unless corroborated. It is for you to say whether any attempt at impeachment has been successful."

14—*Plummer v. State*, 111 Ga. 839.

tation for truth and veracity, still you may give full faith and credit to his testimony, and convict the defendant on the testimony of said witness without corroboration," is erroneous, because it practically instructs the jury to give full faith and credit to the testimony of the impeached witness, and to convict on it without corroboration, and does not even require, as a prerequisite, that they should believe the testimony.¹⁵

§ 380. Propriety or necessity of instructing as to application of maxim "falsus in uno, falsus in omnibus."

According to a number of decisions, the propriety of giving an instruction as to the maxim "*falsus in uno, falsus in omnibus*," in any particular case must be left largely to the judgment and discretion of the trial court;¹⁶ and others hold that under no circumstances can the court be required to give such an instruction,¹⁷ and that it makes no difference that there is evidence to which such instruction would be applicable.¹⁸ In other decisions it has been held that, where the facts in evidence warrant it, the refusal or failure to give such an instruction is reversible error.¹⁹

An instruction as to the maxim is improper unless warranted by the evidence.²⁰ There must be something in the

15—Snyder v. State, 78 Miss. 366.

16—State v. Hickam, 95 Mo. 322; Sampson v. St. Louis & S. F. R. Co., 156 Mo. App. 419; McCormick v. City of Monroe, 64 Mo. App. 197; Paddock v. Somes, 51 Mo. App. 320.

17—State v. Banks, 40 La. Ann. 736; James v. Mickey, 26 S. C. 270.

18—State v. Hickam, 95 Mo. 322, 6 Am. St. Rep. 54; Paddock v. Somes, 51 Mo. App. 320.

19—Merriweather v. Sayre Min. & Mfg. Co., 161 Ala. 441; Plummer v. State, 111 Ga. 839; State v. Dwire, 25 Mo. 553; Gillett v. Wimer,

23 Mo. 77; State v. Perry, 41 W. Va. 641.

20—There must be a sufficient basis in the testimony to warrant the giving of the charge. Merriweather v. Sayre Min. & Mfg. Co., 161 Ala. 441; State v. Palmer, 88 Mo. 568; White v. Maxcy, 64 Mo. 552; Sampson v. St. Louis & S. F. R. Co., 156 Mo. App. 419; James v. Mickey, 26 S. C. 270; Ingalls v. State, 48 Wis. 647.

If there is no evidence on which such an instruction can be based, it need not be given when requested.

appearance of the witness, or in his demeanor while testifying, or some inconsistency between his testimony and that of other witnesses, or with physical facts, which leads to the conclusion that the witness is untruthful, in order to justify an instruction on this subject.²¹ And the fact that the evidence was directly conflicting is sufficient to justify the giving of the instruction.²²

The fact that a witness is not directly impeached does not preclude the court from instructing upon the maxim, because a witness may be discredited or impeached for the purposes of the maxim by being contradicted by other witnesses, or by facts and circumstances proved.²³ But where a witness corrects a misstatement of fact before leaving the stand, the maxim under consideration has no application, and the court should not instruct upon it.²⁴

“An instruction properly stating the rule arising from the maxim, ‘*falsus in uno, falsus in omnibus*,’ is proper where the defense is an alibi, and the testimony of the witnesses directly conflicts.”²⁵

§ 381. Sufficiency of instructions as to disregarding false testimony.

The rule that the credibility of witnesses is for the jury applies to a witness who has knowingly testified falsely as to one or more material facts, and the jury may believe or disbelieve his testimony as to other facts according as they

State v. McDevitt, 69 Iowa 549;
Ingalls v. State, 48 Wis. 647.

To give such an instruction, when not warranted by the evidence, is erroneous. Kay v. Noll, 20 Neb. 380. See also, White v. Maxey, 64 Mo. 552.

21—Hansberger v. Sedalia Elec. Railway, Light & Power Co., 82 Mo. App. 566, wherein an instruction that the jury “were the sole judges of the weight and importance” of

the testimony, and that, if they believed, “from all they had seen and heard at the trial,” that any witness had wilfully sworn falsely, they were at liberty to entirely disregard the testimony of such witness, was held erroneous, as too broad.

22—State v. Hale, 156 Mo. 102.

23—Sanders v. Illinois Cent. R. Co., 90 Ill. App. 582.

24—Kay v. Noll, 20 Neb. 388.

25—State v. Johnson, 91 Mo. 439.

deem it true or untrue.²⁶ There is no rule of law by virtue of which the evidence may be withdrawn from the consideration of the jury,²⁷ or which prevents their giving credit to such a witness if, as a matter of fact, they do believe him.²⁸ Accordingly, if the facts and circumstances of the case warrant it, the court may properly charge the jury that, if a witness has wilfully and knowingly sworn to an untruth material to the issue, they may disregard the whole of his testimony.²⁹ And the jury may further be instructed that, while they may reject the whole of such testimony, they are not bound to do so, but may give it such weight as they think it entitled to.³⁰

The instructions as to disregarding testimony should be applied to the witnesses of both parties,³¹ and it is error to single out a particular witness, and to direct a cautionary instruction, although couched in proper terms, against his testimony.³² The giving of such an instruction has

26—*Schuek v. Hagar*, 24 Minn. 339.

27—*State v. Williams*, 47 N. C. 257.

28—*Fisher v. People*, 20 Mich. 135.

29—*California. People v. Strong*, 30 Cal. 156.

Colorado. *Minich v. People*, 8 Colo. 440, 9 Pac. 4.

Illinois. *Dean v. Blackwell*, 18 Ill. 336; *East St. Louis Connecting Ry. Co. v. Allen*, 54 Ill. App. 32.

Michigan. *Fraser v. Haggerty*, 86 Mich. 521.

Missouri. *Millar v. Madison Car Co.*, 130 Mo. 517; *Gerdes v. Christopher & Simpson Architectural Iron & Foundry Co.*, 124 Mo. 347; *Britton v. City of St. Louis*, 120 Mo. 437; *McFadin v. Catron*, 120 Mo. 252; *State v. Duncan*, 116 Mo. 288; *Seligman v. Rogers*, 113 Mo. 642; *State v. Beauchleigh*, 92 Mo. 490; *State v. Van Sant*, 80 Mo. 71; *State v. Thomas*, 78 Mo. 341; *Kelly v.*

United States Exp. Co., 45 Mo. 428; *Paulette v. Brown*, 40 Mo. 53; *Hansberger v. Sedalia Elec. Railway, Light & Power Co.*, 82 Mo. App. 566; *White v. Lowenberg*, 55 Mo. App. 69; *Hart v. Hopson*, 52 Mo. App. 177.

Nebraska. *Atkins v. Gladwish*, 27 Neb. 841.

New York. *Barrelle v. Pennsylvania Ry. Co.*, 21 N. Y. St. 109.

Ohio. *Mead v. McGraw*, 19 Ohio 61.

West Virginia. *State v. Thompson*, 21 W. Va. 746.

Contra, *Barnett v. Com.*, 84 Ky. 449.

30—*State v. Meagher*, 49 Mo. App. 589; *State v. Thompson*, 21 W. Va. 746.

31—*Herrin & S. R. Co. v. Nolte*, 243 Ill. 594.

32—*People v. Arlington*, 131 Cal. 231, 63 Pac. 347; *State v. Meagher*, 49 Mo. App. 589. See § 148, *ante*,

been repeatedly condemned,³³ and held a good ground for reversal,³⁴ and the refusal of such an instruction has, of course, been held proper.³⁵ A general instruction on the subject applicable to any and all the witnesses should be given;³⁶ and the reason for this is that an instruction applying this maxim to the testimony of a particular witness tends to convey to the minds of the jurors the impression that the testimony of the particular witness is disbelieved by the judge, and is to be disregarded, which question is within their province, and not within his.³⁷

It has been held, though, that an instruction that, "if you find that either one of these parties—the complaining witness or the defendant—has falsely and intentionally testified," etc., does not convey any impression as to which of the parties the judge was disposed to believe, and is not improper.³⁸ In one case it has been held that an instruction that, "if the jury believe from the evidence that a particular witness has wilfully sworn falsely on this trial as to any matter or thing material to the issues in this case, then the jury are at liberty to disregard his entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts and circumstances proved on the trial," is not erroneous, as misleading and singling out a particular witness, though it would be good practice to add "that the same rule would apply to any other witness who has willfully sworn falsely concerning any material matter in controversy."³⁹

"Singling out and giving undue prominence to issues, theories, and evidence."

33—State v. Kellerman, 14 Kan. 135; State v. Stout, 31 Mo. 406; State v. Meagher, 49 Mo. App. 589; Argabright v. State, 49 Neb. 760.

34—State v. Stout, 31 Mo. 406.

35—State v. Kellerman, 14 Kan. 135; Fraser v. Haggerty, 86 Mich. 521.

36—Argabright v. State, 49 Neb. 760.

37—State v. Meagher, 49 Mo. App. 589.

38—State v. Sexton, 10 S. D. 127.

39—Bunce v. McMahon, 6 Wyo. 24, 42 Pac. 23. This case is clearly erroneous, within the rule laid down by the preceding decisions, and is also in violation of the rule as to corroboration governing instructions on this maxim. See § 385, *post*.

An instruction invoking the maxim, "*falsus in uno, falsus in omnibus*," must state both alternatives as to so much of the evidence of the witness as is not known to be false, by telling the jury they may disregard it, or give it such effect as they think it is entitled to.⁴⁰ The following forms of instruction on this head have been approved, and are believed to be worthy models for imitation: "If the jury believe that any witness in this case has knowingly sworn falsely to any material matter in this case, then you are instructed that this would justify you in disregarding the testimony of such witness entirely."⁴¹ "If the jury believe from the evidence that any witness who has testified in this case has knowingly and willfully testified falsely to any material facts in this case, they may disregard the whole testimony of such witness, or they may give such weight to the evidence of such witness on other points as they may think it entitled to. The jury are the exclusive judges of the weight of the testimony."⁴² And an instruction permitting the disregard of false testimony in so far as the jury believe the same false is not misleading.⁴³

An instruction that the jury "will disregard the testimony of any witness which you may believe to be false; and if you believe that any witness has testified wilfully falsely to any material fact, you may disregard the whole of the testimony of such witness if you believe it totally unworthy of credence," while not as clear as it should be, is not erroneous, especially where no objection is made.⁴⁴ To direct a disregard of the entire testimony is error,⁴⁵ and

40—State v. Wilson, — W. Va. —, 83 S. E. 44.

An instruction to disregard the testimony of a witness because false is improper. People v. Dietmeyer, 164 Ill. App. 405.

41—Atkins v. Gladwish, 27 Neb. 841.

42—State v. Thompson, 21 W. Va. 746.

43—St. Louis, P. & N. R. Co. v. Rawley, 106 Ill. App. 550.

44—Burgess v. State, 108 Ark. 508. See also, instruction in Louisville & N. R. Co. v. Seale, 160 Ala. 584.

45—Dunn v. Crichfield, 214 Ill. 292; Sedoff v. Chicago City Ry. Co., 124 Ill. App. 609; Bickerman v. Tarter, 115 Ill. App. 278.

an instruction that where it is "palpable" that a witness has wilfully sworn falsely, the testimony can be disregarded, has been held erroneous.⁴⁶

An instruction that, "if any witness has made statements out of court different and contradictory from those made in court in this case, then you may disregard the whole testimony of such witness or witnesses, if you see proper to do so," not even qualified by requiring the statements out of or in court to be material, is erroneous, as inducing the jury not to believe anything a witness might say, if some one testified that he anywhere in his testimony contradicted anything he had said outside.⁴⁷

An instruction authorizing the jury to disregard testimony of a certain witness if such witness testified falsely on a former trial has also been held erroneous.⁴⁸ The giving of an instruction to disregard testimony using the phrase "successfully impeached," without explaining such term, is not reversible error where the other party is not prejudiced.⁴⁹ An instruction directing the jury to disregard the testimony of witnesses guilty of exaggeration is improper.⁵⁰ The giving of an instruction to disregard the testimony of a witness wilfully testifying falsely has been held reversible error where the word "competent" was used instead of the word "credible," or other word of like import.⁵¹ And an instruction that, "if they believe from the evidence that any witness has willfully sworn falsely to any material matter in this case, or that the testimony of such witness is unreasonable, or that the testimony of any witness is colored or biased on account of relationship of the witness to the defendant, or if, from any reason arising out of the

46—West Chicago St. Ry. Co. v. Moras, 111 Ill. App. 531.

47—McDonald v. State, (Miss.) 28 So. 750.

48—Lancaster v. Bartscht, 152 Ill. App. 533.

49—Metzger v. Manlove, 241 Ill. 113, aff'g 145 Ill. App. 419.

50—McDonnell v. Chicago City Ry. Co., 131 Ill. App. 227; Sedoff v. Chicago City Ry. Co., 124 Ill. App. 609.

51—Martukis v. Keyt, 186 Ill. App. 279.

evidence, they may believe the testimony of any witness is untrue, then they may disregard the whole testimony of such witness, if they see proper to do so," is rendered erroneous by the use of the disjunctives, especially where the instruction is manifestly aimed at a particular witness. It is tantamount to telling the jury to disbelieve the witness.⁵²

§ 382. Instructions that jury "should" or "must" disregard evidence.

According to some decisions, an instruction that the jury "should" or "must" disregard the testimony of a witness "who has knowingly and wilfully testified" falsely in regard to a material matter, is proper.⁵³ But this line of decisions is clearly against the weight of authority, and some of them have been expressly overruled; the view taken by the majority of decisions being that, in instructing as to the maxim, it is not proper for the court to charge that the jury should or must disregard the entire testimony of a witness who has knowingly and wilfully sworn falsely to a material fact.⁵⁴ "Whether the jury should disregard the whole of the testimony of a witness in such a case is

52—*Jeffries v. State*, 77 Miss. 757.

53—*State v. Kellerman*, 14 Kan. 135; *Gannon v. Stevens*, 13 Kan. 461; *Hale v. Rawallie*, 8 Kan. 136; *Hargraves v. Miller's Adm'x*, 16 Ohio 338; *Stoffer v. State*, 15 Ohio 47, 86 Am. Dec. 470. See also, *Day v. Crawford*, 13 Ga. 513; *State v. Hale*, 156 Mo. 102.

Illustrations:

Where a fact is sworn to by a single witness, who plainly perjured himself, it is error to leave such fact to the jury, and the court should instruct the jury to disregard the testimony. *Dunlop v. Patterson*, 5 Cow. (N. Y.) 243.

An instruction that the jury "might exercise a sound discretion, reject part of a witness' testimony,

which they did not believe, and act on such part as they did believe," is erroneous. *State v. Jim*, 12 N. C. 508.

It is erroneous to refuse a charge that, "if the jury believe * * * that the witness, B., has testified falsely in respect to any material fact, it is their duty to disregard the whole of her testimony," the court saying that it would not be sufficient to charge that the jury "are authorized to disregard" such evidence. *Campbell v. State*, 3 Kan. 488.

54—**Alabama.** *Lowe v. State*, 88 Ala. 8.

California. *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256; *People v. Oldham*, 111 Cal. 648, 44 Pac.

a matter resting entirely with them. * * * The jury ought to be allowed to weigh every portion of the testimony of every witness, and to give to each portion of the testimony just such consideration as it is entitled to, considering all the facts and circumstances of the case.

* * * No inflexible rule of law should be interposed between the witness and the jury, commanding the jury to take all, or to exclude all, of his testimony."⁵⁵ Accordingly, it has been held erroneous to give the following instructions: "If you believe from the evidence that any witness has knowingly and willfully testified falsely to any material fact, you should totally disregard all the testimony of any such witness;"⁵⁶ or "that, if they [the jury] believe any witness has sworn falsely and knowingly as to any material fact, they are bound to disregard his testimony altogether."⁵⁷ It has been held, however, that if no objection is taken to an erroneous instruction of this

312; *People v. Sprague*, 53 Cal. 495; *People v. Strong*, 30 Cal. 156.

Illinois. *Reynolds v. Greenbaum*, 80 Ill. 416; *Blanchard v. Pratt*, 37 Ill. 245; *Meixsell v. Williamson*, 35 Ill. 529.

Iowa. *Callanan v. Shaw*, 24 Iowa 441; *McCraney v. Crandall*, 1 Iowa 117.

Kansas. *Greer v. Higgins*, 20 Kan. 425; *Higbee v. McMillan*, 18 Kan. 133; *State v. Potter*, 16 Kan. 80; *Shellabarger v. Nafus*, 15 Kan. 547, overruling all prior Kansas decisions to the contrary.

Kentucky. *Hall v. Renfro*, 3 Mete. 51; *Letton v. Young*, 2 Mete. 558.

Maine. *Lewis v. Hodgdon*, 17 Me. 273.

Michigan. *Fisher v. People*, 20 Mich. 147; *Knowles v. People*, 15 Mich. 408.

Minnesota. *Schuek v. Hagar*, 24 Minn. 339.

Mississippi. *Finley v. Hunt*, 56 Miss. 221; *White v. State*, 52 Miss. 216.

Missouri. *State v. Stout*, 31 Mo. 406; *State v. Cushing*, 29 Mo. 215.

New Hampshire. *Senter v. Carr*, 15 N. H. 351.

New York. *People v. O'Neil*, 109 N. Y. 251; *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319n.

North Carolina. *State v. Williams*, 47 N. C. 257.

Ohio. *Mead v. McGraw*, 19 Ohio 55.

Oregon. *State v. Goff*, 71 Ore. 352, 142 Pac. 564.

55—*Shellabarger v. Nafus*, 15 Kan. 547.

56—*Higbee v. McMillan*, 18 Kan. 133.

57—*Letton v. Young*, 2 Mete. (Ky.) 565.

kind, the error is waived.⁵⁸ Though the reason given for an instruction is erroneous, yet if the instruction, as a whole, is correct, the reason may be disregarded. Thus, if, after the court charged the jury that they should compare the witnesses one with the other, to see if there were any contradictions, and to see whether the witness was unreliable, in which event his testimony should have no weight, he concluded by saying, in that connection, "because the rule of law is that, where a witness is false in one particular, he is false in all," the latter clause will be deemed immaterial. In effect, the charge is "that, if the witness was found unreliable,—that is, if no confidence whatever could be put in his statements,—then no weight should be given to any of his testimony."⁵⁹

In some states, by statute, the court is expressly authorized to instruct "that a witness false in one part of his testimony is to be distrusted in others,"⁶⁰ and an instruction in the language of the statute is proper.⁶¹ When a witness has knowingly testified falsely as to a material point, the statute requires the jury to distrust other parts of his evidence, and they may, in their discretion, reject all of his evidence, or they may accept and act upon other parts of his evidence, if they believe that as to those facts he is telling the truth.⁶² Where the defendant has requested an instruction that, if the jury believe that any witness "examined during the progress of this trial, has willfully sworn falsely as to any material matter, then it is

58—State v. Potter, 16 Kan. 99.

59—State v. Littlejohn, 33 S. C. 599.

60—Code Civ. Proc. Cal., § 2061, subd. 3; People v. MacDonald, 167 Cal. 545, 140 Pac. 256. See People v. Arlington, 131 Cal. 231, 63 Pac. 347; L. O. L., § 863, State v. Goff, 71 Ore. 352, 142 Pac. 564.

61—State v. Meyers, 59 Ore. 537, 117 Pac. 818.

There is no error in instructing that a witness false in one part of his testimony is to be distrusted in others, etc. Code Civ. Proc. Cal., § 2061, People v. MacDonald, 167 Cal. 545, 140 Pac. 256.

62—State v. Goff, 71 Ore. 352, 142 Pac. 564.

your duty to * * * distrust the entire evidence of such witness," it is not error for the court to add to such instruction the admonition to scan closely the testimony of such witness.⁶³ Where the court has instructed, in the language of the statute, that "a witness false in one part of his or her testimony, as the case may be, is to be distrusted in others," the court may further charge: "And if you find that any witness in this case has willfully testified falsely to any material matter in the case, you have a right to entirely disregard and cast aside the testimony of such witness."⁶⁴ An instruction that it is the "duty" of the jury to distrust the entire testimony of a witness who has sworn falsely to a material part thereof, is erroneous.⁶⁵

§ 383. Element of intent to swear falsely.

An instruction to disregard false testimony must be conditioned on the witness wilfully or knowingly swearing falsely,⁶⁶ and the omission of the qualifying words "wilfully and corruptly" is error.⁶⁷ A false statement by a

63—*People v. Harlan*, 133 Cal. 16, 65 Pac. 9.

64—*People v. Arlington*, 131 Cal. 231, 63 Pac. 347.

65—*People v. Delucchi*, 17 Cal. App. 96, 118 Pac. 935.

66—*Gillespie v. Hester*, 160 Ala. 444; *Herrin & S. R. Co. v. Nolte*, 243 Ill. 594; *Lancaster v. Bartscht*, 152 Ill. App. 533; *Peterson v. Pusey*, 141 Ill. App. 578, aff'd 237 Ill. 204; *Geringer v. Novak*, 117 Ill. App. 160; *Beck v. People ex rel. Etter*, 115 Ill. App. 19; *Perkins v. Knisley*, 102 Ill. App. 562, rev'd 204 Ill. 275.

Instructions as to the maxim under consideration should embody the element of intent. *Gottlieb v. Hartman*, 3 Colo. 53.

67—*Howell v. State*, 98 Miss. 439.

An instruction omitting the qualifying clause that the false swear-

ing must have been intentionally and corruptly done is erroneous. *State v. Wofford*, — Miss. —, 56 So. 162.

An instruction that, if "any witness has sworn falsely in regard to any material fact in issue, they are at liberty to disregard his entire evidence," is erroneous for omitting the word "wilfully" or "knowingly," or words of similar import:

Alabama. *Gillespie v. Hester*, 160 Ala. 444; *Childs v. State*, 76 Ala. 93; *Grimes v. State*, 63 Ala. 166.

California. *People v. Strong*, 30 Cal. 156. Compare *People v. Righetti*, 66 Cal. 184, 4 Pac. 1063, 1185.

Georgia. *Skipper v. State*, 59 Ga. 63; *McLean v. Clark*, 47 Ga. 25.

Mississippi. *White v. State*, 52 Miss. 216.

Missouri. *State v. Lett*, 85 Mo.

witness, though it may affect his credibility, does not require that his entire testimony should be discarded by the jury, unless it was known by him to be false, or was made with intent to deceive or mislead.⁶⁸ And an instruction that the jury may conclude that the entire testimony of a witness is false if they believe that he has sworn falsely upon any one point, is properly refused as not distinguishing between testimony which is false merely, and testimony which is knowingly and wilfully false,⁶⁹ for the rule is not applicable to a case of mere mistake.⁷⁰

An instruction using the word "and" instead of "or" between the words "wilfully" and "corruptly" has been held not objectionable.⁷¹ And an instruction that if the jury believe that any witness has "wilfully and corruptly" sworn falsely as to any material thing, etc., is not erroneous in using the quoted words in place of "knowingly."⁷²

A requested instruction that "the jury have no right to disregard the testimony of a witness where such testimony is not contradicted, and such witness has not been impeached," has been held erroneous.⁷³ So, an instruction that if the jury "believe that any of the witnesses swore falsely or were mistaken, then they are at liberty to disregard the whole or any part of such witnesses' testimony, is erroneous."⁷⁴

An instruction that, "if the circumstances respecting which testimony is discordant be immaterial, and of such a nature that mistakes may easily exist, and be accounted

52; *State v. Brown*, 64 Mo. 367; *Iron Mountain Bank of St. Louis v. Murdock*, 62 Mo. 70; *Paulette v. Brown*, 40 Mo. 52; *Blitt v. Heinrich*, 33 Mo. App. 243; *Smith v. Wabash, St. L. & P. Ry. Co.*, 19 Mo. App. 120; *Evans v. St. Louis, I. M. & S. Ry. Co.*, 16 Mo. App. 522.

New York. *Jennings v. Kosmak*, 20 Misc. 300.

Wisconsin. *Cahn v. Ladd*, 94 Wis.

134; *Little v. Superior Rapid Transit Ry. Co.*, 88 Wis. 402.

68—*Childs v. State*, 76 Ala. 93.

69—*Skipper v. State*, 59 Ga. 63.

70—*State v. Lett*, 85 Mo. 52.

71—*Hanchett v. Haas*, 219 Ill. 546, aff'g 125 Ill. App. 111.

72—*Turner v. State*, 95 Miss. 879.

73—*W. G. Wood Co. v. Nysewander*, 187 Ill. App. 354.

74—*State v. Elkins*, 63 Mo. 159.

for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of mind, rather than from deliberate error. If, however, a witness, with intent to deceive, falsely testifies as to a material fact, which the witness knows to be absolutely false, then you can apply to the testimony of the witness the maxim, '*falsus in uno, falsus in omnibus.*' If you find that either one of these parties—the complaining witness or the defendant—has falsely and intentionally testified to a material fact in this case, which is not true, that this has been done intentionally, falsely, knowing it to be untrue, you are at liberty to apply this maxim to such testimony,"—in effect cautions the jury that, in the absence of motive and wilful intent to deceive, by testifying falsely to a material fact known at the time to be absolutely false, discrepancies, though material, should be attributed to mistake, misapprehension or the infirmity of the mind, and when thus accounted for, the maxim, "false in one thing, false in all things," should not be applied, and such an instruction is clearly within the discretion of the court to give. It is not necessary to add to such an instruction the phrase, "unless corroborated by other credible evidence in the cause, or by facts and circumstances proved at the trial."⁷⁵

§ 384. Element of materiality of testimony.

An instruction to disregard testimony, which omits the element that such testimony must be as to a material fact, is erroneous.⁷⁶ Where the court instructs that if the

75—State v. Sexton, 10 S. D. 127.

76—Cummins v. Cleveland, C., C. & St. L. Ry. Co., 147 Ill. App. 291; People v. Peltz, 143 Ill. App. 181; Hughes v. Ferriman, 119 Ill. App. 169; Geringer v. Novak, 117 Ill. App. 160; Rautert v. Carlson, 116 Ill. App. 260; Bickerman v. Tarter, 115 Ill.

App. 278; Weddemann v. Lehman, 111 Ill. App. 231; Junction Min. Co. v. Goodwin, 109 Ill. App. 144.

An instruction that the jury have the right to disregard testimony of a witness who has wilfully testified falsely, is properly refused when it fails to use the necessary qualifying

jury believe any witness has wilfully sworn falsely as to any of the facts mentioned in the other instructions as bearing upon the claim sued on or the defense thereto, they may entirely disregard his testimony, the instruction is not objectionable as not confining the false swearing to material facts. So, instructions that the jury may entirely disregard the testimony of any witness whom they may believe to have sworn falsely as to any fact in the case has been held not objectionable as failing to restrict its effect to false testimony regarding material matters.⁷⁷ And instructions as to the effect of knowingly testifying falsely as to a material fact need not state that the fact must be material to the issues.⁷⁸ An instruction that the testimony of one credible witness is entitled to more weight than the testimony of many others, has been held bad, as amounting to an instruction that the testimony of such a witness is entitled to more weight than the others, upon the theory that such other witnesses have testified untruthfully, without limiting such untruthfulness to facts or questions material to the issue.⁷⁹

words "in a material matter." *People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075.

The maxim is not applicable unless the false testimony relates to some material matter, and therefore in instructing as to this maxim it is error to omit the element of materiality:

Alabama. *Cobb v. State*, 115 Ala. 18.

Georgia. *Pierce v. State*, 53 Ga. 365; *McLean v. Clark*, 47 Ga. 25.

Illinois. *Peak v. People*, 76 Ill. 289; *West Chicago St. R. Co. v. Raftery*, 85 Ill. App. 319; *Coggins v. Chicago & A. R. Co.*, 18 Ill. App. 620.

Mississippi. *White v. State*, 52 Miss. 216.

Missouri. An instruction that, "if

the jury believe that any witness has wilfully sworn falsely as to any of the facts mentioned in the instructions, they may," etc., is erroneous, as being too restrictive, since, if any witness swears falsely to any material fact, whether mentioned in the instructions or not, the jury should disregard his testimony. *Hansberger v. Sedalia Elec. Railway, Light & Power Co.*, 82 Mo. App. 566.

Nevada. *Moresi v. Swift*, 15 Nev. 215.

⁷⁷—*People v. Ah Sing*, 95 Cal. 654, 30 Pac. 796.

⁷⁸—*Hoxie v. Pfaelzer*, 167 Ill. App. 79.

⁷⁹—*West Chicago St. R. Co. v. Raftery*, 85 Ill. App. 319.

§ 385. Instructions making corroboration a condition of belief.

In general, it is proper to charge that if a witness has wilfully sworn falsely as to any material matter, the jury are at liberty to disregard his testimony unless corroborated by other credible evidence,⁸⁰ and an instruction disregarding the possibility of corroboration is erroneous.⁸¹ An instruction that the jury may disregard the whole testimony of a witness who has wilfully and knowingly sworn falsely as to one matter, has been held erroneous because the words "unless corroborated" were omitted.⁸² And in another case the rule was laid down that, if there is no evidence tending to corroborate a witness, it is not error to instruct that, if the jury believe that a witness has wilfully sworn falsely upon any material point, they have the right to disregard his entire testimony.⁸³

In some cases it has been held that an instruction that the jury may disregard the testimony of any witness who has wilfully testified falsely to a material fact is rendered erroneous by the addition of the words, "unless corroborated," or words of similar import, on the ground that the province of the jury is thereby invaded.⁸⁴ Thus it has been said that "it is true, as a legal proposition, that, if a witness has will-

80—Illinois. *Bevelot v. Lestrade*, 153 Ill. 632; *Rider v. People*, 110 Ill. 13; *Bowers v. People*, 74 Ill. 418; *Sanders v. Illinois Cent. R. Co.*, 90 Ill. App. 582.

Indiana. *Robertson v. Monroe*, 7 Ind. App. 470.

Iowa. *Blotcky v. Caplan*, 91 Iowa 352.

Nebraska. *Walker v. Haggerty*, 30 Neb. 120.

New Mexico. *Faulkner v. Territory*, 6 N. M. 464, 30 Pac. 905.

Utah. *State v. Morris*, 40 Utah 431, 122 Pac. 380.

Washington. *Lyts v. Keevey*, 5 Wash. 606, 32 Pac. 534.

Wyoming. *Bunce v. McMahon*, 6 Wyo. 24, 42 Pac. 23.

81—*Humphreys v. Smith*, 133 Ga. 456; *Szymkus v. Eureka Fire & Marine Ins. Co.*, 114 Ill. App. 401.

82—*Peak v. People*, 76 Ill. 289; *Meixsell v. Williamson*, 35 Ill. 529.

83—*Howard v. McDonald*, 46 Ill. 123.

84—*Brown v. Hannibal & St. J. R. Co.*, 66 Mo. 600; *Wastl v. Montana Union R. Co.*, 17 Mont. 213, 42 Pac. 772; *State v. Musgrave*, 43 W. Va. 672. See also, *Minich v. People*, 8 Colo. 440, 9 Pac. 4, where the court said: "We are told that this instruction is wrong, because it did not

fully sworn falsely as to a material fact, the jury are at liberty to disregard his entire testimony, notwithstanding he may have been corroborated as to that or any other fact to which he testified.”⁸⁵ The decisions sustaining this doctrine are in the minority, and the minority rule has been disapproved,⁸⁶ it having been held that such an instruction does not invade the province of the jury.⁸⁷

It is error to instruct that the jury are bound to accept as true the testimony of a witness whom they believe has testified falsely on any material matter when such witness is corroborated by other credible testimony.⁸⁸ If the jury believe a witness has wilfully falsified in any particular, they are not required to credit him in other matters, unless convinced that he has, as to such matters, sworn truly. As they know he will not be restrained by his oath, they must judge for themselves how far, if at all, corroboration in some particulars renders it safe to believe him. The court cannot require them to credit testimony, under any circumstances, against their own conclusions from it.⁸⁹ It is not

contain a qualification concerning corroborating testimony. It is said that, if a witness wilfully testifies falsely to a material fact, but his testimony as to other material matters is supported by corroborating proofs or circumstances, the jury should be told that they need not discard it in so far as it relates to such other matters. This position would perhaps be correct should a court assume the doubtful authority of directing the jury that they must disregard the entire evidence of a witness wilfully testifying falsely to one material fact; but it is not correct in cases like the present, where the court simply suggests that the jury may disregard, or that they are at liberty to disregard, the testimony of such witness.”

85—*Brown v. Hannibal & St. J. R. Co.*, 66 Mo. 599.

86—*State v. Morris*, 40 Utah 431, 122 Pac. 380.

87—An instruction as to disregarding testimony of a witness who has wilfully sworn falsely, “except as he may have been corroborated by credible witnesses or evidence,” is not objectionable in that the court invades the province of the jury. *State v. Morris*, 40 Utah 431, 122 Pac. 380.

88—*Havill v. State*, 7 Okla. Cr. 22, 121 Pac. 794.

89—*Hamilton v. People*, 29 Mich. 174.

An instruction that the jury may disregard the testimony of any witness whom they believe from the evidence has testified falsely, except in so far as his testimony is corrobora-

reversible error to give an instruction that if any witness has wilfully testified falsely to any material fact his testimony may be disregarded, except in so far as he may be corroborated by other testimony in the case, without also adding corroboration by "facts and circumstances."⁹⁰

A requested charge that if the jury believe from the evidence that any witness has wilfully or knowingly sworn falsely to any material element of the case, or "wilfully or knowingly exaggerated" any fact material to the issues for the purpose of deceiving the jury, they have the right to reject the entire testimony of such witness, except in so far as corroborated by other evidence, "which they believe" or by facts appearing in the case, is improper.⁹¹ An instruction that the jury may reject all testimony of witnesses, etc., unless corroborated "by the statements of other credible witnesses," was held erroneous on the ground that corroboration by any credible evidence, or by facts fairly inferable therefrom, is sufficient.⁹² An instruction that the entire testimony of a witness who has knowingly sworn falsely may be rejected, unless corroborated by other evidence, has been held improper,⁹³ and it has also been held error to give an instruction that if the evidence is untrue or unreliable, all the testimony of such witness may be disbelieved or believed in part.⁹⁴

It has been held improper to instruct the jury that a witness who has wilfully testified falsely to a material matter is entitled to no credit unless corroborated,⁹⁵ or is "not to be believed in anything he swears to, unless corroborated."⁹⁶

rated by other evidence or facts and circumstances in the case, should not be given, as the jury cannot be bound by the court to believe the testimony of such witness whether corroborated or not. *McKnight v. State*, 7 Okla. Cr. 235, 122 Pac. 1118.

90—*Christo v. Nicola*, 183 Ill. App. 487.

91—*Simpson v. Peoria Ry. Co.*, 179 Ill. App. 307.

92—*F. Dohmen Co. v. Niagara Fire Ins. Co.*, 96 Wis. 38.

93—*Zoeller v. Schmitz*, 172 Ill. App. 167; *Souleyret v. O'Gara Coal Co.*, 161 Ill. App. 60.

94—*Stephens v. Elkins*, 169 Ill. App. 269.

95—*Senter v. Carr*, 15 N. H. 351.

96—*Mercer v. Wright*, 3 Wis. 645.

In support of these conclusions it is said: "It is true, as a general rule, that, when a witness deliberately and knowingly swears falsely in regard to one material fact, the jury are not bound to believe him in any of his statements unless he is corroborated; but it is wrong to say that the jury are not at liberty to believe him. The maxim, '*falsus in uno, falsus in omnibus*,' does not operate to preclude the jury from believing the witness if they choose to do so. The jury may believe any competent witness, though in many instances they ought not." ⁹⁷

There are, however, a number of decisions which take the opposite view. Thus it has been held proper to charge that, if a witness has wilfully sworn falsely in reference to any material transaction, the jury should "give no weight" to such testimony unless corroborated,⁹⁸ or to disregard the evidence unless corroborated;⁹⁹ and it has been held error to fail to charge in a proper case that, if a witness wilfully and knowingly swear falsely as to a material matter, his testimony ought to be disregarded entirely unless corroborated.¹ So, it has also been held that, if a witness knowingly and wilfully swears falsely to a material matter, his testimony should be rejected entirely unless corroborated by the facts and circumstances of the case, or other credible evidence, and that it is not proper to charge that credit may be given to such a witness, without also stating the necessity for corroboration.² And in another case, decided by the same court, a request for an instruction that, if a witness was guilty of knowing and wilful perjury in one particular, or upon one point, the jury were to conclude that he is false in the whole of his statements, was held to have been properly refused, because no allowance was made for corroboration.³

97—*Mercer v. Wright*, 3 Wis. 645.

98—*State v. McCartey*, 17 Minn. 76 (Gil. 54). In this case it was further held proper to refuse an instruction not to consider such witness' testimony at all.

99—*Machette v. Wanless*, 2 Colo. 169.

1—*Plummer v. State*, 111 Ga. 839.

2—*Pierce v. State*, 53 Ga. 365.

3—*Ivey v. State*, 23 Ga. 576.

An instruction requiring corroboration to be by more than one witness is erroneous,⁴ and it is also error to require the corroboration to be by "credible witnesses."⁵

§ 386. Evidence of character.

Proof of good character should always be considered in determining the guilt or innocence of an accused,⁶ without reference to the apparently conclusive or inconclusive character of the other evidence.⁷ Evidence of the good character of the prisoner is of value, not only in doubtful cases, but also when the testimony tends very strongly to establish the guilt of the accused.⁸ Such evidence is not a mere makeweight thrown in to assist in the production of a result that would happen at all events, but it is positive evidence, and may of itself, by the creation of a reasonable doubt, produce an acquittal.⁹ Evidence of the general char-

4—*Junction Min. Co. v. Goodwin*, 109 Ill. App. 144.

5—*Hughes v. Ferriman*, 119 Ill. App. 169.

6—*Arkansas. Ware v. State*, 91 Ark. 555.

California. People v. De La Cour Soto, 63 Cal. 165; *People v. Bell*, 49 Cal. 485.

Illinois. Creed v. People, 81 Ill. 569.

Indiana. Holland v. State, 131 Ind. 572; *McQueen v. State*, 82 Ind. 74; *Kistler v. State*, 54 Ind. 400.

Iowa. State v. Lindley, 51 Iowa 344; *State v. Horning*, 49 Iowa 158.

Michigan. People v. Mead, 50 Mich. 228.

Mississippi. Hammond v. State, 74 Miss. 214.

Missouri. State v. McNamara, 100 Mo. 100; *State v. McMurphy*, 52 Mo. 251.

New York. Remsen v. People, 57 Barb. 324.

North Carolina. State v. Henry, 50 N. C. 65.

Ohio. Stewart v. State, 22 Ohio St. 478.

Oklahoma. Dickinson v. State, 3 Okla. Cr. 151, 104 Pac. 923.

Oregon. State v. Porter, 32 Ore. 135, 49 Pac. 964.

South Carolina. State v. Tarrant, 24 S. C. 593.

Wisconsin. Robinson v. State, 143 Wis. 205.

United States. Edgington v. United States, 164 U. S. 361, 41 L. Ed. 467.

7—*Kistler v. State*, 54 Ind. 400.

8—*Remsen v. People*, 43 N. Y. 6, rev'g 57 Barb. (N. Y.) 324.

9—*Alabama. Felix v. State*, 18 Ala. 725.

California. People v. Bell, 49 Cal. 485.

New York. Remsen v. People, 43 N. Y. 6; *People v. Friedland*, 2 App. Div. 332.

Oregon. State v. Porter, 32 Ore. 135, 49 Pac. 964.

Pennsylvania. Heine v. Com., 91 Pa. St. 145.

acter of the accused, having reference and analogy to the charge, is competent as original testimony,¹⁰ and its effect as primary evidence should not be denied by an instruction.¹¹ The reason for this is obvious. To hold that a man's general good character is only evidence in cases where there is doubt is equivalent to holding that he shall derive no benefit from it as evidence in a criminal case; for if the jury entertain a reasonable doubt as to his guilt, they will give him the benefit of such doubt, and acquit, aside from proof of his good character.¹²

§ 387. Necessity of instructions on character.

A few courts have held that it is not proper to charge at all on the question of good character on the theory that to do so is singling out and charging on the weight and effect of evidence and is invading the province of the jury. But the majority of the courts hold that it is the duty of the court when requested, to charge on the subject or question of good character.¹³ The reasons in favor of the majority rule are that jurors can hardly be expected to apply evidence of good character, understand the purpose for which it may be considered and its legal effect, and the danger of incorrect inferences and illogical conclusions, if not aided by the court.¹⁴ In the absence of a request, it has been held that no instruction on this subject need be given;¹⁵ and if defendant asks an improper instruction on the subject of character, he cannot complain if none at all

10—*Felix v. State*, 18 Ala. 725.

11—*People v. Friedland*, 73 N. Y. St. 516, 37 N. Y. Supp. 974.

12—*Felix v. State*, 18 Ala. 725.

13—*State v. Brown*, 39 Utah 140, Ann. Cas. 1913 E 1n, 115 Pac. 994,

In case defendant has produced evidence to show good character, he is entitled, on request, to an instruction stating the effect of such evidence. *State v. Swain*, 68 Mo.

605; *People v. Elliott*, 163 N. Y. 11, rev'g 43 App. Div. (N. Y.) 621.

14—*State v. Brown*, 39 Utah 140, Ann. Cas. 1913 E 1n, 115 Pac. 994.

15—*State v. Peterson*, 38 Kan. 204, 16 Pac. 263; *State v. McNamara*, 100 Mo. 100.

The court need not instruct as to good character in a misdemeanor case where an instruction on such subject is not requested. *State v. Kimmell*, 156 Mo. App. 461.

is given. The law requiring the court to declare the law applicable to the case, whether proper instructions are asked for or not, does not comprehend such merely collateral matters;¹⁶ and a refusal to give a proper instruction on good character is not error, though an improper one has been asked and refused.¹⁷ It has also been held that, if a charge as to good character is not sufficiently specific, error cannot be predicated thereon unless a more specific charge is requested.¹⁸ So, instructions on good character which have already been given in substance may properly be refused.¹⁹

Where the court has charged that, "if the evidence satisfies you in this case that this defendant is a man of good character and of peaceable habits, why, you should take that into consideration with all the other evidence in the case, and all the surrounding facts and circumstances, and give it just such weight as you think it is justly and properly entitled to," and that "a reasonable doubt may arise out of the evidence of good character, where a party charged with a criminal offense offers evidence tending to show that he has heretofore borne a good character. That, in itself, will sometimes create in the minds of a jury that reasonable doubt, to the benefit of which I have already told you the defendant is entitled if it exists in this case,"—it is not error to refuse to charge that "evidence of good character, of itself, tends to prove that the defendant is not guilty of the offense charged."²⁰

An instruction as to character is unnecessary where there is no evidence on such matter.²¹ So, where no evidence of defendant's bad character is adduced, the court does not

16—State v. McNamara, 100 Mo. 100.

17—State v. McNamara, 100 Mo. 100.

18—Franklin v. State, 69 Ga. 36, 47 Am. Rep. 748. See also, Keys v. State, 112 Ga. 392, 81 Am. St. Rep. 63.

19—People v. Johnson, 61 Cal. 142; Com. v. Wilson, 152 Mass. 12.

20—People v. Spriggs, 58 Hun (N. Y.) 603, 11 N. Y. Supp. 433.

21—People v. Cruse, 24 Cal. App. 497, 141 Pac. 936; Addison v. People, 193 Ill. 405; Williams v. People, 166 Ill. 132.

err in failing to instruct the jury that evidence of defendant's bad character goes only to his credibility as a witness, and is not evidence of his guilt.²² Where the only evidence of the character of defendant is that he is a quiet and peaceable man, and there is no attempt at impeachment of the defendant, and, consequently, evidence of his character for veracity could not have been introduced by him, an instruction that the jury "may look to the fact, if it be a fact, that defendant is a man of good character, in determining what weight they will give to the testimony of the defendant," and "that, in the light of the argument of counsel for the prosecution that the defendant's testimony is not to be believed because of his interest, and that, therefore, the defendant would willfully testify falsely in the case, the jury may look to the fact, if it be a fact, that the defendant is a man of good general character, in determining what weight the jury will give defendant's testimony," is abstract.²³

§ 388. Sufficiency of instructions as to character.

An instruction which ignores the fact that the law requires the jury in considering the good character of a defendant to do so along with the other evidence in the case, is erroneous.²⁴ Where defendant introduces evidence of good character, which the prosecution does not attempt to rebut, it has been held prejudicial error for the court to instruct that, while the law permits him to make such proof, the people are prohibited from showing his bad character.²⁵ But the court may instruct "that it is competent for the prisoner to avail himself of his former good character, if it existed, by proof of the fact; and, if he offers no such testimony, it is not competent for the government to show it was not good, if there is no intimation that an inference

22—State v. Furgerson, 162 Mo. 668.

24—Allen v. State, 8 Ala. App. 228.

23—Bodine v. State, 129 Ala. 106. 555.

25—People v. Marks, 90 Mich.

prejudicial to the accused should be drawn by the jury from his omission to offer such testimony.”²⁶ Where defendant asks an instruction that “the good character of the defendant for honesty and integrity is a fact in the case, to be considered by you in connection with all the other evidence in the case,” and the court adds the following, “But such fact, like all others, must be proven by competent evidence,” such instruction is correct.²⁷

Where there is evidence tending to show the previous good reputation of the defendant as a peaceable citizen, an instruction that “no inference can be drawn by a jury, of the intention which induced the commission of the offense, from the previous character of the prisoner. His intention can only be determined by his acts. The law will imply a malicious intention,”—is erroneous.²⁸ So, where it has been sought to impeach a witness both by disproving facts testified to by him, and also by proof of contradictory statements, and to sustain him by evidence of good character, it is error to limit the effect of such sustaining evidence by charging that, if a fact or facts testified to by a witness be disproved to the satisfaction of the jury, then evidence of general good character should not be treated as re-establishing such disproved facts.²⁹

An instruction that, “if the jury, from all the evidence in this cause, have any doubt of the defendant’s guilt, and further believe from the evidence that the defendant has for a long time and now possesses a good moral character for peace, sobriety, and honesty, then such fact of good character, coupled with the presumption of innocence which the law invokes, is sufficient upon which to find a verdict of not guilty,” is erroneous, and is properly refused.³⁰ An instruction that the accused had introduced

26—State v. Tozier, 49 Me. 404.

27—People v. Velarde, 59 Cal. 457.

28—People v. Casey, 53 Cal. 360.

29—McEwen v. Springfield, 64 Ga.

30—State v. McNamara, 100 Mo.

100.

some evidence of good character, and authorizing the jury to consider it, is not erroneous because of the use of the word "some."³¹ An instruction containing the words, "I hope you will not take into consideration the fact that he may be a prominent farmer," did not mean that the good character of the accused should not be considered, when considered as a whole, but that neither lowliness nor prominence of station could be a factor in the just administration of the law.³²

Instructions should not be given which tend to impress the jury with the belief that evidence of good character is of no value;³³ as, for instance, "that the respondent had the right to put his good reputation before them for their consideration, 'as a kind of makeweight in his favor, if there is a pinch in the case.'"³⁴

The court may properly inform the jury that good character is of importance to a person charged with a crime, and that they have the right to consider whether a person would be less liable to be guilty of crime than a person of bad habits and character;³⁵ but an instruction that good character raises a strong presumption of innocence is erroneous, and is properly refused.³⁶ And so, an instruction that the reasonable effect of proof of defendant's good character is to raise a presumption that he was not guilty of the crime charged.³⁷ An instruction that "a witness may be discredited by showing that such witness had been living a life of moral turpitude, or of committing immoral acts, the effect and weight of such evidence in all cases to be determined by the jury," though technically incorrect, was held not error.³⁸ An instruction is proper which

31—*Keys v. State*, 112 Ga. 392, 81 Am. St. Rep. 63.

32—*State v. Hunter*, 79 S. C. 84.

33—*People v. Pedro*, 19 Misc. Rep. (N. Y.) 300; *State v. Daley*, 53 Vt. 442, 38 Am. Rep. 694.

34—*State v. Daley*, 53 Vt. 442, 38 Am. Rep. 694.

35—*People v. Harrison*, 93 Mich. 597. See also, *Wilson v. State*, 3 Okla. Cr. 714, 109 Pac. 289.

36—*Wayne v. Winter*, 6 McLean 344, Fed. Cas. No. 17,304.

37—*Moran v. State*, 11 Ohio Cir. Ct. R. 464.

38—*Wheeler v. State*, 112 Ga. 43.

charges, in effect, that the proof of good character was not necessarily a bar to the conviction; that it created a presumption in favor of the prisoner, but that such presumption could be overcome by evidence of crime; and, as illustrative of that principle, said that positive evidence, if believed by the jury, would overcome the presumption arising from good character, if the court has already, in substance, charged that the defendant was presumed to be innocent; that, in case they had a reasonable doubt as to her guilt, they should acquit, although the evidence and circumstances pointed to the guilt of the prisoner, and that good character might be sufficient to raise such a doubt.³⁹

§ 389. Instructions limiting effect of evidence to doubtful cases.

It has been almost uniformly held erroneous for the court, by its instructions, to limit the consideration of evidence of character to cases where the other evidence leaves a doubt in the minds of the jury as to the defendant's guilt,⁴⁰ and the following instructions have been held erroneous: "That good character should only be received as a

39—*People v. Brooks*, 61 Hun 619, 15 N. Y. Supp. 362.

40—**Alabama.** *Felix v. State*, 18 Ala. 725.

Georgia. *Epps v. State*, 19 Ga. 102.

Illinois. *Jupitz v. People*, 34 Ill. 516.

Indiana. *Holland v. State*, 131 Ind. 568.

Iowa. *State v. Northrup*, 48 Iowa 583, 30 Am. Rep. 408; *State v. Kinley*, 43 Iowa 296.

Massachusetts. *Com. v. Leonard*, 140 Mass. 473, 54 Am. Rep. 485.

Minnesota. *State v. Holmes*, 65 Minn. 230; *State v. Sauer*, 38 Minn. 438.

Mississippi. *Hammond v. State*, 74 Miss. 214.

New York. *People v. Friedland*, 73 N. Y. St. 516; *Remsen v. People*, 43 N. Y. 6; *Cancemi v. People*, 16 N. Y. 501; *Ryan v. People*, 19 Abb. Pr. 232.

North Carolina. *State v. Henry*, 50 N. C. 65.

Ohio. *Stewart v. State*, 22 Ohio St. 478; *Harrington v. State*, 19 Ohio 268; *Donaldson v. State*, 10 Ohio Cir. Ct. R. 613.

Pennsylvania. *Com. v. Cleary*, 135 Pa. St. 64; *Heine v. Com.*, 91 Pa. St. 145; *Com. v. Carey*, 2 Brewst. 406.

Utah. *People v. Hancock*, 7 Utah 170, 25 Pac. 1093.

Contra, *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711n.

circumstance in cases where a crime is sought to be solely established by circumstantial evidence;" ⁴¹ that "where the evidence, outside of the presumption of good character, is clear and explicit, on which no doubt can be cast, good character will only cause the jury to hesitate and think about the matter;" ⁴² "that good character is always of importance, and is evidence to be duly considered by the jury, and may turn the scale where there is a reasonable doubt as to the degree or grade of the crime;" ⁴³ that "if a man is guilty, his previous good character has nothing to do with the case, but, if you have doubt as to his guilt, then character steps in and aids in determining that doubt;" ⁴⁴ "that good character may have its weight in a doubtful case, and it may have its weight in any case to this extent: that * * * if there is a question of doubt, it may determine the matter in his favor;" ⁴⁵ "that, in a plain case, a good character would not help a prisoner; but, in a doubtful case, he had a right to have it cast into the scales and weighed in his behalf;" ⁴⁶ or that evidence of good character is of no weight except in a doubtful case.⁴⁷

An instruction that: "Proof of the good character of the person charged with the offense is always allowed in this class of cases, and the weight to be given to it is to be determined by the jury. It is all-important in doubtful cases. Where the evidence, outside of the presumption of good character, is clear and explicit, on which no doubt can be cast, good character will only cause the jury to hesitate and think about the matter. The jury will always remember that a man has to commit his first crime; he

41—State v. Kinley, 43 Iowa 296.
See also, Stover v. People, 56 N. Y. 315, where it was held that good character is to be considered on the question of credibility of direct evidence of guilt, the same as upon proof of circumstances tending to show it, or the inferences to be drawn from such circumstances.

42—People v. Hancock, 7 Utah 170, 25 Pac. 1093.

43—Com. v. Cleary, 135 Pa. St. 64, 8 L. R. A. 301n.

44—Heine v. Com., 91 Pa. St. 145.

45—State v. Sauer, 38 Minn. 438.

46—State v. Henry, 50 N. C. 65.

47—Jupitz v. People, 34 Ill. 516.

cannot commit all the crimes, if he does commit many, at once. He has to break over the rules of good conduct for the first time some time in his life,"—is erroneous as limiting the effect of good character to doubtful cases.⁴⁸

It is also error to instruct that "evidence of previous good character may be considered by you in connection with all the other evidence given in the cause in determining whether the defendant would likely commit the crime with which he is charged; and if you find from all the evidence in the cause, independent of the evidence of his good character, that there is a reasonable doubt, then you should give him the benefit of his good character, and acquit him. * * *

If, however, you should find from all the evidence given in the cause, independent of the evidence of previous good character, that the defendant did commit the crime, or was present, aided or abetted, encouraged, counseled, directed, and assisted in the same, evidence of previous good character would not avail him anything, and you should find him guilty." The effect of such instruction is to deprive the accused of the benefit of evidence of good character.⁴⁹

So, the following instruction was condemned as prohibiting the consideration of evidence of good character, unless the other evidence generated a reasonable doubt: "That [evidence of good character] is a legitimate subject for you to take into consideration, but it goes only to this extent: If an act which the law makes an offense has been actually committed,—if you are satisfied beyond a reasonable doubt that the prohibited act was committed,—it makes no difference what the character of the man is. It is not the subject of your investigation. But if the evidence should leave your minds in such a state that you cannot say that you are satisfied beyond a reasonable doubt, and if you find that the defendant has borne hitherto an unblemished character,—such a character as makes the act inconsistent with

48—*People v. Hancock*, 7 Utah
170, 25 Pac. 1093.

49—*Holland v. State*, 131 Ind. 568.

his history and standing,—that circumstance should turn the scale in his favor. At such a time, the influence of a good character ought to weigh very strongly in behalf of a person accused.”⁵⁰ It has been held, however, that, although an instruction “that the good character of the defendant can only be taken into consideration when the jury have a reasonable doubt” of his guilt, is improper, a conviction will not be reversed therefor when defendant was clearly guilty according to his own testimony.⁵¹

§ 390. Instructing that evidence of good character cannot avail against clear proof of guilt.

If the proof of guilt is clear and convincing, proof of previous good character cannot be looked to as a ground of acquittal, and the jury may be so instructed.⁵² Thus, it has been held proper to instruct that, if the evidence is convincing beyond a reasonable doubt, it is the duty of the jury to convict, notwithstanding good reputation;⁵³ “If the jury is satisfied of the prisoner’s guilt from all the other facts and circumstances detailed in evidence, his good character cannot be looked to as a ground of acquittal;”⁵⁴ “if you should believe the defendant guilty, you must so find, notwithstanding his good character;”⁵⁵ “evidence of good character is, in law, to be considered by the jury, in all doubtful cases, of great weight. Yet, if the

50—State v. Holmes, 65 Minn. 230.
51—State v. Slingerland, 19 Nev. 135, 7 Pac. 280.

52—Arkansas. Edmonds v. State, 34 Ark. 720.

California. People v. Mitchell, 129 Cal. 584, 62 Pac. 187.

Georgia. Jackson v. State, 76 Ga. 562.

Indiana. McQueen v. State, 82 Ind. 74.

Kansas. State v. Douglass, 24 Pac. 1118.

Mississippi. Wesley v. State, 37 Miss. 327, 75 Am. Dec. 62.

Missouri. State v. Vansant, 80 Mo. 70; State v. McMurphy, 52 Mo. 251.

New York. People v. Sweeney, 133 N. Y. 609; People v. Hammill, 2 Parker, Cr. R. 223.

Oregon. State v. Porter, 32 Ore. 135, 49 Pac. 964.

Compare State v. Lindley, 51 Iowa 344.

53—People v. Mead, 50 Mich. 233.

54—State v. McMurphy, 52 Mo. 251.

55—People v. Samsels, 66 Cal. 99, 4 Pac. 1061.

proof of guilt is direct and clear, it is entitled to little consideration;"⁵⁶ "if, from the whole testimony, they believe defendant is guilty, then his previous good character neither justifies, mitigates, nor excuses the offense;"⁵⁷ "if you shall conclude from all the evidence that the defendant is guilty, you should not acquit him because you may believe that he has heretofore been a person of good repute;"⁵⁸ "evidence as to good character can have little practical effect against direct and satisfactory evidence as to guilt, and it cannot turn the scale against conclusive evidence."⁵⁹ Previous good character is of great importance, but evidence thereof is not to overcome the conclusion which properly follows if the jury are satisfied beyond a reasonable doubt that the defendant is guilty.⁶⁰

"Proof of the good character of the party charged with crime, if there is doubt of his guilt upon the evidence, may afford good ground for a presumption of innocence, but will not be available to overcome or set aside satisfactory proof of criminality."⁶¹ "The good character of a person accused of a crime, when proven, is of itself a fact in the case; it is a circumstance tending in a greater or less degree to establish his innocence; it must be considered in connection with all the other facts and circumstances of the case. But if, after full consideration of all the evidence adduced, the jury believe the defendant to be guilty of any degree of crime, they should so find, notwithstanding proof of good character."⁶²

It has also been held proper to instruct that: "The defendant in this case has offered evidence tending to show his character as a peaceable, law-abiding citizen. The defendant has a right to show his previous good character as a circumstance tending to show the improbability of his

56—Creed v. People, 81 Ill. 569.

57—State v. Jones, 78 Mo. 282.

58—State v. Vansant, 80 Mo. 70.

59—State v. Spooner, 41 La. Ann.
780.

60—Com. v. Eckerd, 174 Pa. St.
137.

61—United States v. Smith, 2
Bond 323, Fed. Cas. No. 16,322.

62—People v. Smith, 59 Cal. 601.

guilt, or that he would commit such a crime. If, however, you believe from the evidence, beyond a reasonable doubt, that the defendant committed the crime in question, as charged in the indictment, then it would be your duty to find the defendant guilty, even though the evidence satisfied your minds that defendant, previous to the commission of the alleged crime, had sustained a good reputation as a peaceable and law-abiding citizen." The court need not add to such an instruction the words, "The court further instructs you that proof of good character may be sufficient of itself to create a reasonable doubt of defendant's guilt, although no such doubt would have existed but for such good character." ⁶³

So, an instruction that: "The defendant has introduced evidence before you tending to show his good character for peace and quietness. If, in the present case, the good character of the defendant for these qualities is proven to your satisfaction, then such fact is to be kept in view by you in all your deliberations, and it is to be considered by you in connection with the other facts in the case; and if, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain a reasonable doubt as to defendant's guilt, then I charge you it is your duty to acquit him. But if the evidence convinces you, beyond a reasonable doubt, of defendant's guilt, you must so find, notwithstanding his good character,"—is not open to the interpretation that the jury must be convinced beyond a reasonable doubt of defendant's guilt from the evidence taken in the case, excluding from their minds the evidence offered in reference to defendant's good character. ⁶⁴

It has been held not erroneous to charge that evidence of the good character of the defendant can have but little or no effect where the facts constituting the crime are clearly

63—State v. Porter, 32 Ore. 135,
49 Pac. 964.

64—People v. Mitchell, 129 Cal.
584, 62 Pac. 187.

proved, if the jury are also told that this is not such a case, but that this evidence is to be considered with all the other evidence in determining whether there is a reasonable doubt of his guilt.⁶⁵ But in one case it was held error to refuse an instruction that the jury might, in the exercise of a sound discretion, give the defendant the benefit of previous good character, no matter how conclusive other testimony might appear to be, and to leave it to the jury to say what weight good character should have in determining defendant's guilt or innocence.⁶⁶

§ 391. Instructing that evidence of good character may create reasonable doubt.

As a general rule, it is proper to instruct that evidence of good character may of itself be sufficient to create a reasonable doubt,⁶⁷ and the defendant is entitled to have the jury distinctly instructed that good character may of itself create a doubt, where otherwise none would exist.⁶⁸ Accordingly, it is error to charge that it is only in connection with other evidence that such evidence may, by the creation of a reasonable doubt, produce an acquittal.⁶⁹ And an instruction which hypothesizes that evidence of good character, taken in connection with all the evidence in the case, is sufficient to generate a doubt, is properly refused, as good character, if proven, may at most suffice in connection with all the other evidence, to generate such doubt.⁷⁰ In one case, the reviewing court said that it was not sufficient for the trial judge to instruct the jurors that "the good character of the defendant is a circumstance * * * for their consideration," because this was only equivalent

65—State v. Leppere, 66 Wis. 355.

66—People v. Elliott, 163 N. Y. 11, rev'g 43 App. Div. (N. Y.) 621.

67—People v. Doggett, 62 Cal. 27; People v. Bell, 49 Cal. 489; Lowenberg v. People, 5 Parker, Cr. R. (N. Y.) 414; Stephens v. People, 4 Parker, Cr. R. (N. Y.) 396.

68—People v. Elliott, 163 N. Y. 11, rev'g 43 App. Div. 621.

69—Taylor v. State, 13 Ga. App. 715.

70—Abrams v. State, 155 Ala. 105.

to the admission of the testimony as to character.⁷¹ It has been held, however, that a refusal to give such an instruction is not prejudicial, where the court instructs that "evidence of the defendant's good character must be considered in connection with all the evidence in the case, and if, then, the jury have a reasonable doubt of the defendant's guilt, they must acquit."⁷²

There is some conflict of authority as to whether it is proper to instruct that good character, if established, is sufficient to raise a doubt as to the prisoner's guilt. In one state, where an instruction on the weight of the evidence is permissible, a charge to this effect has been approved.⁷³ In another jurisdiction, where it is not permissible to charge on the weight of the evidence, it has been held proper to refuse such an instruction, the court saying that, "while such evidence is admissible for the purpose of generating a reasonable doubt of guilt, its sufficiency is a question for the decision of the jury."⁷⁴ So, a requested instruction that the jury may consider defendant's character for the purpose of accepting or rejecting his statement, and weighing it as against, and as corroborative of, sworn evidence, and that, whenever the case is doubtful, character should control the jury in favor of the innocence of the prisoner, was held properly refused as argumentative, and as stating the law too favorably for the accused.⁷⁵ The refusal of a requested instruction to the effect that, if evidence of defendant's good character raises a doubt of his guilt, the jury might acquit him, though the other evidence shows

71—*People v. Bell*, 49 Cal. 485. In *People v. Elliott*, 163 N. Y. 11, where the court merely charged that good character should weigh when a man is charged with crime, and left it to the jury to say what weight should be given it, it was held error to refuse defendant's request to charge distinctly that good character might create a reasonable doubt.

72—*People v. Bowman*, 81 Cal. 566, 22 Pac. 917.

73—*Com. v. Carey*, 2 Brewst. (Pa.) 406.

74—*Barnett v. State*, 83 Ala. 40; *Booker v. State*, 76 Ala. 22.

75—*Johnson v. State*, 95 Ga. 499.

him guilty beyond a reasonable doubt, was also held proper. The two clauses of this instruction are contradictory.⁷⁶

In one state, the rule is well settled that "evidence of the good character of the accused should go to the jury as any other fact, and its influence in the determination of the case should be left to the jury, without any intimation from the court of its value."⁷⁷

§ 392. Instructions as to effect of evidence of good character in cases of great and atrocious criminality.

While the strength of the presumption of innocence arising from evidence of good character will vary according to the attending circumstances of each case, there is no reason why the presumption should not be as strong in the case of an accusation of a great offense.⁷⁸ Evidence of good character is not only of value in prosecutions for minor offenses, but is entitled to be considered when the crime charged is atrocious.⁷⁹ And, in accordance with this view, it has been held erroneous to charge that, "where it is a question of great and atrocious criminality, * * *

76—State v. Bryant, 134 Mo. 246.

77—Powers v. State, 74 Miss. 777; Hammond v. State, 74 Miss. 214; Coleman v. State, 59 Miss. 490; Wesley v. State, 37 Miss. 327.

See also, Briggs v. Com., 82 Va. 554, where it was held proper to refuse a charge that, "if accused be proved of good character as a man of peace, the law says that such good character may be sufficient to create a reasonable doubt of his guilt, although no such doubt would have existed but for such good character;" and to instruct that the character of the accused, good or bad, when proved, may always be received and weighed in favor of or against him, as the case may be.

78—Remsen v. People, 43 N. Y.

9; Cancemi v. People, 16 N. Y. 501; Harrington v. State, 19 Ohio St. 264.

79—Remsen v. People, 43 N. Y. 9. *Contra*; In the Webster Case, Chief Justice Shaw charged the jury as follows: "Where it is a question of great and atrocious criminality; the commission of the act is so unusual, so out of the ordinary course of things, and beyond common experience; it is so manifest that the offense, if perpetrated, must have been influenced by motives not frequently operating upon the human mind,—that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade." Com. v. Webster, 5 Cush. (Mass.) 324.

evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade." ⁸⁰

§ 393. Identity of defendant.

As a general rule it would seem that the giving of an instruction as to weighing the evidence as to the identity of the person who has committed a crime, when that fact is in issue, is unnecessary, as that question is sufficiently covered by the usual instructions as to reasonable doubt, the presumption of innocence, and the like. But such instructions are frequently given. Where the presumption of identity of person from identity of name is disputed, and the defendant offers no evidence to disprove such presumption, the jury may be instructed that "identity of person is presumed from identity of name," and the failure to instruct that this presumption is only *prima facie* is not prejudicial error.⁸¹ In a case where witnesses positively identify a defendant as one of the persons participating in the crime charged, the defendant is not entitled to an instruction that such testimony is but a mere matter of opinion.

An instruction that the jury are to fully consider all the circumstances and conditions under which these witnesses claimed to have seen the defendant at the time of the crime, as well as the circumstances of his subsequent identification, claimed to have been made by them, and that they are not bound by the fact that these witnesses testified that the defendant was one of these criminals, and it is left to the jury to say what weight it would give to this testimony thus considered, and, taken in connection with the evidence introduced by the defendant in support of an

⁸⁰—*Cancemi v. People*, 16 N. Y. 501.

⁸¹—*People v. Riley*, 75 Cal. 98, 16 Pac. 544.

alibi, is as favorable to a defendant as he is entitled to.⁸² An instruction that the jury should feel "an abiding confidence and full faith" that certain witnesses were not mistaken in the fact of identification by personal recognition, is erroneous and is properly refused.⁸³ So, an instruction that "the law books are full of cases of mistaken identity," is bad, as being argumentative,⁸⁴ and it is error to instruct that the jury are not legally bound to acquit the defendant, because they may not be entirely satisfied that the defendant, and no other person, committed the alleged offense.⁸⁵ It is proper to refuse an instruction that "the identity of the accused must be established to an absolute moral certainty, and every fact and circumstance must be established to the same degree of certainty as the main fact which these independent circumstances, taken together, tend to establish. If this certainty is not proven then the jury must acquit the defendant."⁸⁶

In a prosecution for an assault, a request for an instruction that the defendant is entitled to an acquittal if there is any probability that the prosecuting witness is mistaken as to his identity, is properly refused, though a reasonable doubt as to identity entitles an accused to an acquittal.⁸⁷

82—State v. Powers, 72 Vt. 168.

83—Hughes v. State, 75 Ala. 31.

84—Hughes v. State, 75 Ala. 31.

85—People v. Carrillo, 70 Cal. 643,
11 Pac. 840; People v. Brown, 56
Cal. 405.

86—People v. Nelson, 85 Cal. 421,
24 Pac. 1006.

87—Booker v. State, 76 Ala. 22.

CHAPTER XXXI.

INSTRUCTIONS AS TO CIRCUMSTANTIAL EVIDENCE.

- § 394. Necessity and propriety of instructions as to circumstantial evidence.
- § 395. Sufficiency of instructions as to circumstantial evidence.
- § 396. Instructions disparaging circumstantial evidence.
- § 397. Instructing that circumstantial evidence alone may warrant conviction.
- § 398. Instructing that proof must be inconsistent with any other reasonable conclusion than that of guilt.
- § 399. Instructing that circumstantial evidence must exclude to a moral certainty every hypothesis but that of guilt.
- § 400. Instructing that circumstantial evidence must exclude every "possible" hypothesis except that of guilt.
- § 401. Instructing that circumstances must be absolutely incompatible with innocence.
- § 402. Instructing that circumstantial evidence should produce nearly the same degree of certainty as direct evidence.
- § 403. Instructing that circumstantial evidence must be equal to testimony of one eyewitness.
- § 404. Instructing that each link in the chain of circumstantial evidence must be proved beyond reasonable doubt.
- § 405. Same—Contrary view.
- § 406. Instructing that jury need not be satisfied, beyond a reasonable doubt, of each link.

§ 394. Necessity and propriety of instructions as to circumstantial evidence.

The omission or refusal to give instructions on the law of circumstantial evidence, whether requested or not, is error in jurisdictions where the statutes require the trial court to give to the jury all the law applicable to a case.¹

1—*Navarrow v. State* (Tex. App.) 17 S. W. 545; *Smith v. State*; 28 Tex. App. 309; *Daniels v. State* (Tex. App.) 14 S. W. 395; *Deaton v. State* (Tex. App.) 13 S. W. 1009; *Scott v. State* (Tex. App.) 12 S. W. 504; *Crowley v. State*, 26 Tex. App. 578; *Willard v. State*, 26 Tex. App. 126; *Boyd v. State*, 24 Tex. App. 570, 5 Am. St. Rep. 908; *Crowell v. State*, 24 Tex. App. 404; *Struckman v. State*, 7 Tex. App. 581; *Hunt v. State*, 7 Tex. App. 212; *Boswell v. State*, 59 Tex. Cr. App. 161; *Childers v. State*, 37 Tex. Cr. App. 392; *Lopez v. State*

And usually such error is ground for reversal;² and in one state no objection or exception is necessary to save the error for review.³ If a request for an instruction on circumstantial evidence is made, the court is bound to instruct on the subject, though the requested instruction is erroneous.⁴ The omission to charge on the nature and conclusiveness of circumstantial evidence is not cured by the giving of an instruction on reasonable doubt.⁵ But in one case it was held that, although the court failed to charge specially as to circumstantial evidence, this was not ground for new trial, when the court did very fully and liberally to defendant instruct as to reasonable doubt, and the amount and character of testimony necessary to a conviction.⁶ And in another case it was held that an instruction that if the jury were satisfied beyond a reasonable doubt that a crime had been committed, and if, from all the circumstances proven connected with the commission of the alleged crime, the jury were satisfied of defendant's guilt beyond a rea-

(Tex. Cr. App.) 40 S. W. 595; *McCamant v. State* (Tex. Cr. App.) 37 S. W. 437; *Poston v. State* (Tex. Cr. App.) 35 S. W. 656; *Green v. State* (Tex. Cr. App.) 34 S. W. 283; *Polanka v. State*, 33 Tex. Cr. App. 634; *Robertson v. State* (Tex. Cr. App.) 26 S. W. 728; *Martin v. State*, 32 Tex. Cr. App. 441; *Scott v. State* (Tex. Cr. App.) 23 S. W. 685; *Alderman v. State* (Tex. Cr. App.) 23 S. W. 685; *Montgomery v. State* (Tex. Cr. App.) 20 S. W. 926; *People v. Scott*, 10 Utah 217, 37 Pac. 335; *United States Exp. Co. v. Jenkins*, 64 Wis. 542.

Where proof of guilt depends alone on circumstantial evidence, the court should submit that issue in his charge to the jury. *Law v. State*, 71 Tex. Cr. App. 179.

It is only when the evidence is purely and wholly circumstantial that the court is authorized or re-

quired to charge on circumstantial evidence. *Womack v. State*, — Tex. Cr. App. —, 170 S. W. 139.

2—*Kincaid v. State*, 13 Ga. App. 683; *Navarrow v. State* (Tex. App.) 17 S. W. 545; *Deaton v. State* (Tex. App.) 13 S. W. 1009; *Crowley v. State*, 26 Tex. App. 578; *Willard v. State*, 26 Tex. App. 126; *Hanks v. State* (Tex. Cr. App.) 56 S. W. 922; *Poston v. State* (Tex. Cr. App.) 35 S. W. 656; *Polanka v. State*, 33 Tex. Cr. App. 634; *Scott v. State* (Tex. Cr. App.) 23 S. W. 685; *Montgomery v. State* (Tex. Cr. App.) 20 S. W. 926.

3—*Polanka v. State*, 33 Tex. Cr. App. 634; *Montgomery v. State* (Tex. Cr. App.) 20 S. W. 926.

4—*People v. Scott*, 10 Utah 217, 37 Pac. 335.

5—*Hamilton v. State*, 96 Ga. 301; *Struckman v. State*, 7 Tex. App. 581.

6—*Barrow v. State*, 80 Ga. 191.

sonable doubt, they should return a verdict accordingly, sufficiently expressed the rule that circumstantial evidence must exclude every reasonable hypothesis except that of guilt, in order to justify a conviction.⁷ In a prosecution for rape, evidence of an attempt to spirit the girl away, the attempt of the defendant to commit suicide, the birth of child within 282 days after the act of intercourse, and the fact that the prosecutrix had never been seen in the company of other men and boys, justified an instruction as to circumstantial evidence.⁸

In jurisdictions where the court is not bound to give all the law applicable to a case of its own motion, the refusal of a request for an instruction on circumstantial evidence is erroneous, where this is the only evidence in the case on which to base a conviction.⁹ But where the court, at the instance of the state, instructs the jury as to the right to convict upon circumstantial evidence, and thereafter gives all the instructions asked by the defendant in respect to such evidence, the latter has no cause of complaint that the first instructions failed to give any rules for weighing and determining the effect of circumstantial testimony, or to suggest the need of extra caution respecting such testimony.¹⁰

Instructions on the weight and effect of circumstantial evidence are not required and should not be given, where proof of guilt is not dependent upon circumstantial evidence, but rests on direct and positive testimony.¹¹ In such

7—*Tatum v. State*, 61 Neb. 229.

8—*People v. Duncan*, 261 Ill. 339.

9—*Wantland v. State*, 145 Ind. 38; *Territory v. Lermo*, 8 N. M. 566, 46 Pac. 16. Compare *State v. Roe*, 12 Vt. 93, where it was held that, as to circumstantial evidence, it rests in the discretion of the trial judge to what extent he will go in laying down to the jury the approved rules for weighing such evidence. In this case the trial court

refused an instruction on the subject.

10—*State v. Ingram*, 16 Kan. 14.

11—*Alabama*. *Cowart v. State*, 11 Ala. App. 102.

Arkansas. *Vaughan v. State*, 57 Ark. 1.

California. *People v. Holden*, 13 Cal. App. 354, 109 Pac. 495.

Georgia. *Moore v. State*, 97 Ga. 759.

case an instruction as to circumstantial evidence is abstract, and is properly refused.¹² It is not error to omit to give the jury a charge explaining the rules governing in cases of circumstantial evidence, where the evidence relied upon for a conviction is not wholly circumstantial.¹³ If there is direct evidence to prove that defendant committed the crime charged, the court may properly refuse to give instructions based on the hypothesis that the case is purely one of circumstantial evidence, and stating the rules as to the weight and conclusiveness of such evidence.¹⁴ But, though the court may not be compelled to charge on circumstantial evidence, where there is direct evidence of guilt, it is proper to do so where the evidence in the case was largely circumstantial.¹⁵ So, where the guilt of an

Mississippi. *Purvis v. State*, 71 Miss. 706.

Missouri. *State v. Fairlamb*, 121 Mo. 137.

South Dakota. *State v. Harbour*, 27 S. D. 42.

Texas. *Colter v. State*, 37 Tex. 284; *Leeper v. State*, 29 Tex. App. 154; *Clore v. State*, 26 Tex. App. 624; *Granado v. State*, 37 Tex. Cr. App. 426; *Rodgers v. State*, 36 Tex. Cr. App. 563; *Campbell v. State*, 35 Tex. Cr. App. 160; *Evans v. State* (Tex. Cr. App.) 31 S. W. 648; *Ellis v. State*, 33 Tex. Cr. App. 86; *Blanton v. State* (Tex. Cr. App.) 26 S. W. 624; *White v. State*, 32 Tex. Cr. App. 625; *Connors v. State*, 31 Tex. Cr. App. 453.

12—*Cowart v. State*, 11 Ala. App. 102.

13—*Rains v. State*, 88 Ala. 91; *Coleman v. State*, 87 Ala. 14; *Weathersby v. State*, 29 Tex. App. 278; *Jones v. State*, 23 Tex. App. 501; *Stone v. State*, 22 Tex. App. 185; *Dunn v. State*, 43 Tex. Cr. App. 25. See also, *Beason v. State* (Tex. Cr. App.) 63 S. W. 633.

Contra, see *State v. Andrews*, 62 Kan. 207, 61 Pac. 808, wherein it was held error to refuse an instruction on circumstantial evidence, where the evidence of defendant's guilt was partly circumstantial.

Instruction is properly refused where the evidence is not wholly circumstantial. *Jones v. State*, 59 Tex. Cr. App. 559.

An instruction as to circumstantial evidence is erroneous when there is very little, if any, of such evidence. *State v. Brandell*, 26 S. D. 642.

14—*Wilson v. State*, 128 Ala. 17; *Rains v. State*, 88 Ala. 91; *Cotton v. State*, 87 Ala. 75; *People v. Lem Deo*, 132 Cal. 199, 64 Pac. 265; *State v. Donnelly*, 130 Mo. 642; *Weathersby v. State*, 29 Tex. App. 278; *Thomas v. State*, 43 Tex. Cr. App. 20, 96 Am. St. Rep. 834; *Upchurch v. State* (Tex. Cr. App.) 39 S. W. 371.

15—*Rountree v. State* (Tex. Cr. App.) 58 S. W. 106.

accused depends upon the interpretation and probative force of circumstances shown by the evidence, it is error to refuse an instruction as to circumstantial evidence, though much direct evidence has been introduced.¹⁶

It is not necessary or proper for the court to charge on circumstantial evidence where the defendant has confessed to the crime.¹⁷ Proof of confessions by defendant obviates the necessity of stating the law applicable to circumstantial evidence,¹⁸ even though such proof is made by the testimony of an accomplice,¹⁹ unless the evidence shows him utterly unworthy of belief, and his testimony is the only positive evidence given.²⁰ When there is testimony to show that defendant confessed his guilt, it is, of course, proper to refuse an instruction that the evidence in the case is purely circumstantial.²¹

On a prosecution for murder, where a witness identified the defendant as the person who fired the fatal shot, a charge on circumstantial evidence was properly refused.²² So, instructions as to the weight of circumstantial evidence are properly refused when defendant's guilt is testified to positively by eyewitnesses,²³ and it makes no difference that

16—State v. Miller, 90 Kan. 230, Ann. Cas. 1915 B 818n, 133 Pac. 878.

17—Anderson v. State, 71 Tex. Cr. App. 27.

No instruction on circumstantial evidence is necessary when defendant confesses his guilt. Jackson v. State (Tex. Cr. App.) 62 S. W. 914; Albritton v. State (Tex. Cr. App.) 26 S. W. 398. Where the record in a prosecution for murder shows that defendant made a confession admitting his presence and participation in the death of deceased, but claimed that he participated because coerced to do so, the case is taken out of the realm of circumstantial evidence, and it is consequently not error for the court to fail to charge thereon.

18—Perry v. State, 110 Ga. 234; Langdon v. People, 133 Ill. 382; State v. Robinson, 117 Mo. 649; Carr v. State, 24 Tex. App. 562, 5 Am. St. Rep. 905; Ricks v. State, 41 Tex. Cr. App. 676; White v. State, 32 Tex. Cr. App. 625.

19—Vaughan v. State, 57 Ark. 1; Wampler v. State, 28 Tex. App. 352.

20—State v. Donnelly, 130 Mo. 642.

21—Green v. State, 97 Ala. 59.

22—Herrera v. State, — Tex. Cr. App. —, 170 S. W. 719.

23—Purvis v. State, 71 Miss. 706; Campbell v. State (Tex. Cr. App.) 38 S. W. 171; Evans v. State (Tex. Cr. App.) 31 S. W. 648; Adams v. State, 34 Tex. Cr. App. 470; Thomp-

such witness is the prosecuting witness in the case,²⁴ or an accomplice in the commission of the crime charged.²⁵ Where the only issue was whether the stolen property belonged to the prosecutor, and he testified that it did, a failure to charge on circumstantial evidence is not error.²⁶

A charge on circumstantial evidence is inapplicable and should not be given on the question of venue.²⁷

§ 395. Sufficiency of instructions as to circumstantial evidence.

It is an unnecessary and dangerous thing to give lengthy and prolix instructions attempting to explain the law applicable to circumstantial evidence.²⁸ An instruction should not be given which leads to the inference that the circumstances should be segregated in passing upon the weight to be attached to each.²⁹ The weight of circumstantial evidence is not for the court, and the statement, "then the requirements of the law as to the sufficiency of circumstantial evidence will be satisfied," is erroneous as invading the province of the jury.³⁰ It has been held that an instruction that "there is nothing in the nature of circumstantial evidence that renders it less reliable than other classes of evidence" contains a correct statement of the law, and is free from legal exceptions.³¹ The court may direct the attention of the jury to the circumstances relied upon by the state, if at the same time it is left to the jury to deter-

son v. State, 33 Tex. Cr. App. 217;
Jones v. State, 31 Tex. Cr. App. 177;
Gibbs v. State (Tex. Cr. App.) 20
S. W. 919.

24—Evans v. State (Tex. Cr.
App.) 31 S. W. 648. See also, Gann
v. State (Tex. Cr. App.) 59 S. W.
896; Granado v. State, 37 Tex. Cr.
App. 426.

25—Thompson v. State, 33 Tex. Cr.
App. 217. See also, Thomas v. State,
43 Tex. Cr. App. 20, 96 Am. St. Rep.
834.

26—Gann v. State (Tex. Cr. App.)
59 S. W. 896.

27—Reynolds v. State, 71 Tex. Cr.
App. 454.

28—Harris v. State, 10 Okla. Cr.
417, 139 Pac. 846, 137 Pac. 365.

29—State v. Fisk, 170 Ind. 166.

30—Harris v. State, 10 Okla. Cr.
417, 139 Pac. 846, 137 Pac. 365.

31—People v. Urquidas, 96 Cal.
239, 31 Pac. 52; People v. Morrow,
60 Cal. 142.

mine whether or not the circumstances are shown to exist.³²

An instruction which, in effect, tells the jury that circumstantial evidence is to be regarded when it is strong and satisfactory, and is to be disregarded when it is not, is erroneous. On a trial for homicide, an instruction that "circumstantial evidence was to be regarded by the jury in all cases, and that, when it was strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force, and that they should make those reasonable inferences from circumstances proven which the guarded judgment of a reasonable man should ordinarily make under like circumstances," is properly given.³³ An instruction on circumstantial evidence that, "if it is of such a character as to exclude every reasonable supposition or hypothesis, other than that of the defendant's guilt, then and in that event it should be given the same weight by you as direct evidence," was held not to be an unconditional direction to the jury to give the same weight to circumstantial evidence as to direct evidence.³⁴ So, in several cases it was held that an instruction that, "if circumstantial evidence is of such a character as to exclude every reasonable hypothesis other than that of defendant's guilt, it is entitled to the same weight as direct evidence," was not erroneous, as meaning not that circumstantial evidence is entitled to the same weight as direct evidence, but that, when a defendant's guilt is established by circumstantial, it is the same as if it were established by direct, evidence.³⁵ While it is error to instruct that "circumstantial evidence is legal and competent evidence," as the jury have no concern with the legality and competency of the evidence, such error will not warrant reversal unless it appears that the party complaining has been prejudiced.³⁶

32—Koerner v. State, 98 Ind. 7;
McKay v. Seattle Elec. Co., 76 Wash.
257, 136 Pac. 134.

33—Smith v. State, 61 Neb. 296.

34—Davis v. State, 51 Neb. 301.

35—Reynolds v. State, 147 Ind. 3.

See also, to same effect, People v.
Neufeld, 165 N. Y. 43; Longley v.
Com., 99 Va. 807.

36—Williams v. State, 95 Miss.
671.

When full instructions are given that the jury must be guided entirely by the evidence and must be convinced by it beyond a reasonable doubt, the instruction goes to both circumstantial and direct evidence, and it must be assumed that the jury will so apply it.³⁷ So, the following instruction has been approved: "For the practical purposes of the trial, there is no difference between what is called circumstantial and what is called direct evidence." That the only question is, does the evidence show defendant's guilt beyond a reasonable doubt?³⁸ An instruction, given at defendant's request: "That, to warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other, and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to generate and justify full belief according to the standard rule of certainty. It is not sufficient that they coincide with and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis. No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence, but the facts must be absolutely incompatible with innocence, and incapable of explanation upon any other reasonable hypothesis than that of guilt,"—is a sufficient charge on circumstantial evidence.³⁹

37—*People v. Holden*, 13 Cal. App. 354, 109 Pac. 495.

38—*State v. Rome*, 64 Conn. 329.

39—*Villereal v. State* (Tex. Cr. App.) 61 S. W. 715.

Where the evidence is merely circumstantial in its character, an instruction that the jury must find the defendant guilty if they believe the evidence is erroneous as being an invasion of the province of the jury.⁴⁰ The jury may properly be instructed, where the evidence is all circumstantial, that defendant's innocence must be presumed until his guilt is established by convincing evidence beyond a reasonable doubt.⁴¹ So, the court may instruct that each necessary fact must be proved beyond a reasonable doubt; that all the facts must be conclusive in their nature, leading to the conclusion, with moral certainty, that defendant, and no other person, committed the crime, and that if they, from the evidence or the want of evidence, could account for the facts and circumstances in evidence upon any theory or hypothesis consistent with the innocence of accused, then to acquit.⁴² So it has been held erroneous to refuse an instruction: "The jury must find the defendant not guilty if the conduct of said defendant, upon a reasonable hypothesis, is consistent with innocence."⁴³

An instruction as to circumstantial evidence which leaves out the element of reasonable doubt is erroneous.⁴⁴ An instruction that circumstantial evidence must produce, "in effect, a reasonable and moral certainty" of defendant's guilt, has been held not erroneous for using this phrase instead of the phrase, "the effect of a reasonable and moral certainty."⁴⁵ So, an instruction that "circumstantial evidence * * * consists in this: that, where there is no satisfactory evidence of the direct fact, certain facts which are assumed to have stood around or been attendant on the direct fact are proved, from the existence of which the direct fact may be inferred," has been held not erroneous, since the word "assumed" is clearly used in the sense of

40—Sims v. State, 43 Ala. 33;
State v. Dixon, 104 N. C. 704.

41—Gilmore v. State, 99 Ala. 154.

42—Crow v. State, 33 Tex. Cr.
App. 264.

43—Howard v. State, 108 Ala. 571.

44—People v. Moore, 161 Ill. App.
56.

45—Loggins v. State, 32 Tex. Cr.
App. 364.

“claimed.”⁴⁶ It has been held that an instruction that, in cases of circumstantial evidence, the time, place, manner, opportunity, motive and conduct must concur in pointing to the prisoner as the guilty agent, is not improperly modified by charging that all these circumstances, or such of them as may be proved with other facts, if any, must so concur.⁴⁷ Where a full and correct charge on the law of circumstantial evidence has been given, the giving of a further instruction that, “if the circumstances are such as to carry conviction to your minds, beyond a reasonable doubt, that the defendant is guilty, and are such as the defendant might explain away, and he fails so to do, then you would be authorized to find the defendant guilty,” does not warrant a new trial.⁴⁸

In charging on circumstantial evidence, it was held not reversible error to tell the jury that those who declare it to be cruel and criminal to convict on circumstantial evidence are knaves or fools.⁴⁹ An inaccurate statement in a charge as to the distinction between direct and circumstantial evidence is not ground for reversal, where the court correctly instructs the jury on the legal definition of both classes of evidence, and also instructs that defendant is to have the benefit of any reasonable doubt.⁵⁰ Where the court is prohibited from charging the jury with respect to matters of fact, an instruction: “Though in human judicature, imperfect as it must necessarily be, it sometimes happens that error has been committed from a reliance on circumstantial evidence, yet this species of evidence, in the opinion of all those who are most conversant with the administration of justice, and most skilled in judicial proceedings, is not only proper and necessary, but it is sometimes even more satisfactory than the testimony of a single individual, who swears that he has seen a fact committed. Even persons

46—*Jenkins v. State*, 62 Wis. 49.

47—*Sutton v. Com.*, 85 Va. 128.

48—*Wells v. State*, 99 Ga. 206.

49—*Hickory v. United States*, 151 U. S. 303, 38 L. Ed. 170.

50—*Roberts v. State*, 83 Ga. 369.

professing to have been eye-witnesses of that to which they may testify may speak falsely,"—is reversible error, as a charge on the relative value of direct and circumstantial evidence.⁵¹ Where, in a murder case, the trial court, in charging the jury upon the competency and meaning of circumstantial evidence, remarks that "many, probably a majority of, convictions of crime are had upon circumstantial evidence," such remark will not constitute reversible error if the question of defendant's guilt is submitted to the jury with full and fair instructions as to their duties and exclusive rights in its determination.⁵² Where charges upon circumstantial evidence have once been approved by the court of last resort, they should not thereafter be tampered with by the trial court.⁵³

An instruction in a criminal prosecution, "to the effect that, in a case of circumstantial evidence, where the criminative circumstances are either denied by the defendants or are explained in such a way as to render their guilt doubtful, it is the duty of the jury to acquit the accused," is erroneous in requiring an acquittal wherever the accused denies such circumstances, without reference to the credibility of the denial, and ought to be refused.⁵⁴

§ 396. Instructions disparaging circumstantial evidence.

Circumstantial evidence, like direct or positive evidence, should be left to the consideration and determination of the jury without caution or suggestion on the part of the court as to its value or the necessity of scrutinizing it closely.⁵⁵

The court may properly refuse instructions, the tendency of which is to disparage the force and effect of circumstantial evidence. It has therefore been held proper to refuse the following instruction: "Circumstantial evidence ought to be received with great caution, especially where an anx-

51—*People v. O'Brien*, 130 Cal. 1, 62 Pac. 297.

52—*Funk v. United States*, 16 App. Cas. (D. C.) 478.

53—*McIver v. State* (Tex. Cr. App.) 60 S. W. 50.

54—*Long v. State*, 42 Fla. 509.

55—*Minniard v. Com.*, 158 Ky. 210.

iety is naturally felt for the detection of great crimes;" and, "The jury, upon circumstantial evidence, and where such evidence is less conclusive than the positive and direct evidence of one witness, who testifies to the fact, must acquit the defendant."⁵⁶ An instruction that defendant cannot be convicted upon circumstantial evidence alone in a case where the state might have produced eyewitnesses was properly refused, where the eyewitnesses were unfriendly to the state.⁵⁷ Where the court refers to the necessity of resorting to circumstantial evidence as to the origin of a fire set by sparks from a locomotive, because sparks emitted in the daytime are, ordinarily speaking, invisible, no unfairness or prejudice can result from such a statement of a matter of common knowledge.⁵⁸

§ 397. Instructing that circumstantial evidence alone may warrant conviction.

There is no impropriety in instructing the jury that "they may, from circumstantial evidence alone, find the defendant guilty, when the facts established are inconsistent with any other theory than that of his guilt;"⁵⁹ or that, if the evidence of the defendant's guilt is convincing, the jury are bound to convict her, though there were no eyewitnesses to the fact.⁶⁰ But it is erroneous to instruct that, "when direct evidence cannot be produced, minds will form their judgments on circumstances, and act on the probabilities of the case." The law requires the jury to be convinced of defendant's guilt, and does not permit the jury to act upon evidence insufficient to produce belief or conviction.⁶¹

Error in charging that "a conviction may be had upon circumstantial evidence as well as upon direct evidence,"

56—*Brown v. State*, 23 Tex. 195.

57—*McCandless v. State*, 42 Tex. Cr. App. 655.

58—*Trustees of Little Cedar Congregation of Adams v. Chicago, M. & St. P. R. Co.*, 119 Minn. 181.

59—*State v. Hill*, 65 Mo. 87. And

see, *State v. Hillman*, 142 Mo. App. 510.

60—*Com. v. Harman*, 4 Pa. St. 269.

61—*People v. O'Brien*, 130 Cal. 1, 62 Pac. 297.

in that the statement is a charge on the weight of the evidence, will not warrant reversal when the remainder of the charge states that the circumstances must be of such a conclusive nature as to exclude every conclusion except the guilt of the defendant.⁶²

§ 398. Instructing that proof must be inconsistent with any other reasonable conclusion than that of guilt.

The jury must always be advised that before circumstantial evidence is sufficient, it must exclude every other reasonable hypothesis than that of guilt,⁶³ and an instruction upon the quantum of circumstantial evidence should substantially advise the jury that the circumstances proved must be consistent with each other and with the hypothesis that the defendant is guilty, and inconsistent with the theory of his innocence and with every reasonable hypothesis, except that of guilt.⁶⁴

In a well-considered Indiana decision it is said: "The true test by which to determine the value of circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is not whether the proof establishes circumstances which are consistent, or which coincide with the hypothesis of the guilt of the accused, but whether the circumstances, satisfactorily established, are of so conclusive a character, and point so surely and unerringly to the guilt of the accused, as to exclude every reasonable hypothesis of his innocence. The force of circumstantial evidence being exclusive in its character, the mere coincidence of a given number of circumstances with the hypothesis of guilt,

62—*Roberts v. State*, 60 Tex. Cr. App. 20.

63—*Simmons v. State*, — Miss. —, 64 So. 721; *Smith v. State*, 101 Miss. 283; *Irving v. State*, 100 Miss. 208.

64—*State v. Maggard*, 250 Mo. 335.

It is sufficient if the court instructs the jury that the circum-

stances proven must not only be consistent with the guilt of the defendant, but must also be inconsistent with his innocence, and incapable of any other reasonable explanation except upon the ground that the defendant is guilty. *Harris v. State*, 10 Okla. Cr. 417, 139 Pac. 846, 137 Pac. 365.

or that they would account for, or concur with, or render probable the guilt of the accused, is not a reliable or admissible test, unless the circumstances are to such a degree of cogency and force as, in the order of natural causes and effect, to exclude, to a moral certainty, every other hypothesis except the single one of guilt. * * * The proof must not only coincide with the hypothesis of guilt, but it must be inconsistent with every other rational conclusion.”⁶⁵ Whether the court is or is not required to instruct on its own motion on all the law applicable to a case, the refusal to give an instruction to this effect, when requested, is erroneous, where circumstantial evidence alone is relied on.⁶⁶ In one jurisdiction where the court is required in all trials of felony to state in its charge all the law applicable to the case, the court is bound to instruct the jury, in substance, that, where circumstantial evidence is relied on for a conviction, the circumstances must be such as to exclude every other reasonable hypothesis except that of guilt,⁶⁷ and a failure to give this instruction is held to be reversible error.⁶⁸

There is some difference of opinion as to whether error in omitting or refusing an instruction to this effect may be cured by other instructions given. According to some decisions, an ordinary charge as to the law of reasonable doubt is not sufficient.⁶⁹ But in one case it was held not

65—Cavender v. State, 126 Ind. 48. See also, Stout v. State, 90 Ind. 1; Binns v. State, 66 Ind. 428; Sumner v. State, 5 Blackf. (Ind.) 579.

“Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner’s guilt, but inconsistent with every other rational conclusion.” 1 Greenleaf, Ev. § 34.

66—People v. Dick, 32 Cal. 216; Wantland v. State, 145 Ind. 38; Kollock v. State, 88 Wis. 663. See

also, State v. Andrews, 62 Kan. 207, 61 Pac. 808; Tatum v. State, 61 Neb. 229.

67—Smith v. State, 7 Tex. App. 382; Hunt v. State, 7 Tex. App. 212; Coffman v. State, — Tex. Cr. App. —, 165 S. W. 939; Smith v. State, 35 Tex. Cr. App. 618; Harris v. State, 34 Tex. Cr. App. 494; Jones v. State, 34 Tex. Cr. App. 490.

68—Harris v. State, 34 Tex. Cr. App. 494.

69—Smith v. State, 7 Tex. App. 382; Hunt v. State, 7 Tex. App. 212.

error to refuse such an instruction, where the court sufficiently charged as to reasonable doubt, and also instructed that the burden of proof rested on the state.⁷⁰ And in another it was held not error to refuse an instruction "that, before the defendant could be convicted on circumstantial evidence, the circumstances should all concur to show that he committed the crime, and must all be inconsistent with any other rational conclusion," where the court charged that: "You are instructed that circumstantial evidence is to be regarded by the jury in all cases, and is many times quite as conclusive in its convincing power as direct and positive evidence of eyewitnesses. When it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force. It should have its just and fair weight with you; and if, when it is all taken as a whole, and fairly and candidly weighed, it convinces the guarded judgment, you should convict, and on such conviction you are not to fancy situations or circumstances which do not appear in the evidence, but you are to make those just and reasonable inferences from circumstances proven which the guarded judgment of a reasonable man would ordinarily make under like circumstances. * * * And if, in connection with the positive evidence before you, you then have no reasonable doubt as to the defendant's guilt, you should convict him, but, if you then entertain such doubt, you should acquit him."⁷¹

The following charges have been held proper on this head: That, to justify a conviction upon circumstantial evidence alone, "the facts relied upon must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."⁷² "That the testimony must not only be consistent with the guilt of the defendants, but incon-

70—Jones v. State, 61 Ark. 88.
See also, Tatum v. State, 61 Neb.
229.

71—State v. Seymour, 94 Iowa 699.
72—Smith v. State, 7 Tex. App.
382; Hunt v. State, 7 Tex. App. 212.

sistent with any other reasonable supposition.”⁷³ That “the circumstances must be proved to your entire satisfaction, and, when the circumstances are established, they must point conclusively to the person charged, and must be inconsistent with any other reasonable hypothesis.”⁷⁴ That, “when a conviction is sought alone upon circumstantial testimony, the circumstances, taken together, must be such as to be incapable of explanation upon any other rational hypothesis but that of defendant’s guilt.”⁷⁵ That, to authorize conviction on circumstantial evidence, “each of the circumstances should not only be consistent with the defendant’s guilt, but they must be inconsistent with any other rational conclusion or reasonable hypothesis, and such as to leave no reasonable doubt.”⁷⁶ That the jury must “find the guilt of defendant beyond a reasonable doubt, and that the facts and circumstances tending to prove his guilt were not only consistent with any rational theory but that of the guilt of the defendant,” and that “the proven facts must be inconsistent with any rational hypothesis consistent with his innocence.”⁷⁷ That, to warrant a conviction, “each fact necessary to establish guilt of the accused must be proved by competent evidence beyond a reasonable doubt, and the facts and circumstances proved should not only be consistent with guilt of the accused, but inconsistent with any other reasonable hypothesis or conclusion than that of guilt, and producing in your minds a

73—State v. Davenport, 38 S. C. 348, in which the reviewing court said that, while this was a slight departure from the words generally used, it was not error.

74—State v. Milling, 35 S. C. 16.

75—Irvin v. State, 7 Tex. App. 109; Crutchfield v. State, 7 Tex. App. 65.

76—State v. Asbell, 57 Kan. 398, 46 Pac. 770.

77—State v. David, 131 Mo. 380; State v. Hillman, 142 Mo. App. 510.

See also, State v. Kebler, 228 Mo. 367.

Compare State v. Taylor, 111 Mo. 538, where the following instruction, “Before you can convict on circumstantial evidence it must be of such character and weight as to exclude all reasonable hypothesis of defendant’s innocence,” was held bad, as being too meager, and as, failing, too, to state the rule in such a way as to make it a safe guide for the jury.

reasonable and moral certainty that the accused committed the offense.”⁷⁸

A charge that circumstantial evidence must produce, “in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged; but in such case it is not sufficient that the circumstances coincided with, accounted for, and therefore rendered probable, the guilt of defendant. They must exclude to a moral certainty every other reasonable hypothesis,”—is not error.⁷⁹ An instruction which tells the jury that if circumstantial evidence convinces the guarded judgment they should convict, whereas if the evidence convinces the jury of defendant’s innocence or raises a doubt of his guilt he should be acquitted, while possibly not misleading, should state that the jury should convict only if the circumstances were of such a character as to satisfy the minds of the jury of the guilt of the defendant beyond a reasonable doubt to the exclusion of every reasonable hypothesis other than the guilt of the defendant.⁸⁰ It will be noticed that in all these instructions the word “reasonable” or “rational” is used to qualify the word “conclusion” or “hypothesis.” While there are a few decisions in which instructions omitting these words have been approved,⁸¹ there are others in which a refusal of requested instructions has been upheld, because these words were omitted from the instructions.⁸² Thus it was held proper to refuse an instruction that the jury should acquit unless the evidence was “such as to exclude every hypothesis but that of guilt.”⁸³

An instruction that “the humane provision of the law is that a conviction should not be had on circumstantial evi-

78—*Chitister v. State*, 33 Tex. Cr. App. 635. See also, *Moseley v. State*, 59 Tex. Cr. App. 90.

79—*Gonzales v. State* (Tex. Cr. App.) 57 S. W. 667.

80—*State v. Allen*, 34 Mont. 403, 87 Pac. 177.

81—*Riley v. State*, 88 Ala. 188;

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Coleman v. State, 59 Ala. 52; *Mose v. State*, 36 Ala. 212; *Black v. State*, 1 Tex. App. 368.

82—*Crawford v. State*, 112 Ala. 1; *People v. Strong*, 30 Cal. 151. See also, *State v. Glass*, 5 Ore. 81.

83—*Crawford v. State*, 112 Ala. 1.

dence, unless it excludes to a moral certainty every reasonable hypothesis but that of the defendant's guilt," has been held properly refused on account of the word "humane," which was thought to render the instruction argumentative.⁸⁴ So it has been held improper to instruct the jury to convict if the facts and circumstances cannot be reasonably accounted for by any other reasonable hypothesis than that of defendant's guilt. In condemning this instruction, the court said: "If this were the law, the more mysterious and obscure the crime, the more difficult it would be for one environed by suspicious but inconclusive circumstances, and who was charged with its perpetration, to defend himself; for the verdict would not depend upon the strength of the evidence against him, but upon the fact that the jury could not satisfactorily account for the crime."⁸⁵ An instruction that "the proof ought to be not only consistent with the prisoner's guilt but inconsistent with any other rational conclusion," is not erroneous in the use of the word "ought" in place of "must," the words being substantially of the same meaning.⁸⁶

§ 399. Instructing that circumstantial evidence must exclude to a moral certainty every hypothesis but that of guilt.

The jury may properly be instructed that before they can convict the defendant in cases depending on circumstantial evidence, the evidence should be such as to exclude to a moral certainty every hypothesis save that of guilt.⁸⁷ The use of the word "absolute" before the word "certainty" has been held to vitiate the instruction, and to make its refusal proper, on the ground that the word "absolute"

84—Dennis v. State, 112 Ala. 64.

85—Webb v. State, 73 Miss. 456.

86—State v. Blaine, 45 Mont. 482, 124 Pac. 516.

87—Mose v. State, 36 Ala. 211; People v. Anthony, 56 Cal. 397; Peo-

ple v. Dick, 32 Cal. 214; Black v. State, 1 Tex. App. 368; Moseley v. State, 59 Tex. Cr. App. 90. See also, ch. XXVII, *ante*, "Instructions on Reasonable Doubt."

suggests a degree of certainty greater than moral certainty.⁸⁸ An instruction that "the hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any other hypothesis being true, or the jury must find the defendant not guilty," was held properly refused. "Absolute moral certainty excludes not only reasonable doubt, but all doubt. It describes a fixed and uncompromising attitude of the mind, of which men are not capable in any of the situations of life. It means such a degree of certainty as precludes the possibility of error or mistake, and as presupposes the infallibility of witnesses and jurors."⁸⁹ An instruction as to circumstantial evidence containing the words "and must exclude to a reasonable and moral certainty every other reasonable hypothesis than that of the guilt of defendant," is not erroneous because the words "beyond a reasonable doubt" are omitted after the word "exclude."⁹⁰

§ 400. Instructing that circumstantial evidence must exclude every "possible" hypothesis except that of guilt.

An instruction which requires acquittal "unless the evidence should be such as to exclude to a moral certainty every possible hypothesis but that of guilt," is erroneous; and properly refused. "A doubt which requires an acquittal must be 'actual and substantial, not mere possibility or speculation.' It is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt." Conviction resting on human testimony can never attain the certainty of mathematical demonstration, or repel all possible doubt of its correctness. A rule so exacting would paralyze the punitive arm of the law. In giving

88—People v. Davis, 64 Cal. 440, 1 Pac. 889; State v. Glass, 5 Ore. 73.
 89—State v. Glass, 5 Ore. 82.
 90—Wheeler v. State, 61 Tex. Cr. App. 527.

an instruction to the jury that the evidence, to authorize conviction, should be so strong as to lead the mind to the conclusion that the accused cannot be guiltless, the court should explain that it is moral and not mathematical certainty of proof which the law requires.⁹¹

§ 401. Instructing that circumstances must be absolutely incompatible with innocence.

The following instructions have been held erroneous and properly refused: "To justify the inference of legal guilt from circumstantial evidence, the existence of inculpatory facts must be absolutely and to a demonstration incompatible with the innocence of the accused."⁹² That, to warrant conviction on circumstantial evidence alone, the facts and circumstances must be such "as are absolutely inconsistent, upon any reasonable hypothesis, with the innocence of the accused."⁹³ That, to convict on circumstantial evidence, the facts and circumstances "must be absolutely incompatible with the innocence of the accused."⁹⁴ These instructions all require too high a degree of proof. In effect, they direct the jury that defendant cannot be convicted if there is a "possible" doubt of his guilt. "Absolute, metaphysical, and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty, to the exclusion of every reasonable doubt."⁹⁵

§ 402. Instructing that circumstantial evidence should produce nearly the same degree of certainty as direct evidence.

According to some decisions, it is not improper to charge the jury that, "in order to convict, the circumstantial evi-

91—*Coleman v. State*, 59 Ala. 52; *Mose v. State*, 36 Ala. 211. And see, generally, ch. XXVII, *ante*.

92—*People v. Bellamy*, 109 Cal. 610, 42 Pac. 236.

93—*Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346.

94—*Cornish v. Territory*, 3 Wyo. 95, 3 Pac. 793. See *People v. Neufeld*, 165 N. Y. 43, wherein such an instruction was given.

95—*Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346; 1 Starkie, Ev. § 79.

dence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence.”⁹⁶ Commenting on this instruction, the reviewing court said in one of these decisions: “It was but another mode of telling the jury that, although, as a general rule, circumstantial evidence, in the nature of things, may not be so entirely satisfactory proof of a fact as the positive testimony of credible eyewitnesses, yet they must convict if they were satisfied of the guilt of the defendant, to the exclusion of all rational probabilities.”⁹⁷ The reasoning is not very satisfactory. As guilt must be established beyond a reasonable doubt in all cases, it would seem that circumstantial evidence should be such as to produce the same degree of certainty as that which arises from direct testimony, or, in other words, the probative force of the two kinds of evidence must be identical.

§ 403. Instructing that circumstantial evidence must be equal to testimony of one eyewitness.

In a number of decisions, it is held that the test of the sufficiency of circumstantial evidence to warrant a conviction in a criminal case is not whether it produces as full a conviction as would be produced by the positive testimony of an eyewitness, but whether it satisfies the mind of the jury of the defendant's guilt, to the exclusion of every reasonable doubt.⁹⁸ Such instructions are based on the statement of a learned text writer,⁹⁹ but whether considered correct as a rule of evidence or not, the courts are all agreed that it should not be given to the jury in the shape

96—*People v. Cronin*, 34 Cal. 191; *State v. Bryan*, 19 Nev. 365, 11 Pac. 317; *State v. Nelson*, 11 Nev. 334.

97—*People v. Cronin*, 34 Cal. 191.

98—*Thornton v. State*, 113 Ala. 43, 59 Am. St. Rep. 97; *Banks v. State*, 72 Ala. 522; *Foulk v. State*, 52 Ala. 415.

99—“In no case, as it seems, ought the force of circumstantial evidence, sufficient to warrant conviction, be inferior to that which is derived from the testimony of a single witness, the lowest degree of direct evidence.” Starkie, *Ev.* p. 578.

of an instruction.¹⁰⁰ Accordingly, it has been held proper to refuse instructions: That "the strength of circumstantial evidence must be equal to the strength of one credible eye-witness;"¹ that, to authorize conviction, "circumstantial evidence should be just as clear and convincing as

100—**Alabama.** *Thornton v. State*, 113 Ala. 43, 59 Am. St. Rep. 97; *Bland v. State*, 75 Ala. 574; *Banks v. State*, 72 Ala. 522; *Mickle v. State*, 27 Ala. 20.

Kentucky. *Jane v. Com.*, 2 Mete. 30.

Mississippi. *Cicely v. State*, 13 Smedes & M. 202.

North Carolina. *State v. Carson*, 115 N. C. 743; *State v. Allen*, 103 N. C. 433; *State v. Gee*, 92 N. C. 756; *State v. Norwood*, 74 N. C. 248.

Tennessee. *Rea v. State*, 8 Lea 363.

In commenting on this rule, it was said in a well-reasoned case: "Under the operation of this rule, the juror would be compelled to act, not upon the direct effect which the evidence has produced in his mind. He would be not only required to inquire into the state of his mental convictions, to ascertain whether the evidence offered in support of the prosecution had excluded from his mind all reasonable doubt; he would be forced to go further, and to institute a comparison between the degree of conviction produced by the evidence and that which would be the result of the testimony of one direct witness; for that would be the standard by which he would have to determine the degree of certainty in the proof which would authorize conviction or require an acquittal. We have daily experience that the same evidence, in judicial proceedings, does not invariably produce the

same degree of conviction in different minds. Hence we may well conclude that the legitimate force of the direct evidence of a single witness would be differently estimated by persons whose minds were differently constituted. The practical application of the principle contained in the instruction would, in effect, be to adopt a standard for estimating the force of this species of evidence, which would differ with the varying mental organization of each juror. Its practical effect, in all probability, would be, on the one hand, to lead to convictions in cases where, by the use of the more intelligible and safe rule, acquittals would follow; and, on the other, to produce acquittals, where, by the same test, the parties would merit conviction." *Cicely v. State*, 13 Smedes & M. (Miss.) 211.

In another case, the reviewing court, in sustaining the refusal of such an instruction, gave the following reasons: "The instruction only says, in a different form, that the jury ought not to convict unless every reasonable doubt was excluded, and is, therefore unnecessary. If it means more, it would require a certainty which would exclude circumstantial evidence altogether; and the danger is that, to many minds, it would appear to fairly imply the higher degree of certainty." **Rea v. State*, 8 Lea (Tenn.) 363.

1—*State v. Carson*, 115 N. C. 743.

where the facts are testified to by eye-witnesses;"² or that, "Before the jury can convict the defendants, they must be as well satisfied from the combination of circumstances that the defendant did the killing, as though an eye-witness had testified before them that the defendants did the killing."³

It has been held proper to instruct "that, where the evidence is entirely circumstantial, yet is not only consistent with the guilt of defendant, but is inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses."⁴

§ 404. Instructing that each link in the chain of circumstantial evidence must be proved beyond reasonable doubt.

The rule that, when the state relies on circumstantial evidence to convict the defendant, each fact in a chain of facts from which the main fact in issue is to be inferred must be proved by competent evidence, and by the same weight and force of evidence as if each were the main fact in issue, has been recognized in a number of states.⁵ When independent facts and circumstances are relied upon to identify the accused as the person committing the offense charged, and, taken together, are regarded as a sufficient basis for a presumption of his guilt to a moral certainty or beyond a reasonable doubt, each material independent fact or circumstance necessary to complete such chain or series of independent facts, tending to establish

2—Thornton v. State, 113 Ala. 43.

3—Banks v. State, 72 Ala. 522.

4—People v. Daniels (Cal.) 34 Pac. 233; People v. Cronin, 34 Cal. 202; State v. Slingerland, 19 Nev. 135, 7 Pac. 280.

5—People v. Anthony, 56 Cal. 397; People v. Stewart, 75 Mich. 21;

Brookin v. State, 26 Tex. App. 121; Scott v. State, 19 Tex. App. 325; Johnson v. State, 18 Tex. App. 385; Harrison v. State, 6 Tex. App. 42.

The same rule has been variously expressed as follows: "The several circumstances upon which the conclusion depends must be fully estab-

a presumption of guilt, should be established to the same degree of certainty as the main fact which these independent circumstances, taken together, tend to establish,—that is, each essential, independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty, or beyond a reasonable doubt.⁶

It has been held error to refuse an instruction that, “in order to convict the defendant upon that class of evidence [circumstantial], you must be satisfied, beyond any reasonable doubt, that each material fact or necessary link in the chain has been proven; and, if you have any reasonable doubt about any one of the necessary facts or links constituting the chain of circumstances, then you should acquit the defendant.”⁷ Or to refuse an instruction that “each fact in any chain of facts from which the defendant’s guilt is to be inferred must be proved by the same weight, degree, and force of evidence as if it were the main fact of the defendant’s guilt itself. All of such facts must be consistent each with all of the others, and with the defendant’s guilt, and all, taken together, must be so strong as to exclude, to a moral certainty, every reasonable hypothesis but that of the defendant’s guilt.”⁸ Yet an instruction that the jury should acquit “if a single circumstance proven is inconsistent with the guilt of the accused” was held to be properly refused, the court saying: “There is a distinction between the circumstances proven and a necessary link in the chain of circumstances.”⁹

The following instructions on this subject have been approved: That, to warrant a conviction “on circumstan-

lished by proof. They are facts from which*the main fact is to be inferred; and they are to be proved by competent evidence, and by the same weight and force of evidence, as if each one were itself the main fact in issue.” *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711n.

6—*People v. Ah Chung*, 54 Cal. 398; *People v. Phipps*, 39 Cal. 333.

7—*People v. Stewart*, 75 Mich. 21.

8—*Johnson v. State*, 18 Tex. App. 385.

9—*People v. Willett*, 105 Mich. 110.

tial evidence, each fact necessary to the conclusion sought to be established must be proved beyond a reasonable doubt;"¹⁰ that, "when the evidence against the defendant is made up wholly of a chain of circumstances, and there is reasonable doubt as to one of the facts essential to establish guilt, it is the duty of the jury to acquit;"¹¹ or that "each circumstance essential to the conclusion of the defendant's guilt should be fully established in the same manner and to the same extent as if the whole issue rested upon it. You must be satisfied that each link in the chain of circumstances essential to that conclusion sought to be established by the prosecution has been fully proved beyond a reasonable doubt, and to your entire satisfaction; otherwise, you must acquit."¹²

§ 405. Same—Contrary view.

The likening of circumstantial evidence to a chain has been condemned in a number of cases,¹³ and in one state an

10—*Brooklin v. State*, 26 Tex. App. 121.

11—*People v. Anthony*, 56 Cal. 397.

12—*People v. Ah Chung*, 54 Cal. 398.

13—"It is incorrect to speak of a body of circumstantial evidence as a chain, and allude to the different circumstances as the links constituting such chain; for a chain cannot be stronger than its weakest link, and, if one link fails, the chain is broken. This figure of speech may perhaps be correctly applied to the ultimate and essential facts necessary to conviction in criminal cases, since if one be omitted, or be not proven beyond a reasonable doubt, an acquittal must follow. It is not true, however, that each and every of the minor circumstances introduced to sustain these ultimate facts must be proven with the same degree

of certainty. Some of these circumstances may fail of proof altogether, and be discarded from consideration by the jury, yet the ultimate fact to establish which they were presented may be shown beyond a reasonable doubt. The evidence in cases similar to the one before us has been more aptly likened to a cable. One, two, or a half-dozen strands may part, yet the cable still remains so strong that there is scarcely a possibility of its breaking." *Clare v. People*, 9 Colo. 122, 10 Pac. 799.

"Ordinarily, in a case resting in circumstances, a linked arrangement of fact to fact is observable in a part or parts of the evidence. But a guilty person is more commonly hemmed in by a throng of circumstances than inclosed by facts arranged chainwise. Release from a chain comes when the weakest link

instruction that, "as the evidence in the case is wholly circumstantial, you must be satisfied beyond a reasonable doubt of each necessary link in the chain of circumstances to establish the defendant's guilt," was refused on the ground that it is a reasonable doubt arising from a consideration of all the evidence in the case which warrants acquittal.¹⁴ In another jurisdiction it was held proper to refuse an instruction that "every link of the chain of circumstances must be so complete and consistent with the guilt of defendant as to exclude every reasonable hypothesis of his innocence, and so perfect and complete as to establish his guilt to a moral certainty." The reviewing court said: "The circumstances might point to two persons as the guilty parties; the defendant being one of the two. One or more of the circumstances proved might have no reference whatever to the defendant, or to the crime charged, or form no part of 'the chain,' or not point to any particular fact connected with the crime, and the jury be therefore justified in not considering it at all."¹⁵ So, an instruction that if there was any one single fact proved to the satisfaction of the jury which was inconsistent with defendant's guilt, that was sufficient to raise a presump-

gives way; but escape from a crowd does not necessarily depend on the presence or absence of one or another, or even, perhaps, the greatest number, of the individuals composing it. * * * The fault in the instruction lies in its tendency to lead the jury to regard all the facts as disposed in a chain, every link in which, if such were the case, would need to be proved beyond a reasonable doubt." *Leonard v. Washington Territory*, 2 Wash. T. 381, 7 Pac. 872.

"The cable metaphor * * * illustrates the force of circumstantial evidence more clearly, perhaps, than does the chain comparison. In the

cable simile, the circumstances which tend to establish the ultimate circumstances or facts are aptly compared with the strands of a cable. All such evidentiary matters going to prove such ultimate circumstances or facts need not be established beyond a reasonable doubt, and still each ultimate fact or circumstance must be proved beyond a reasonable doubt." *State v. Gleim*, 17 Mont. 17. See also, *Rayburn v. State* (Ark.) 63 S. W. 356.

14—*State v. Hayden*, 45 Iowa 11. See also, *Smith v. State*, 61 Neb. 296.

15—*Timmerman v. Territory*, 3 Wash. T. 445, 17 Pac. 624.

tion of doubt, and the jury should acquit, was held properly refused, as it permitted the consideration of different facts as distinct and independent propositions, and because it did not restrict the jury to the consideration of the material facts upon which defendant's guilt must be predicated.¹⁶ In another state it has been held proper in a number of decisions to refuse an instruction that, "if there is a single link wanting in the chain of circumstantial evidence, the jury are bound to acquit the defendant," on the ground that it is misleading.¹⁷

§ 406. Instructing that jury need not be satisfied, beyond a reasonable doubt, of each link.

An instruction stating that: "The rule requiring the jury to be satisfied of a defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied, beyond a reasonable doubt, of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt,"—has been held proper in one state,¹⁸ but in other jurisdictions the giving of instructions the same in substance has been held reversible error, and their refusal proper.¹⁹ The objection to such an instruction is that the metaphor used is liable to confuse and mis-

16—*Smith v. State*, 61 Neb. 296.

17—*Harvey v. State*, 125 Ala. 47;
Grant v. State, 97 Ala. 35; *Wharton v. State*, 73 Ala. 366; *Tompkins v. State*, 32 Ala. 569.

In one of these decisions the court said: "We have found no rule of law which declares that circumstantial evidence necessarily consists of links, or which prescribes any definite number of circumstances as necessary to the sufficiency of circumstantial proof." *Tompkins v. State*, 32 Ala. 569.

18—*Bressler v. People*, 117 Ill. 422.

19—**Colorado.** *Graves v. People*, 18 Colo. 170, 32 Pac. 63; *Clare v. People*, 9 Colo. 122, 10 Pac. 799.

Montana. *State v. Gleim*, 17 Mont. 17, 31 L. R. A. 294, 52 Am. St. Rep. 655, 41 Pac. 998.

Nebraska. *Marion v. State*, 16 Neb. 349.

North Dakota. *State v. Young*, 9 N. D. 165.

Washington. *Leonard v. Washington Territory*, 2 Wash. T. 381, 7 Pac. 872.

lead, since a chain cannot be stronger than its weakest link, and, if the chain meant is the chain of the ultimate and essential facts necessary to conviction, the instruction would, of course, be erroneous. What is usually meant by such an instruction is that every minor circumstance tending to prove ultimate facts need not be proven beyond a reasonable doubt, but this the jury may not understand without explanation.²⁰

The proposition which the court doubtless intended to announce is that it was not necessary for the state to have proven, beyond a reasonable doubt, every circumstance on which a conviction depended. This would have been, in our judgment, good law. But while such was the purpose which the court sought to accomplish, it is exceedingly doubtful if the language employed did not mislead the jury. The metaphor used is inaccurate, and liable to misconstruction.²¹ "The jury are quite as likely to have applied that portion of the instruction referring to the links to those facts which the law requires to be established beyond a reasonable doubt to warrant conviction as to those evidentiary matters which go to prove such facts, and one or more of which may fail, while the ultimate fact might still be sufficiently established."²² Where, however, the court instructs: "The guilt of the defendant shall be established to your satisfaction, beyond a reasonable doubt, before you can convict him, but it does not require that each circumstance in the chain of evidence shall be established to your satisfaction beyond a reasonable doubt. It is sufficient if, on the whole case, you are satisfied beyond a reasonable doubt, although the individual circumstances may not themselves be so established;" and the defendant's attorney argued: "This is a case depending on a chain of circumstantial evidence. No chain is stronger than its weak-

20—Clare v. People, 9 Colo. 122, 10 Pac. 799; Marion v. State, 16 Neb. 349; Leonard v. Washington Territory, 2 Wash. T. 381, 7 Pac. 872.

21—Clare v. People, 9 Colo. 122, 10 Pac. 799.

22—Graves v. People, 18 Colo. 170, 32 Pac. 63; State v. Gleim, 17 Mont.

est link. If any link in this chain is weak or broken by the evidence of defendant, then the entire chain is broken and destroyed, and you should acquit the defendant,"—it is proper for the court to charge, in order that the jury might not get an erroneous impression of the force and effect to be given circumstantial evidence, as follows: "We often speak of a chain of circumstantial evidence. This is an expression used in these instructions, and found in the law books. It is a metaphor used to convey an idea. It is not strictly accurate. It is more accurate to speak of the series of facts given in evidence in a circumstantial evidence case, not as links in a chain, but as threads or strands making a rope or cord of evidence. The individual fibers may be of very small strength, in themselves unable to sustain any weight of consequence, but when sufficiently numerous, and properly intertwined with others of like kind, may make the strongest cordage,—cordage sufficient to hold the largest ship in the greatest storm.'" ²³

17, 31 L. R. A. 294, 52 Am. St. Rep.
655, 41 Pac. 998.

23—Rayburn v. State, 69 Ark. 177.

CHAPTER XXXII.

INSTRUCTIONS AS TO CRIMINAL OFFENSES AND PUNISHMENT.

- § 407. Instructions as to crimes in general.
- § 408. Necessity of instructions as to included offenses.
- § 409. Necessity of giving when warranted by the evidence.
- § 410. Propriety of particular instructions.
- § 411. Necessity and propriety of instructions as to punishment.
- § 412. Misstating punishment.

§ 407. Instructions as to crimes in general.

A charge which predicates a finding by the jury of the constituent ingredients of an offense as a necessary prerequisite of their finding against the defendant, without defining such ingredients, submits a question of law.¹ An instruction which states the material elements of the crime charged but which omits an essential element, is erroneous.² Criminal intent is a necessary ingredient of the crime of larceny, and when the statutory definition does not express such intent in appropriate terms, it must be imported into it by the court.³

A charge as to theft which omits the element of fraudulent intent is fatally defective.⁴ An instruction as to embezzlement which follows the language of the statute cannot be objected to, in that "fraudulently" is used in place of "feloniously," and the jury is not instructed that the crime must have been done with a felonious intent.⁵

Where murder is defined by statute as the "unlawful"

1—Brooks v. State, 8 Ala. App. 277.

2—Lockhart v. State, 10 Okla. Cr. 582, 139 Pac. 1156.

3—State v. Allen, 34 Mont. 403, 87 Pac. 177.

4—Wilson v. State, 59 Tex. Cr. App. 623.

5—People v. Gregg, 170 Mich. 168.

killing of a human being with malice, it is better, in giving instructions, not to experiment by substituting the word "wrongful" for "unlawful."⁶ A definition of accessaries substantially in the language of the statute is sufficient.⁷ An instruction that "an accomplice to a crime is one who wilfully and knowingly aids, encourages or assists another in the commission of a crime" is not erroneous in the use of the disjunctive "or" for "and" when the qualifying words are considered.⁸

An instruction defining "wilfully" and stating that a robbery must be wilfully committed, cannot be complained of, as it merely adds to the burden of proof necessary to be made by the state.⁹ Where burglary and larceny are treated as a single crime in an indictment, the court may charge that the jury can bring in a verdict of guilty or not guilty, and need not charge that it may bring in separate verdicts or a verdict of "guilty of larceny."¹⁰

§ 408. Necessity of instructions as to included offenses.

In a criminal prosecution, error cannot be predicated of the omission or refusal of a trial judge to instruct as to the lesser grades of the offense charged, where there is no

6—*Jabich v. People*, — Colo. —, 143 Pac. 1092.

7—*People v. Lee*, 237 Ill. 272.

8—*People v. Kosta*, 14 Cal. App. 696, 112 Pac. 907.

9—*Madrid v. State*, 71 Tex. Cr. App. 420.

10—*State v. Fuselier*, 134 La. 632.

Alabama. *Ragland v. State*, 125 Ala. 12.

Arkansas. *Curtis v. State*, 36 Ark. 284; *Benton v. State*, 30 Ark. 328.

California. *People v. Byrnes*, 30 Cal. 207.

Colorado. *Smith v. People*, 1 Colo. 121.

Indiana. *Richie v. State*, 58 Ind. 355.

Iowa. *State v. Harrison*, — Iowa —, 149 N. W. 452; *State v. Reasby*, 100 Iowa 231; *State v. Sterrett*, 80 Iowa 609; *State v. Perigo*, 80 Iowa 37; *State v. Casford*, 76 Iowa 330; *State v. Mahan*, 68 Iowa 304; *State v. Cole*, 63 Iowa 695.

Kansas. *State v. Kornstett*, 62 Kan. 221, 61 Pac. 805; *State v. Estep*, 44 Kan. 572, 24 Pac. 986; *State v. Mowry*, 37 Kan. 369, 15 Pac. 282; *State v. Mize*, 36 Kan. 187, 13 Pac. 1; *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1050; *State v. Rhea*, 25 Kan. 576.

Missouri. *State v. Alcorn*, 137 Mo. 121; *State v. Turlington*, 102 Mo. 642.

evidence to reduce the offense to a lesser grade.¹¹ In such a case, a general instruction tends to mislead the jury,¹² and, if prejudicial to the party complaining, will be sufficient ground upon which to reverse the judgment.¹³

11—**Oregon.** *State v. Garrand*, 5 Ore. 216.

Tennessee. *Williams v. State*, 3 Heisk. 376; *Ray v. State*, 3 Heisk. 379, note; *State v. Parker*, 13 Lea 221; *State v. Hargrove*, 13 Lea 178; *Good v. State*, 1 Lea 293.

Texas. *Mayfield v. State*, 44 Tex. 59; *Blocker v. State*, 27 Tex. App. 41; *Trumble v. State*, 25 Tex. App. 631; *Henning v. State*, 24 Tex. App. 315; *May v. State*, 22 Tex. App. 595; *Jackson v. State*, 18 Tex. App. 586; *Johnson v. State*, 18 Tex. App. 385; *Bryant v. State*, 18 Tex. App. 107; *Rhodes v. State*, 17 Tex. App. 579; *Gomez v. State*, 15 Tex. App. 327; *Smith v. State*, 15 Tex. App. 139; *Darnell v. State*, 15 Tex. App. 70; *Davis v. State*, 14 Tex. App. 645; *Neyland v. State*, 13 Tex. App. 536; *Lum v. State*, 11 Tex. App. 483; *Hubby v. State*, 8 Tex. App. 597; *Collins v. State*, 6 Tex. App. 72; *Gatlin v. State*, 5 Tex. App. 531; *Taylor v. State*, 3 Tex. App. 387; *Washington v. State*, 1 Tex. App. 647; *Holden v. State*, 1 Tex. App. 226; *Browning v. State*, 1 Tex. App. 96; *Steiner v. State*, 33 Tex. Cr. App. 291; *Hodge v. State* (Tex. Cr. App.) 26 S. W. 69.

Washington. *Smith v. United States*, 1 Wash. T. 262.

12—The practice of laying down general principles relating to the offense charged in all its degrees, without reference to the evidence in the case, is objectionable, as tending to confuse and perplex the jury. *Curtis v. State*, 36 Ark. 284; *People v. Chun Heong*, 86 Cal. 329, 24 Pac.

1021; *State v. Mize*, 36 Kan. 187, 13 Pac. 1; *Lopez v. State*, 42 Tex. 299; *Serio v. State*, 22 Tex. App. 633.

13—*State v. Mize*, 36 Kan. 187, 13 Pac. 1, in which case it was held that, "where a defendant is charged with an offense which includes others of an inferior degree, the law of each degree which the evidence tends to prove should be given to the jury; but where the defendant was charged with assault and battery, and convicted of assault, and it appears from the evidence that, if he was not guilty of assault and battery, he was not guilty of any offense, an instruction as to the lower degree of the offense is inapplicable, and might have misled the jury, and, as the testimony is such as to leave the question of the defendant's guilt in doubt," the judgment should be reversed.

Where the evidence does not warrant an instruction on the lower degrees of crime, and such an instruction is given, the fact that such instruction stated the law erroneously will not be ground for reversal if no prejudice could have resulted therefrom. *State v. Kotovsky*, 74 Mo. 247; *State v. Erb*, 74 Mo. 199.

An instruction correct as to murder in the first degree, but which might compel the jury to acquit improperly of murder in the second degree, will not work a reversal. *People v. Chun Heong*, 86 Cal. 329; *State v. Ellis*, 74 Mo. 207.

If the jury find a verdict of murder in the first degree, a reversal

Where, in a prosecution for violating a statute describing the offense of wilfully and maliciously throwing vitriol upon the person of another, with the intent to injure the flesh or disfigure the body of such person, the only question left open by the evidence is one as to the intent of defendant, the wilful and malicious throwing being abundantly proven, it is not error to fail to charge upon simple assault.¹⁴ On a trial for robbery, if there is no evidence to show the offense to be larceny, a failure to instruct as to larceny is not error.¹⁵ It has also been held that an instruction as to larceny is properly refused where the defendant is accused of burglary, since larceny is not included in burglary.¹⁶ Where the evidence, if true, sustains an indictment charging an assault with intent to commit rape, no instructions should be given as to common assault.¹⁷ Where an indictment charges a felonious assault within the exact terms of a statute, and no effort is made to prove any other offense, it is not error to fail to instruct on the offense of maiming, wounding, or disfiguring, prohibited by another statute.¹⁸ Where the defendant is charged with assault with intent to murder, he may be convicted of simple assault, and where the weapon used is not a deadly weapon, and the injuries inflicted are not serious, it may be error not to charge upon simple assault; but where the evidence shows that the injuries inflicted by defendant were quite serious, and the weapon used might reasonably be found by the jury to be a deadly weapon, the failure to submit the question of simple assault to the jury will not work a reversal.¹⁹ An incorrect charge on manslaughter is not cause for reversal if the defendant, if guilty

will not be warranted by the giving of an instruction as to murder in the second degree, when the act, if not done in self-defense, must have been murder in the first degree. *State v. Ellis*, 74 Mo. 207.

14—*People v. Stanton*, 106 Cal. 139, 39 Pac. 525.

15—*State v. Reasby*, 100 Iowa 231.

16—*State v. Leonard*, 135 Iowa 371.

17—*State v. Alcorn*, 137 Mo. 121.

18—*State v. Johnson*, 129 Mo. 26.

19—*Hodge v. State* (Tex. Cr. App.) 26 S. W. 69.

of any crime, is guilty of murder;²⁰ and the court does not err in not submitting included offenses where the evidence shows that defendant was guilty of manslaughter or should have been acquitted.²¹ Where, under the evidence, "the defendant is either guilty of murder in the first degree or innocent of any offense, it is unnecessary to charge * * * as to any degree of the offense other than murder in the first degree."²² An instruction defining murder in the second degree on the trial of an indictment for murder should not be given unless there is evidence in the case tending to prove that the crime was or may have been of that grade.²³

On a prosecution for murder in the first degree, if the evidence is indisputable that the deceased died from the effects of a wound inflicted by the defendant, it is not necessary for the court to instruct as to crime less in degree than that of criminal homicide.²⁴ If there is no evidence tending to prove that the crime was manslaughter, or that the killing was excusable or justifiable, it is not error to instruct that, "if the killing was wilful (that is, intentional), deliberate, and premeditated, it is murder in the first degree; otherwise, it is murder in the second degree."²⁵ In a prosecution for murder, where it is admitted that defendant, by violence, caused the death of deceased, and claims that his act was done in self-defense, and was not unlawful, it is not necessary to instruct as to offenses lower than manslaughter, which may be included in the crime of murder charged.²⁶ And where there is no question but that the defendant inflicted the mortal wound, and the only question is whether he did so wilfully, it is not necessary to instruct the jury as to assault with intent

20—*Ragland v. State*, 125 Ala. 12.

21—*State v. Luther*, 150 Iowa 158.

22—*State v. Kornstett*, 62 Kan.

221, 61 Pac. 805.

23—*People v. Byrnes*, 30 Cal. 206;

State v. Garrand, 5 Ore. 216; *O'Connell v. State*, 18 Tex. 343.

24—*State v. Froelick*, 70 Iowa 213.

25—*People v. Welch*, 49 Cal. 174.

26—*State v. Mahan*, 68 Iowa 304.

to inflict great bodily injury, assault and battery, and other offenses less than manslaughter.²⁷

§ 409. Necessity of giving when warranted by the evidence.

Instructions as to lower grades of an offense should be given when warranted by the evidence.²⁸ This duty is not dependent upon the court's judgment of the strength or weakness of the testimony supporting the theory, it being the prerogative of the jury to pass upon the probative force of the testimony.²⁹ And even though there is only slight evidence that the offense committed may have been of a lower degree than the one charged, it is the duty of the court to define such lower degree, and to give the law applicable to such lower offense.³⁰ If there is any doubt in the judge's mind as to the degree of the offense established, the law of the lesser as well as of the greater offense should be given in charge to the jury.³¹

Accordingly, instructions on the lower grades of offense should be given, although the only testimony tending to show a lower degree of crime is that of defendant himself,³²

27—State v. Perigo, 80 Iowa 37.

28—Arkansas. Roberson v. State, 109 Ark. 420.

Georgia. Jackson v. State, 76 Ga. 473; Crawford v. State, 12 Ga. 142.

Kansas. State v. Mize, 36 Kan. 187, 13 Pac. 1.

Michigan. People v. Palmer, 96 Mich. 580.

Missouri. State v. Young, 99 Mo. 666; State v. O'Hara, 92 Mo. 59; State v. Banks, 73 Mo. 592.

New Mexico. Territory v. Romero, 2 N. M. 474.

Evidence held not to justify submission of higher culpability than manslaughter. Whiten v. State, 71 Tex. Cr. App. 555.

29—Liskowski v. State, 23 Tex. App. 165.

30—Kansas. State v. Evans, 36 Kan. 497, 13 Pac. 849; State v. Mize, 36 Kan. 187, 13 Pac. 1.

Kentucky. Madison v. Com., 13 Ky. L. Rep. 313.

Missouri. State v. Elliott, 98 Mo. 150.

New Mexico. Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905.

Texas. Blocker v. State, 27 Tex. App. 16; Holden v. State, 1 Tex. App. 225.

31—Holden v. State, 1 Tex. App. 225.

32—State v. Partlow, 90 Mo. 608, 59 Am. Rep. 31; State v. Palmer, 88 Mo. 568; State v. Banks, 73 Mo. 592.

and although his testimony is at variance with that of every other witness.³³ For the purpose of instructing the jury, the defendant's testimony "occupies the same footing as that of any other witness."³⁴ Nevertheless, it has been held not erroneous to refuse an instruction on the lower degrees of crime, where it is a physical impossibility that defendant's testimony could be true. "Neither courts nor juries should be required to base their actions or belief on physical impossibilities."³⁵ Usually it is held that the court is required to instruct as to lower degrees of an offense, although no request for instructions of this character is made,³⁶ or, if made, state the law incorrectly,³⁷ but in one case in a prosecution for felony it was held that error could not be predicated on the failure of the trial court to define a lesser offense included in the crime charged, unless requested to do so.³⁸ The right to instructions of this character is also waived if the defendant asks that the instructions be confined to the offense charged.³⁹ But the right is not waived by his counsel's insisting, during the course of the trial, that he is guilty of the offense charged, or of none at all.⁴⁰

§ 410. Propriety of particular instructions.

If the court assumes to give instructions relating to several grades of offense, the jury should be made to understand to what grade each instruction applies.⁴¹ An instruction that, if the jury find that certain facts, which constitute the offense of assault with intent to commit murder, are proved beyond a reasonable doubt, they must find the defendant guilty of that offense, is not erroneous, as the law does not intend a person to be found guilty of a

33—State v. Banks, 73 Mo. 592.

34—State v. Palmer, 88 Mo. 568.

35—State v. Turlington, 102 Mo. 642.

36—Dolan v. State, 44 Neb. 643; Vollmer v. State, 24 Neb. 838; Chapel v. State, 7 Cold. (Tenn.) 92; Ross v. State, 23 Tex. App. 689.

37—State v. Young, 99 Mo. 666.

38—McConnell v. State, 77 Neb. 773.

39—State v. Keele, 105 Mo. 38.

40—State v. Johnson, 8 Iowa 525, 74 Am. Dec. 321.

41—Burris v. State, 38 Ark. 221.

lesser crime than that of which the evidence shows him guilty.⁴² So, an instruction that, if the jury had a reasonable doubt as to the degree of the offense of which the defendant was guilty, "they should find him guilty of that offense highest in degree of which they may have no reasonable doubt," is not prejudicial error, though not in conformity to the statute.⁴³

§ 411. Necessity and propriety of instructions as to punishment.

Where the jury are not authorized by statute to prescribe the punishment to be inflicted for the commission of a crime, no error is committed in refusing to instruct them what the penalty might be if the defendant is found guilty as charged, or if convicted of a lesser offense included within the greater.⁴⁴ Under such circumstances there is no legitimate object to be subserved by instructing the jury as to the punishment which may be inflicted as a result of their verdict,⁴⁵ and the verdict of the jury should not be influenced by any consideration of the degree of punishment, and information with regard thereto is likely to create sympathy or prejudice.⁴⁶ In one case, a different conclusion was reached as to this rule,⁴⁷ but the opinion is not a well considered one, and is opposed to the general doctrine.⁴⁸

The matter of instructing as to the consequences of a verdict is, however, discretionary with the trial court, and

42—*Crowell v. People*, 190 Ill. 508.

43—*Ireland v. Com.*, 22 Ky. L. Rep. 478.

44—*State v. Daley*, 54 Ore. 514, 103 Pac. 502, 104 Pac. 1.

45—*Russell v. State*, 57 Ga. 420; *State v. Peffers*, 80 Iowa 580; *People v. Ryan*, 55 Hun (N. Y.) 214.

46—*State v. Peffers*, 80 Iowa 580; *State v. Ragsdale*, 59 Mo. App. 590; *Ford v. State*, 46 Neb. 390; *Keller v. Strausburger*, 90 N. Y. 379; *People*

v. Ryan, 55 Hun (N. Y.) 214; *Wood v. People*, 1 Hun (N. Y.) 381.

Contra, *People v. Cassiano*, 30 Hun (N. Y.) 388.

The verdict should not be affected by any such considerations. *Wood v. People*, 1 Hun (N. Y.) 381.

47—*People v. Cassiano*, 30 Hun (N. Y.) 388.

48—Chief Justice Norval in *Ford v. State*, 46 Neb. 390.

while such an instruction may be important in order to induce the jury to exercise greater care in weighing the evidence,⁴⁹ it has been said that it is much the better practice for the court to say nothing about the punishment in its charge.⁵⁰ It is proper, however, to instruct the jury that they have nothing to do with assessing the punishment if they find the defendant guilty, and that this is a matter of law devolving upon the court.⁵¹ And in cases where the jury have the right under the statute to recommend that one convicted of a felony may be punished as for a misdemeanor, the trial judge must in effect apprise the jury that the recommendation itself will be valueless to the accused unless approved by the judge.⁵²

A part of a charge to the effect that mercy and sentiment do not rest with the jury, is not improper or erroneous,⁵³ and a cautionary instruction that the gravity or magnitude of the punishment prescribed by law for the offense charged should not be allowed to affect the jury's judgment or determine their verdict, does not indicate bias on the part of the court and is not erroneous.⁵⁴

In a prosecution for selling intoxicating liquors an instruction that if the jury find the defendant guilty they "must" assess a certain fine, is erroneous in the use of "must" for "may."⁵⁵

When the matter of fixing the punishment to be inflicted is placed by statute in the hands of the jury, it is the duty of the court to instruct the jury upon the question of punishment, when properly requested to do so, or without a request, in jurisdictions where the court is required to charge on the law of the case, whether requested or not,⁵⁶

49—Keller v. Strasburger, 90 N. Y. 379.

50—Russell v. State, 57 Ga. 424.

51—State v. Howard, 118 Mo. 144; State v. Avery, 113 Mo. 501.

52—Frazier v. State, 15 Ga. App. 365; Taylor v. State, 14 Ga. App. 492.

53—Roberson v. State, 183 Ala. 43.

54—State v. Baldes, 133 Iowa 158.

55—Webb v. State, 162 Ala. 58.

56—As to the necessity of a request, see §§ 156, *et seq.*, *ante*.

and a failure to do so is reversible error.⁵⁷ Of course, where a request is necessary, and none is made, a failure to instruct as to punishment is not available error.⁵⁸ Where the jury have an option to choose between two alternative punishments, it is reversible error for the court to fail to give to the jury, in its charge, the statute providing for such alternative punishments.⁵⁹ A charge which states the term of confinement, but does not state where the confinement was to be, has been held erroneous as not stating the law of the case.⁶⁰ Where an instruction defining an offense tells the jury what the penalty is, and such penalty is stated in submitting the issues, the instructions are not erroneous as making the penalty too prominent.⁶¹ It is not proper for the court to tell the jury in a misdemeanor case that the county attorney has waived the jail penalty, although the error may not warrant reversal.⁶²

Where the jury is invested by statute with the discretion of commuting the death penalty to a life sentence, in case of extenuating circumstances, this discretion is, nevertheless, not an arbitrary one, and the court may properly instruct them as to its exercise;⁶³ but the court, in giving its instruction, should say nothing which will interfere with the proper exercise of this discretion.⁶⁴ When the court

57—Ringo v. State, 2 Tex. App. 291; Cesure v. State, 1 Tex. App. 20; Prinzel v. State, 35 Tex. Cr. App. 274; Brannigan v. People, 3 Utah 488; Calton v. Utah, 130 U. S. 83, 32 L. Ed. 870.

58—Honeycutt v. State, 8 Baxt. (Tenn.) 371; State v. Becton, 7 Baxt. (Tenn.) 138.

59—Ringo v. State, 2 Tex. App. 291.

60—Hamilton v. State, 2 Tex. App. 494.

61—Ulloa v. State, — Tex. Cr. App. —, 163 S. W. 732.

62—Love v. State, 71 Tex. Cr. App. 259.

63—People v. Jones, 63 Cal. 168. See also, cases cited in State v. Peltier, 21 N. D. 188.

64—People v. Bawden, 90 Cal. 195, 27 Pac. 204; People v. Brick, 68 Cal. 190, 8 Pac. 858; People v. Murback, 64 Cal. 369, 30 Pac. 608. See cases cited in State v. Peltier, 21 N. D. 188.

Where a statute allows the jury to fix the penalty in case of conviction of murder in the first degree, and it is left to the jury to do this by the exercise of its own discretion,

advises the jury as to the grounds or reasons for inflicting the death penalty or life imprisonment, he invades the province of the jury, and particularly so when he only instructs them as to the reasons for inflicting the extreme penalty, and such error is fatal.⁶⁵

§ 412. Misstating punishment.

It is error to give an incorrect instruction as to the punishment or penalty which may be inflicted on a defendant,⁶⁶ as where the court misstates the maximum punishment;⁶⁷ or substitutes in the instructions a different and higher punishment for an offense than is prescribed by statute.⁶⁸

Where an instruction only states the maximum term of imprisonment and omits to state the minimum or alternative punishment that may be imposed, a judgment of conviction will be reversed.⁶⁹ And "an instruction overstating the maximum fine, and omitting to state the minimum term of imprisonment," is also erroneous.⁷⁰ If the punishment may be either by fine or imprisonment, it is error not to instruct that the jury might inflict the imprisonment without the fine.⁷¹ And where a statute provides that one convicted of assault may be both fined and

the trial judge cannot indicate in any way the penalty which the jury should fix. *State v. Peltier*, 21 N. D. 188.

65—*State v. Peltier*, 21 N. D. 188.

66—*California*. *People v. Griffith*, 146 Cal. 339, 80 Pac. 68.

Illinois. *Watson v. People*, 134 Ill. 374.

Missouri. *State v. Wheeler*, 108 Mo. 658; *State v. McNally*, 87 Mo. 644; *State v. Sands*, 77 Mo. 118.

Oklahoma. *Williams v. State*, 7 Okla. Cr. 529, 124 Pac. 330.

Texas. *Graham v. State*, 29 Tex. App. 31; *Williams v. State*, 25 Tex. App. 89; *Rodriguez v. State*, 8 Tex. App. 129; *Graham v. State*, 73

Tex. Cr. App. 28; *Hargrove v. State* (*Tex. Cr. App.*) 30 S. W. 801.

Virginia. *Whitlock v. Com.*, 89 Va. 340; *Mitchell v. Com.*, 75 Va. 856.

An instruction which fails to state the correct punishment is error. *Graham v. State*, — *Tex. Cr. App.* —, 163 S. W. 726.

67—*Hargrove v. State* (*Tex. Cr. App.*) 30 S. W. 801.

68—*Wells v. State*, 5 Okla. Cr. 22, 113 Pac. 210.

69—*Colbert v. State*, 4 Okla. Cr. 487, 113 Pac. 561.

70—*State v. Sands*, 77 Mo. 118.

71—*Irvin v. State*, 25 *Tex. App.* 558.

imprisoned, an instruction that the penalty is a fine "or" imprisonment is fatally erroneous.⁷² So, it is error to say unqualifiedly that a verdict of guilty will carry with it imprisonment in the penitentiary for a prescribed period, when such punishment is only authorized in case of a former conviction;⁷³ or to state the minimum punishment for an offense as a term of imprisonment longer than that prescribed by law as the minimum penalty.⁷⁴ And if a penalty is fixed by statute for a specific theft, it is error to state, as the penalty, that which is prescribed for theft in general.⁷⁵

In Texas, an erroneous instruction upon the question of punishment is in all cases reversible error, without regard to whether the defendant was harmed by it or not,⁷⁶ but in other jurisdictions the rule is not so rigid and the doctrine of error without injury has been held to apply.⁷⁷ So, a misstatement of the minimum punishment is harmless error where the jury assess a punishment much larger than the minimum punishment;⁷⁸ and an overstatement of the minimum punishment is no ground for reversal where the jury assessed the punishment at the maximum amount,

72—*Moody v. State*, 30 Tex. App. 422.

73—*Watson v. People*, 134 Ill. 374.

74—*State v. McNally*, 87 Mo. 644; *Williams v. State*, 25 Tex. App. 89.

75—*Jones v. State*, 7 Tex. App. 338.

76—*Buford v. State*, 44 Tex. 525; *Graham v. State*, 29 Tex. App. 32; *Irvin v. State*, 25 Tex. App. 558; *Williams v. State*, 25 Tex. App. 76; *Bostic v. State*, 22 Tex. App. 136; *Gardenhire v. State*, 18 Tex. App. 565; *Howard v. State*, 18 Tex. App. 348; *Sanders v. State*, 17 Tex. App. 222; *Wilson v. State*, 14 Tex. App. 527; *Veal v. State*, 8 Tex. App. 478; *Jones v. State*, 7 Tex. App.

338. *Contra*, *Work v. State*, 3 Tex. App. 234.

Error warrants reversal though the error inures to the benefit of defendant, or though the error does not relate to the offense of which the defendant was convicted. *Graham v. State*, 29 Tex. App. 31.

77—"But on the other hand where the instruction upon this point is correct in point of law, this court has declared that while it is an impropriety and irregularity it is not such irregularity or impropriety as should work a reversal of the case." *People v. Griffith*, 146 Cal. 339, 80 Pac. 68.

78—*Quinn v. People*, 123 Ill. 333.

which has been correctly stated to them.⁷⁹ So, where the court incorrectly tells the jury that a designated statute fixes the minimum punishment for the offense with which defendant is charged, and the minimum punishment, which is in fact regulated by another statute, is the same as that fixed by the statute referred to by the court in its charge, the defendant is not prejudiced.⁸⁰ Also, where the court overstates the maximum punishment, this will not be ground for reversal where the jury find defendant guilty, but leaves the court to fix the punishment, and the court sentences him for a much less period than the maximum allowed by statute.⁸¹

79—*Mitchell v. Com.*, 75 Va. 856.

81—*State v. Wheeler*, 108 Mo. 658.

80—*Whitlock v. Com.*, 89 Va. 340.

CHAPTER XXXIII.

CURE OF ERROR.

- § 413. Introductory statement.
- § 414. Errors in the giving or refusing of instructions as affected by the verdict.
- § 415. Same—Illustrations—Civil cases.
- § 416. Same—Illustrations—Criminal cases.
- § 417. Cure of error in the admission of evidence by instructions.
- § 418. Request for instructions withdrawing evidence.
- § 419. Objections as a basis of requested instructions to withdraw evidence.
- § 420. Sufficiency of instructions withdrawing evidence.
- § 421. Instructions requiring jury to disregard evidence offered or excluded.

§ 413. Introductory statement.

It has been noted in a previous chapter that instructions are to be considered as a whole, and that when so considered, error in the giving of an instruction may be cured by the other charges which have been submitted to the jury.¹ In a like manner, error in the giving or refusing of instructions may be cured by the verdict rendered,² and various errors committed at the trial may be cured by the giving of proper instructions correcting such errors. Thus the majority of the courts hold that error in the admission of evidence may be so cured.³ Properly speaking, the cure of errors committed at the trial is a matter of trial practice, and without the scope of this work, but the matter of curing error in the admission of evidence is so closely related to the giving and refusing of instructions that it has been thought advisable to state such rules in detail.⁴

1—See ch. XVI, *ante*.

2—See §§ 414-416, *post*.

3—See §§ 417, *et seq.*, *post*.

4—See §§ 414-421, *post*.

§ 414. Errors in the giving or refusing of instructions as affected by the verdict.

Error in the giving of an erroneous instruction is considered harmless and not a ground for reversal, where the verdict is clearly right according to the law and the evidence,⁵ or is the only one which could have been found

5—Alabama. North Alabama Traction Co. v. Thomas, 164 Ala. 191; Glass v. Memphis & C. R. Co., 94 Ala. 581.

Arkansas. St. Louis, I. M. & S. R. Co. v. Holmes, 96 Ark. 339.

California. Mott v. Minor, 11 Cal. App. 774, 106 Pac. 244.

Colorado. Northern Colorado Irrigation Co. v. Richards, 22 Colo. 450, 45 Pac. 423; Buckey v. Phenicie, 4 Colo. App. 204, 35 Pac. 277.

Florida. Pensacola Elec. Co. v. Bissett, 59 Fla. 360; Southern Exp. Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107; Prescott v. Johnson, 8 Fla. 391.

Georgia. Fry v. State, 81 Ga. 646; McCurdy v. Binion, 80 Ga. 691; McQueen v. Fletcher, 77 Ga. 445; Clay v. Barlow, 73 Ga. 788; Myric v. Hicks, 15 Ga. 155; Johnson v. State, 14 Ga. 55.

Illinois. East St. Louis Connecting Ry. Co. v. O'Hara, 150 Ill. 580; Needham v. People, 98 Ill. 275; Parker v. Fisher, 39 Ill. 164; New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221; Elam v. Badger, 23 Ill. 498; Dishon v. Schorr, 19 Ill. 59; Newkirk v. Cone, 18 Ill. 449; Harding v. St. Louis Nat. Stock Yards, 149 Ill. App. 370, aff'd 242 Ill. 444; Squire Dingee Co. v. McDonald, 61 Ill. App. 607; Ennis v. Pullman's Palace Car Co., 60 Ill. App. 398; Gray v. Knittle, 56 Ill. App. 302.

Indiana. Worley v. Moore, 97

Ind. 15; Poland v. Miller, 95 Ind. 387, 48 Am. Rep. 730; Veatch v. State, 60 Ind. 291; Wilds v. Bogan, 57 Ind. 453; Musselman v. Pratt, 44 Ind. 126; Lafayette & I. R. Co. v. Adams, 26 Ind. 76; City of Logansport v. Dunn, 8 Ind. 378; Short v. Scott, 6 Ind. 430; Muirhead v. Snyder, 4 Ind. 486; Rogers v. Maxwell, 4 Ind. 243; Sherry v. Reynolds, 3 Ind. 201; Bicknese v. Brandl, 46 Ind. App. 269; Chicago, St. L. & P. R. Co. v. Butler, 10 Ind. App. 244; Amick v. O'Hara, 6 Blackf. 258.

Iowa. Citizens' Railway & Light Co. v. Forepaugh & Sells Bros. Shows, 149 Iowa 355; State v. Hall, 97 Iowa 400; Tuck v. Singer Mfg. Co., 67 Iowa 576; Hall v. Stewart, 58 Iowa 681; Gwinn v. Crawford, 42 Iowa 63; Bondurant v. Crawford, 22 Iowa 40; Dunham v. Dennis, 9 Iowa 543; McGregor v. Armill, 2 Iowa 30.

Kansas. Rouse v. Harry, 55 Kan. 589, 40 Pac. 1007; Head v. Dyson, 31 Kan. 74, 1 Pac. 258; Atchison, T. & S. F. R. Co. v. Huitt, 1 Kan. App. 781.

Kentucky. Chesapeake & O. Ry. Co. v. Richard's Adm'r (Ky.) 126 S. W. 1105.

Louisiana. Keene v. Lizardi, 8 La. 32.

Maine. Webber v. Read, 65 Me. 564.

Michigan. Cook v. Canny, 96 Mich. 398; Saginaw Union St. Ry. v. Michigan Cent. R. Co., 91 Mich. 657; Finan v. Babcock, 58 Mich. 301;

consistent with the evidence,⁶ or where an improper instruction could not have influenced the verdict,⁷ or where

Morse v. Byam, 55 Mich. 594; **Case v. Dewey**, 55 Mich. 116; **Kramer v. Gustin**, 53 Mich. 291; **Marcott v. Marquette, H. & O. R. Co.**, 49 Mich. 99; **Clark v. McGraw**, 14 Mich. 139; **Niagara Fire Ins. Co. v. De Graff**, 12 Mich. 124.

Minnesota. **Smith & Nixon Piano Co. v. Lydick**, 110 Minn. 82; **Dunlap v. May**, 42 Minn. 309.

Mississippi. **Thomas v. State**, 61 Miss. 60; **Wilson v. Kohlheim**, 46 Miss. 346; **Evan v. State**, 44 Miss. 762; **Head v. State**, 44 Miss. 731; **Memphis & C. R. Co. v. Whitfield**, 44 Miss. 466, 7 Am. Rep. 699n; **Hanks v. Neal**, 44 Miss. 212; **Josephine v. State**, 10 George 613; **Mask v. State**, 7 George 77; **Holloway v. Armstrong**, 1 George 504; **Hill v. Calvin**, 4 How. 231; **Wiggins v. McGimpsey**, 13 Smedes & M. 532.

Missouri. **Vogg v. Missouri Pac. Ry. Co.**, 138 Mo. 172; **Otto v. Bent**, 48 Mo. 23; **Cowherd v. St. Louis & S. F. R. Co.**, 151 Mo. App. 1; **Long v. Bolen Coal Co.**, 56 Mo. App. 605; **Doud v. Reid**, 53 Mo. App. 553.

Montana. **Neill v. Jordan**, 15 Mont. 47, 38 Pac. 223; **Hogan v. Shuart**, 11 Mont. 498.

Nebraska. **Whelan v. City of Plattsmouth**, 87 Neb. 824; **Stratton v. Dole**, 45 Neb. 472; **O'Hara v. Wells**, 14 Neb. 403; **Lamb v. Hotchkiss**, 14 Neb. 102; **Meredith v. Kennard**, 1 Neb. 312.

North Carolina. **Cole v. Cole**, 23 N. C. 460.

Ohio. **Creed v. Commercial Bank of Cincinnati**, 11 Ohio 489.

Pennsylvania. **Eldred v. Hazlett's Adm'r**, 38 Pa. St. 16; **Deford v. Reynolds**, 36 Pa. St. 325.

South Carolina. **Caldwell v. Duncan**, 87 S. C. 331; **Carr v. Mouzon**, 86 S. C. 461; **State v. Slack**, 1 Bailey 330.

Texas. **Galveston, H. & S. A. Ry. Co. v. Johnson**, 74 Tex. 256; **City of Galveston v. Morton**, 58 Tex. 409; **Texas & P. Ry. Co. v. Isenhower** (Tex. Civ. App.) 131 S. W. 297; **Clarkson v. Whitaker**, 12 Tex. Civ. App. 483; **Galveston, H. & S. A. Ry. Co. v. Chittim** (Tex. Civ. App.) 28 S. W. 700; **B. C. Evans Co. v. Reeves**, 6 Tex. Civ. App. 254.

Vermont. **Sanborn v. Cole**, 63 Vt. 600.

Virginia. **Fentress v. Steele & Sons**, 110 Va. 578; **Binns v. Waddill**, 32 Grat. 588.

Washington. **City of Tacoma v. Wetherby**, 57 Wash. 295, 106 Pac. 903; **Secor v. Oregon Improvement Co.**, 15 Wash. 35, 45 Pac. 654; **Davis v. Gilliam**, 14 Wash. 206, 44 Pac. 119.

West Virginia. **Bank of Huntington v. Napier**, 41 W. Va. 481.

Wisconsin. **Pireaux v. Simon**, 79 Wis. 392.

English. **Wickes v. Clutterbuck**, 2 Bing. 483.

6—**Greer v. Lafayette County Bank**, 128 Mo. 560; **Bushey v. Glenn**, 107 Mo. 331; **Fitzgerald v. Barker**, 96 Mo. 661, 9 Am. St. Rep. 375; **Stratton v. Dole**, 45 Neb. 472; **Western U. Tel. Co. v. Lowrey**, 32 Neb. 732; **Knowlton v. Mandeville**, 20 Neb. 59. See also, § 417, *post*.

7—**Illinois.** **Avery v. Moore**, 133 Ill. 74; **Fleischbein v. Strother**, 149 Ill. App. 356.

Indiana. **Whitewater R. Co. v. Bridgett**, 94 Ind. 216; **Northern**

the verdict affirmatively shows that the jury were not misled by or did not follow the erroneous instruction.⁸ Thus, no prejudice results from the giving of an erroneous instruction, where the jury find against the hypothesis on which it is predicated, for in that case the instruction is rendered immaterial, as it could not have affected the verdict or changed the result.⁹ So, error in leaving a question of law to the jury is harmless, where the jury decide it

Assur. Co. of London v. Carpenter, 52 Ind. App. 432.

Iowa. Lathrop v. Central Iowa Ry. Co., 69 Iowa 105.

Kansas. Ft. Scott, W. & W. Ry. Co. v. Jones, 48 Kan. 51, 28 Pac. 978.

Mississippi. Josephine v. State, 10 George 613.

Missouri. Brockman Commission Co. v. Aaron, 145 Mo. App. 307; Potter v. Metropolitan St. R. Co., 142 Mo. App. 220.

Texas. Houston, E. & W. T. Ry. Co. v. Hardy, 61 Tex. 230; Wrighton v. Butler (Tex. Civ. App.) 123 S. W. 472; Bender v. Peyton, 4 Tex. Civ. App. 57; Loustaunau v. Lambert, 1 Tex. Civ. App. 434.

Washington. Thornton v. Dow, 60 Wash. 622, 32 L. R. A. (N. S.) 968n, 111 Pac. 899.

8—**Alabama.** Meighan v. Birmingham Terminal Co., 165 Ala. 591.

Illinois. Keegan v. Kinnare, 123 Ill. 280; Kirby v. Wilson, 98 Ill. 240.

Kansas. Woodman v. Davis, 32 Kan. 339, 91 Am. Dec. 589, 4 Pac. 262.

Michigan. Brockway v. Patterson, 72 Mich. 122, 1 L. R. A. 708.

Missouri. State v. Daugherty, 106 Mo. 182.

9—**California.** People v. Wallace, 101 Cal. 281, 35 Pac. 862.

Illinois. Pennsylvania Coal Co. v. Kelly, 156 Ill. 9.

Indiana. Ronan v. Meyer, 84 Ind.

390; Louisville & N. R. Co. v. Orr, 84 Ind. 50; Ryan v. Begein, 79 Ind. 356.

Iowa. White v. Byam, 96 Iowa 166; National Horse Importing Co. v. Novak, 95 Iowa 596.

Kansas. Wilkes v. Wolback, 30 Kan. 375, 2 Pac. 508; Edwards v. Porter, 28 Kan. 700; McIntosh v. Crawford County Com'rs, 13 Kan. 171.

Michigan. Guerold v. Holtz, 103 Mich. 118; English v. Caldwell, 30 Mich. 362. See also, White v. Campbell, 25 Mich. 463.

Missouri. Schaefer v. St. Louis & S. Ry. Co., 128 Mo. 64.

Nebraska. Olsen v. Meyer, 46 Neb. 240.

Ohio. Loudenback v. Collins, 4 Ohio 251.

South Carolina. Mobley v. Charlotte, C. & A. R. Co., 42 S. C. 306; Devereux v. Champion Cotton Press Co., 17 S. C. 72.

Texas. Goodbar v. City Nat. Bank, 78 Tex. 461; Vickers v. Kennedy (Tex. Civ. App.) 34 S. W. 458.

Vermont. Sanborn v. Cole, 63 Vt. 590, 14 L. R. A. 208n.

Wisconsin. Palmer v. Banfield, 86 Wis. 441; Atkinson v. Goodrich Transp. Co., 69 Wis. 5.

United States. Sunset Telephone & Telegraph Co. v. Day, 17 C. C. A. 161, 70 Fed. 364.

correctly.¹⁰ Special findings of the jury may frequently show that they were not misled by the giving of an erroneous instruction.¹¹ It is only where, from the whole case, the jury might have rendered a different verdict, that the giving of improper instructions will be held reversible error.¹²

The refusal of requested instructions which might properly have been given does not warrant the setting aside of a verdict which conforms to the law and the evidence.¹³ In such case the error is harmless.¹⁴ It is also harmless error

10—Webb v. Portland & K. R. Co., 57 Me. 117; Woodman v. Chesley, 39 Me. 45; Osgood v. Lansil, 33 Me. 360; Pike v. Warren, 15 Me. 390; Rogers v. Abbot, 206 Mass. 270, 138 Am. St. Rep. 394; Allen v. Duffie, 43 Mich. 1, 38 Am. Rep. 159n; Hall v. Suydam, 6 Barb. (N. Y.) 83; Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.) 268; Cumpston v. McNair, 1 Wend. (N. Y.) 457; Thornburgh v. Mastin, 93 N. C. 258; Moore v. Parker, 91 N. C. 276. See also, Carson v. McCormick Harvesting Mach. Co., 36 Mo. App. 462; Galveston, H. & S. A. Ry. Co. v. Johnson, 74 Tex. 256; Maritime Ins. Co. v. M. S. Dollar Steamship Co., 100 C. C. A. 547, 177 Fed. 127.

11—Dickey v. Shirk, 128 Ind. 278; Cline v. Lindsey, 110 Ind. 337; Porter v. Waltz, 108 Ind. 40; Woolery v. Louisville, N. A. & C. Ry. Co., 107 Ind. 381, 57 Am. Rep. 114; Ricketts v. Harvey, 106 Ind. 564; Worley v. Moore, 97 Ind. 15; Moore v. Lynn, 79 Ind. 299; Uhl v. Harvey, 78 Ind. 26; Hill v. Hill, 45 Ind. App. 99; Bigelow v. Wygal, 52 Kan. 619, 35 Pac. 200; Chicago, K. & W. R. Co. v. Parsons, 51 Kan. 408, 32 Pac. 1083; Atchison, T. & S. F. R. Co. v. English, 38 Kan. 110, 16 Pac. 82; Luke v. Johnnyeake, 9 Kan. 511;

Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. Rep. 548; Montgomery v. Swindler, 32 Ohio St. 224; Hovey v. Cook, 83 Vt. 458.

Thus, where the jury find, in answer to interrogatories in an action for personal injuries, that plaintiff was not negligent, error in submitting the doctrine of comparative negligence, or in telling the jury that, although negligent, plaintiff may recover because of the wilfulness of defendant, can do no harm. Louisville, N. A. & C. Ry. Co. v. Wright, 115 Ind. 378, 7 Am. St. Rep. 432.

Where the jury return a special verdict, error in the instructions as to the general rules of law applicable to the case is not ground for reversal. Ward v. Cochran, 18 C. C. A. 1, 71 Fed. 127.

12—Musselman v. Pratt, 44 Ind. 126.

13—Randall v. Parramore, 1 Fla. 409; Breckenridge v. Anderson, 3 J. J. Marsh. (Ky.) 717; Thomas v. Tanner, 6 T. B. Mon. (Ky.) 61; Pritchard v. Myers, 11 Smedes & M. (Miss.) 42. A failure to construe the contract in suit is harmless where the jury properly construe it. Galveston, H. & S. A. Ry. Co. v. Johnson, 74 Tex. 256.

14—The refusal of proper instruc-

to refuse a requested instruction where the jury find as asked by the instruction,¹⁵ or where the jury find that the facts on which the instruction was based did not exist.¹⁶

tions is harmless error where the verdict must necessarily have been the same, whether the instructions asked were given or not.

Alabama. Southern Hardware & Supply Co. v. Block Bros., 163 Ala. 81.

Florida. Robinson v. Hyer, 35 Fla. 544; May v. Gamble, 14 Fla. 467.

Georgia. Atlantic & B. R. Co. v. Sumner, 134 Ga. 673.

Illinois. Scott v. Parlin & Orendorff Co., 245 Ill. 460, aff'g 146 Ill. App. 92; Avery v. Moore, 133 Ill. 74; Squire Dingee Co. v. McDonald, 61 Ill. App. 607.

Indiana. Musselman v. Pratt, 44 Ind. 126; Rice v. Rice, 6 Ind. 100.

Iowa. Olson v. Neal, 63 Iowa 214; Cedar Falls & M. R. Co. v. Rich, 33 Iowa 113.

Kentucky. Webb v. Moore, 136 Ky. 708.

Missouri. Sullivan v. Jefferson Ave. Ry. Co., 133 Mo. 1, 32 L. R. A. 167; Jenkins v. Clopton, 141 Mo. App. 74.

Mississippi. Wiggins v. McGimpsey, 13 Smedes & M. 532.

Nebraska. Ryan v. State Bank, 10 Neb. 524.

Texas. City of Houston v. Dupree (Tex. Civ. App.) 129 S. W. 173; Emerson, Talcott & Co. v. Skidmore, 7 Tex. Civ. App. 641.

West Virginia. Butcher v. Sommerville, 67 W. Va. 261.

United States. Pence v. Langdon, 99 U. S. (9 Otto) 578, 25 L. Ed. 420; Douglass v. M'Allister, 3 Cranch 298, 2 L. Ed. 445.

Error is harmless where any other

verdict would properly have been set aside. Cedar Falls & M. R. Co. v. Rich, 33 Iowa 113.

15—White v. Chaffin, 32 Ark. 59; Woodward v. Begue, 53 Ind. 176; Munderbach v. Lutz's Adm'r, 14 Serg. & R. (Pa.) 220; Reed v. Walker (Tex. Civ. App.) 130 S. W. 607; Conrady v. Bywaters (Tex. Civ. App.) 24 S. W. 961. See also, Johnson v. State (Tex. Cr. App.) 35 S. W. 387.

16—**Alabama.** Southern Hardware & Supply Co. v. Block, 163 Ala. 81.

Arkansas. Baker v. State, 58 Ark. 513.

California. Lowe v. San Francisco & N. W. R. Co., 154 Cal. 573, 98 Pac. 678.

Colorado. Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588.

Illinois. Chicago & E. I. R. Co. v. Hines, 33 Ill. App. 271, aff'd 132 Ill. 161.

Indiana. Kimble v. Seal, 92 Ind. 276; State v. Parish, 83 Ind. 223; National Life Maturity Ins. Co. v. Whitacre, 15 Ind. App. 506.

Iowa. Hughes v. Chicago B. & Q. R. Co., 141 Iowa 273, 133 Am. St. Rep. 164; Seekel v. Norman, 78 Iowa 254; Hall v. Ballou, 58 Iowa 585; Clinton Nat. Bank v. Graves, 48 Iowa 228; Martin v. Town of Algon, 40 Iowa 390.

Kansas. Branner v. Stormont, 9 Kan. 51.

Kentucky. Powell v. Weber-Stair Co., (Ky.) 125 S. W. 255.

Maine. Barrett v. City of Bangor, 70 Me. 335; Tainter v. Lombard, 54 Me. 554; Perkins v. Hitchcock, 49 Me. 468.

Michigan. Anderson v. Thunder

§ 415. Same—Illustrations—Civil cases.

Where the verdict finds all the issues in favor of the successful party, if the issues are such that a finding of either of them in his favor entitles him to the judgment rendered, the judgment will not be reversed for error in the instructions of the court relating exclusively to the other.¹⁷ "Where part of the defendants pleaded limitation to the several tracts claimed by them and the verdict is general and evidently upon the issue attacking the title of plaintiffs, errors in the charge upon the subject of limitation would be immaterial."¹⁸ Where plaintiff, on trial of a traverse to the ground of an attachment, successfully carried the burden of proof, a charge that the burden was on defendant was harmless.¹⁹

The error of leaving the construction or effect of a written instrument to be determined by the jury will not warrant reversal if a proper construction of the instrument in the light of the other facts determined by the verdict must lead to the same result.²⁰

In an action on a note, the main issue being as to alteration of the date of the note, an erroneous instruction as to the effect of an alteration by a third person will not work a reversal if the jury find that the note was not altered by any one.²¹ Where the jury find the contract of defendants to be joint, a charge that the jury might find against one, even if a misdirection, was immaterial, as it cannot influence the verdict.²²

Bay River Boom Co., 57 Mich. 216;
Gallaway v. Burr, 32 Mich. 332.

Pennsylvania. Glass v. Ranwolf,
172 Pa. St. 655, 37 Wkly. Notes Cas.
428.

Texas. Houston Oil Co. of Texas
v. Kimball, 103 Tex. 94; Walker v.
Brown, 66 Tex. 556.

Vermont. Good v. Knox, 64 Vt.
97.

17—Sites v. Haverstick, 23 Ohio
St. 626.

18—Parker v. Chancellor, 78 Tex.
524.

19—Moore v. Brewer, 94 Ga. 260.

20—Stadden v. Hazzard, 34 Mich.
76; Roberts v. Alexander, 5 Lea
(Tenn.) 414.

21—Vickers v. Kennedy (Tex. Civ.
App.) 34 S. W. 458.

22—Devereux v. Champion Cotton
Press Co., 17 S. C. 72.

Where the jury specially find, in an action for personal injuries; that plaintiff was wholly free from negligence, the submission to the jury of the exploded doctrine of comparative negligence can work no harm.²³

The refusal to give an instruction based upon an oral agreement works no harm, where the jury find that no such agreement had been made.²⁴ Where the jury specially find that, at the time of an application for a life insurance policy, the applicant was in good health and had never had certain diseases inquired about by the examining physician, a refusal to instruct that if the applicant had such diseases, contrary to representations made by him, he could not recover, is harmless.²⁵ Error committed in refusing a charge that advice of counsel would be no defense if the criminal prosecution was commenced by defendants to collect their debt is error without prejudice, where the jury, in answer to a special question, expressly find that the criminal prosecution was not commenced for that purpose.²⁶

Error in instructions as to the measure of damages is harmless where the jury do not allow a recovery,²⁷ or where

23—*Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9, aff'g 54 Ill. App. 622.

24—*Hall v. Ballou*, 58 Iowa 585.

25—*National Life Maturity Ins. Co. v. Whitacre*, 15 Ind. App. 506.

26—*Gallaway v. Burr*, 32 Mich. 332.

27—*Alabama. Huson Ice & Machine Works v. Bland & Chambers*, 167 Ala. 391.

Illinois. McCutcheon v. City of Chicago, 150 Ill. App. 232.

Iowa. Cooper v. City of Oelwein, 145 Iowa 181; *White v. Byam*, 96 Iowa 166; *National Horse Importing Co. v. Novak*, 95 Iowa 596.

Kansas. Wilkes v. Wolback, 30 Kan. 375, 2 Pac. 508; *McIntosh v.*

Crawford County Com'rs, 13 Kan. 171.

Mississippi. Fairfield v. Louisville & N. R. Co., 94 Miss. 887, 136 Am. St. Rep. 611, 19 Ann. Cas. 456.

Nebraska. Olsen v. Meyer, 46 Neb. 240.

Ohio. Loudenback v. Collins, 4 Ohio 251.

South Carolina. Mobley v. Charlotte, C. & A. R. Co., 42 S. C. 306; *Devereux v. Champion Cotton Press Co.*, 17 S. C. 72.

Texas. Temple v. Duran (Tex. Civ. App.) 121 S. W. 253; *Hill v. Houser*, 51 Tex. Civ. App. 359.

Washington. Manvell v. Weaver, 61 Wash. 23, 111 Pac. 890.

the verdict is for the defendant.²⁸ So, where the verdict shows that the jury were not brought to a consideration of damages, the plaintiff is not prejudiced by the refusal to give an instruction on the measure of damages,²⁹ and error in an instruction relating only to the right of recovery, and not affecting the measure of damages, is harmless where the verdict is in favor of the party objecting.³⁰ So, error in an instruction which authorizes recovery of a greater sum than is actually due is harmless, where the verdict is only for the sum actually due, or where the plaintiff remits the excess.³¹

Where the court erroneously charges that exemplary damages may be allowed, but the jury do not award exemplary damages, the error is harmless.³² The refusal of a request for an instruction on exemplary damages furnishes no ground of complaint where the jury find only actual damages.³³ An instruction not to allow defendant anything overpaid by him is harmless error where the jury find that there was nothing overpaid.³⁴ The fact that a jury awards a sum under the name of "single damages" does not show that no harm has resulted from an instruction erroneously telling the jury that it is within their power to give treble damages. Jurors may have yielded their claim that the damages should be triple, in consider-

Wisconsin. *Jones v. Monson*, 137 Wis. 478, 129 Am. St. Rep. 1082.

28—*Sunman v. Clark*, 120 Ind. 142; *Manning v. Union Transfer Co.*, 7 Mackey (D. C.) 214. See *Porter v. Metcalf*, 84 Tex. 468.

29—*Montgomery v. Willis*, 45 Neb. 434; *Porter v. Metcalf*, 84 Tex. 468.

30—*Lasure v. Graniteville Mfg. Co.*, 18 S. C. 280.

31—*Comerford v. Morrison*, 145 Ill. App. 615; *Saunders v. Flaniken*, 77 Tex. 662. See also, *Blaisdell v. Scally*, 84 Mich. 149.

32—**Indiana.** *Patchell v. Jaqua*, 6 Ind. App. 70.

Kentucky. *Chesapeake & O. R. Co. v. Conley*, 136 Ky. 601.

Michigan. *Durfee v. Newkirk*, 83 Mich. 522.

Ohio. *Kuchenmeister v. O'Connor*, 11 Cine. L. Bul. 120.

South Carolina. *Levan v. Atlantic Coast Line R. Co.*, 86 S. C. 514.

Texas. *Taylor, B. & H. Ry. Co. v. Taylor*, 79 Tex. 104, 23 Am. St. Rep. 316; *Freiberg v. Elliott*, 8 S. W. 322.

33—*Texas & P. Ry. Co. v. Watts* (Tex.) 18 S. W. 312.

34—*Ryan v. Begein*, 79 Ind. 356.

ation of a large sum being awarded as single damages.³⁵

Misleading or erroneous instructions in an equitable cause constitute no ground for reversal where the finding of the jury is adopted by the court as in accordance with the evidence.³⁶

§ 416. Same—Illustrations—Criminal cases.

A refusal to define murder is harmless when the defendant is convicted only of manslaughter,³⁷ and where a defendant is found guilty of fornication, a refusal to give a correct charge as to rape is harmless error.³⁸ Error in an instruction as to a higher offense is harmless and not a ground for reversal where the defendant is convicted of a lower degree of the offense.³⁹ So, error in the charge as to a lower degree of the offense than that of which defendant is convicted is harmless.⁴⁰ Where defendant is convicted under only one count of the indictment, errors in the instructions as to the other counts are harmless.⁴¹ The failure to charge as to another offense contained in a different count is not reversible error.⁴² Error in instructing that the jury may assess a fine at a greater amount than authorized by law is harmless, where they assess the fine at a less amount than authorized by law.⁴³

35—*McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76.

36—*Brandon v. Dawson*, 63 Mo. App. 359. See also, *Richardson v. City of Eureka*, 110 Cal. 441, 42 Pac. 965; *Gray v. Troutman*, 158 Ill. 171.

37—*Parker v. State*, 55 Miss. 414. See also, *State v. See*, 85 S. C. 101, 137 Am. St. Rep. 869; *Cox v. State*, 60 Tex. Cr. App. 471.

38—*Jackson v. State*, 91 Wis. 253.

39—*Alabama*. *Phillips v. State*, 167 Ala. 75.

Georgia. *Tipton v. State*, 8 Ga. App. 92.

Missouri. *State v. Hanson*, 231 Mo. 14; *State v. Gates*, 130 Mo. 351.

Tennessee. *Wickham v. State*, 7 Cold. 525.

Texas. *Rutledge v. State* (Tex. Cr. App.) 33 S. W. 347; *Blackwell v. State*, 33 Tex. Cr. App. 278.

Washington. *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047.

40—*State v. Dickson*, 6 Kan. 209.

41—*Boswell v. State*, 59 Tex. Cr. App. 161; *Tigerina v. State*, 35 Tex. Cr. App. 302.

42—*Parham v. State*, 10 Lea (Tenn.) 502; *Ray v. State*, 3 Heisk. (Tenn.) 379n.

43—*Dudney v. State*, 22 Ark. 251. See also, *Palmer v. State*, 168 Ala. 124.

§ 417. Cure of error in the admission of evidence by instructions.

According to the weight of authority, error in the admission of evidence may be cured by the giving of instructions withdrawing such evidence from the jury's consideration,⁴⁴ or by the giving of instructions which with-

44—California. *People v. Bond*, 13 Cal. App. 175, 109 Pac. 150.

Colorado. *King v. Rea*, 13 Colo. 69, 21 Pac. 1084.

Indiana. *Indianapolis, P. & C. Ry. Co. v. Bush*, 101 Ind. 582; *Zehner v. Kepler*, 16 Ind. 290.

Iowa. *Stewart v. Colfax Consol. Coal Co.*, 147 Iowa 548.

Massachusetts. *Smith v. Whitman*, 6 Allen 562; *Hawes v. Gustin*, 2 Allen 402.

Michigan. *Walsh v. Gibson*, 159 Mich. 312; *Potvin v. West Bay City Shipbuilding Co.*, 156 Mich. 201; *Busch v. Fisher*, 89 Mich. 192; *Tolbert v. Burke*, 89 Mich. 132; *Mitts v. McMorran*, 85 Mich. 94; *Blaisdell v. Scally*, 84 Mich. 149; *Beeman v. Black*, 49 Mich. 598.

Missouri. *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62; *Stephens v. Hannibal & St. J. R. Co.*, 96 Mo. 207, 9 Am. St. Rep. 336n; *Griffith v. Hanks*, 91 Mo. 109; *Davis v. Peveler*, 65 Mo. 189; *Dent v. Springfield Traction Co.*, 145 Mo. App. 61; *Canaday v. United Rys. Co. of St. Louis*, 134 Mo. App. 282.

New Hampshire. *Hamblett v. Hamblett*, 6 N. H. 333.

New York. *McKnight v. Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370; *People v. Parish*, 4 Denio 153.

North Carolina. *Coore v. Seaboard Air Line R. Co.*, 152 N. C. 702; *Bridgers v. Dill*, 97 N. C. 222.

Ohio. *Mimms v. State*, 16 Ohio 221.

Oregon. *Swank v. Elwert*, 55 Ore. 487, 105 Pac. 901.

Pennsylvania. *Com. v. Clements*, 6 Bin. 208.

Rhode Island. *State v. Towler*, 13 R. I. 665.

Tennessee. *Links v. State*, 13 Lea 701.

Texas. *Stephenson v. Jackson* (Tex. Civ. App.) 128 S. W. 1196; *Missouri Valley Bridge & Iron Co. v. Ballard*, 53 Tex. Civ. App. 110; *Jones v. Reus*, 5 Tex. Civ. App. 628.

Virginia. *Washington, A. & Mt. V. R. Co. v. Trimyer*, 110 Va. 856.

Washington. *Puget Sound Iron Co. v. Worthington*, 2 Wash. T. 472, 7 Pac. 882.

Wisconsin. *Beck v. Cole*, 16 Wis. 95; *Conklin v. Parson*, 2 Pin. 264.

United States. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *Specht v. Howard*, 16 Wall. 564, 21 L. Ed. 348.

English. *Tullidge v. Wade*, 3 Wils. 18.

Illustrations: In a suit to recover the value of logs, some of which had been manufactured into lumber, where evidence was received of the value of the lumber and also of the logs, as to which latter value there was no serious dispute, and the jury were instructed that it could only allow plaintiff the value of the logs, it was held that the admission of the testimony as to the value of the

draw the issue to which the evidence relates from the jury's consideration.⁴⁵ However, if it appears that the verdict has been affected by the erroneous evidence, and that the instruction was without effect in withdrawing the evidence, the error is not cured.⁴⁶

According to some decisions, it is presumed that the jury have based their verdict upon legal evidence,⁴⁷ and it is also presumed that the jury have followed and obeyed the instructions of the court.⁴⁸ Accordingly, if an instruction is given requiring the jury to disregard the erroneous evidence, it will be presumed that such instruction was followed and that the erroneous testimony is no longer before the jury.⁴⁹ So, an instruction withdrawing erroneous evidence will be held to cure the error of admitting it, unless it is apparent that prejudice resulted notwithstanding such instruction;⁵⁰ and it is only when it is apparent that immaterial or irrelevant evidence has affected the verdict that

lumber was not prejudicial. *Busch v. Fisher*, 89 Mich. 192.

While it is error for the court to admit evidence of the unlawful conversion of property as a set-off, in an action of assumpsit, yet, if it instructs the jury to reject the set-off, and they find accordingly, the error is cured. *Conklin v. Parsons*, 2 Pin. (Wis.) 264.

Although a wife cannot prove non-access of the husband, and the court causes a question to be asked of her, from the answer to which non-access may be inferred, the verdict cannot be disturbed because of the question, where the jury are instructed that they must not consider anything the wife might say as evidence of non-access. *Com. v. Shepherd*, 6 Bin. (Pa.) 283, 6 Am. Dec. 449.

45—*Elliott v. Capital City State Bank*, 149 Iowa 309; *Smith v. Chicago, M. & St. P. R. Co.*, 26 S. D.

555. See also, *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater*, — Tex. Civ. App. —, 131 S. W. 251.

46—*Sinker v. Diggins*, 76 Mich. 557; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Hamory v. Pennsylvania, M. & S. R. Co.*, 222 Pa. 631; *Sterling v. Sterling*, 41 Vt. 80; *Castleman v. Griffin*, 13 Wis. 602. See also, *Boyd v. Readsboro*, reported in *State v. Meader*, 54 Vt. 654.

47—*Pennsylvania Co. v. Roy*, 102 U. S. (12 Otto) 451, 26 L. Ed. 141. See also, *Bachseits v. Leichtweis*, 256 Ill. 357.

48—*Com. v. Shepherd*, 6 Bin. (Pa.) 283, 6 Am. Dec. 449.

49—*State v. Meller*, 13 R. I. 669.

50—*Deerfield v. Northwood*, 10 N. H. 269; *Missouri Pac. Ry. Co. v. Mitchell*, 75 Tex. 81; *Jones v. Reus*, 5 Tex. Civ. App. 628.

evidence excluded or limited will afford a ground for reversal.⁵¹

There are a number of decisions, however, which hold that if it is apparent that the verdict was influenced by the admission of erroneous evidence, the judgment rendered must be reversed,⁵² and the giving of instructions withdrawing the evidence, or requiring the jury to disregard it, is ineffectual unless it affirmatively appears that no prejudice resulted from the erroneous evidence.⁵³ Some decisions also go further, and, contrary to the general rule first stated, hold without qualification that error in the admission of evidence cannot be cured by the giving of instructions withdrawing or attempting to withdraw such evidence.⁵⁴ In one state, this is the rule in criminal cases.⁵⁵ These decisions base their reasoning on the ground that the impression created by the erroneous evidence, in the minds of the jury, is not easily removed, and that the court can never be sure if the error is in fact cured.

§ 418. Request for instructions withdrawing evidence.

It is error to refuse a requested instruction requiring the jury to disregard improper evidence which has been erroneously admitted. The defendant has the right to have the jury instructed to disregard such evidence,⁵⁶ provided

51—*Jones v. Reus*, 5 Tex. Civ. App. 628.

Unless it can be seen that a party has been injured by the admission of illegal evidence, a reversal should not be had for that cause. *Links v. State*, 13 Lea (Tenn.) 708.

52—*Erben v. Lorillard*, 19 N. Y. 299.

53—*Coleman v. People*, 58 N. Y. 555; *State v. Meader*, 54 Vt. 131. See also, *Hodge v. Town of Bennington*, 43 Vt. 450; *Wood v. Willard*, 36 Vt. 82.

54—*City of Chicago v. Wright & Lawther Oil & Lead Mfg. Co.*, 14

Ill. App. 119; *State v. Mix*, 15 Mo. 153; *Arthur v. Griswold*, 55 N. Y. 400; *Irvine v. Cook*, 15 Johns. (N. Y.) 239; *Penfield v. Carpenter*, 13 Johns. (N. Y.) 350.

55—*State v. Kuehner*, 93 Mo. 193; *State v. Marshall*, 36 Mo. 400; *State v. Wolff*, 15 Mo. 168; *State v. Mix*, 15 Mo. 153. But see *State v. Sassaman*, 214 Mo. 695.

56—*Greenup v. Stoker*, 2 Gilm. (Ill.) 688; *State v. Brown*, 28 La. Ann. 279; *State v. Owens*, 79 Mo. 619; *State v. Cox*, 65 Mo. 29; *Fass v. Western U. Tel. Co.*, 82 S. C. 461.

Compare *George v. Norris*, 23 Ark.

that proper objections have been made to the admission of such evidence when offered,⁵⁷ and in fact the court may properly give such an instruction of its own motion.⁵⁸ Where evidence has been properly received, but its effect has been destroyed by other evidence, a party has not an absolute right to have the evidence first received stricken out. He should request a charge of the court that such evidence be not considered.⁵⁹ Where evidence which is material and competent at the time it is received becomes subsequently incompetent and immaterial, and no request is made to the court to instruct the jury to disregard it, it has been held that a failure to give such an instruction affords no ground for reversal.⁶⁰ Where depositions are introduced in evidence, the proper practice is to point out the objectionable parts, and request an instruction that the jury disregard such parts.⁶¹

§ 419. Objections as a basis of requested instructions to withdraw evidence.

A majority of the courts hold that error in the admission of evidence cannot be cured by requesting the court to instruct the jury to disregard it, where no objection was made to such evidence when offered.⁶² There are, how-

130. In this case it was said: "The first and fifth instructions asked the court to declare that evidence which it had admitted against the objection of the plaintiff was not legal, and could not be considered by the jury. The court did not err in refusing the instructions,—its error was in allowing parol evidence to go to the jury, to construe the bill of sale as a mortgage; but when the evidence was before the jury, the plaintiff should have rested his objection to it on his exception to its introduction,—should not have asked the court to pronounce that not to be law, which the court in a former period of the case ruled to be the

law. The instructions were properly refused."

57—See § 419, *post*.

58—Utter v. Vance, 7 Blackf. (Ind.) 514. See also, Haney v. Marshall, 9 Md. 194; Rankin v. Thomas, 50 N. C. 435.

59—Gawtry v. Doane, 51 N. Y. 84.

60—Aitkin's Heirs v. Young, 12 Pa. St. 15.

61—Buster's Ex'r v. Wallace, 4 Hen. & M. (Va.) 82.

62—Georgia. Harrison v. Young, 9 Ga. 359.

Iowa. Fish v. Chicago, R. I. & P. Ry. Co., 81 Iowa 280; Becker v. Becker, 45 Iowa 239; State v. Pratt, 20 Iowa 267.

ever, some decisions which apparently take the opposite view, and hold that "an omission to object to testimony is not a concession that it is competent," and that, if testimony is incompetent, the party against whom it is received is entitled to an instruction that it should not be considered,⁶³ and that a refusal to give an instruction of this nature is reversible error.⁶⁴ So, it has been held that where incompetent evidence has been admitted either with or without objection, it is not necessarily to be stricken out on motion, but the remedy of the party is to ask for instructions to the jury to disregard it.⁶⁵

It has also been held that where a certain defense is fairly covered by the answer, although so indefinite that greater certainty might have been required, when the evidence to establish such defense has been admitted without objection, it is not proper to direct the jury to disregard such evidence.⁶⁶ In one state it has been held in criminal cases that if incompetent evidence goes to the jury without objection at the time by defendant, a request that the court instruct the jury that such evidence be disregarded should be granted.⁶⁷ If evidence to which no objection is appar-

Missouri. *Maxwell v. Hannibal & St. J. R. Co.*, 85 Mo. 106.

Mississippi. *Edge v. Keith*, 13 Smedes & M. 295.

Texas. *Missouri Pac. R. Co. v. Mitchell*, 75 Tex. 77; *Ann Berta Lodge v. Leverton*, 42 Tex. 18; *Stark v. Coe* (Tex. Civ. App.) 134 S. W. 373.

Objection cannot regularly or properly be raised in this manner, nor at this stage of the proceedings. *State v. Pratt*, 20 Iowa 269.

It would be unjust for the court to thus exclude evidence at a stage of the trial when it is too late for the party to adduce other evidence which might warrant its admission. *Ann Berta Lodge v. Leverton*, 42 Tex. 18.

If the party had an opportunity to interpose an objection, he cannot take the chances that the testimony will be favorable to him, and, when it turns out otherwise, raise his objection. *Maxwell v. Hannibal & St. J. Ry. Co.*, 85 Mo. 106.

63—*Hamilton v. New York Cent. R. Co.*, 51 N. Y. 101.

64—*Sperry v. Helman*, 20 N. Y. Civ. Proc. 226; *Bank of United States v. Johnson*, 3 Cranch, C. C. 228, Fed. Cas. No. 919.

65—*Marks v. King*, 64 N. Y. 628.

66—*Liverpool & L. Ins. Co. v. Gunther*, 116 U. S. 114, 29 L. Ed. 576.

67—*State v. Owens*, 79 Mo. 619; *State v. Cox*, 65 Mo. 29.

ent at the time of its admission is subsequently shown to be incompetent, the rule that an objection must be taken at the time does not apply.⁶⁸

§ 420. Sufficiency of instructions withdrawing evidence.

Error in the admission of improper evidence is not usually cured by the giving of an instruction impliedly withdrawing such evidence,⁶⁹ but the better practice is to withdraw such evidence in express terms.⁷⁰ In another section it was noted that some courts hold, without qualification, that an instruction withdrawing, or attempting to withdraw, evidence erroneously admitted, does not cure the error in admitting it, on the ground that the impression created in the minds of the jury by the admission of the improper evidence is not easily removed or obliterated, and the court can never be sure as to whether the jury have been entirely successful in shutting out from their mental vision the objectionable testimony.⁷¹ The same reasoning applies to the sufficiency of instructions withdrawing such evidence. It is apparent that an express direction is necessary. And it was well said in one decision: "It is difficult to tell what effect evidence once admitted may have upon the triors of fact; but the impression made by hearing what the court has declared to be competent testimony can hardly be removed by anything short of a flat direction that it must be disregarded."⁷²

If evidence is improperly admitted, but afterwards with-

68—State v. Lavin, 80 Iowa 559.

69—Pavey v. Birch, 3 Mo. 314.

70—Georgia. Pelham Mfg. Co. v. Powell, 6 Ga. App. 308.

Michigan. Scripps v. Reilly, 35 Mich. 393.

Missouri. Durant v. Lexington Coal Min. Co., 97 Mo. 62; Griffith v. Hanks, 91 Mo. 109; Pavey v. Burch, 3 Mo. 314.

New York. Galino v. Fleischmann Realty & Construction Co., 130 App. Div. (N. Y.) 605.

Ohio. Henkle v. McClure, 32 Ohio 202.

Pennsylvania. Keil v. Chartiers Valley Gas Co., 131 Pa. St. 466, 17 Am. St. Rep. 823.

Wisconsin. Castleman v. Griffin, 13 Wis. 602. See also, Wright v. Gillespie, 43 Mo. App. 244.

71—See § 417, *ante*.

72—Henkle v. McClure, 32 Ohio St. 202.

drawn by express direction, it is held that this will be sufficient without again directing the jury not to consider it in the general charge.⁷³ So, if, after the admission of illegal testimony, the judge, of his own motion, excludes it and informs the jury that the testimony has nothing to do with the case, the failure to again inform the jury that it was excluded on a subsequent motion made to strike out the testimony is immaterial.⁷⁴ It has also been held that where "evidence properly to be considered under the prayer for exemplary damages was introduced without objection, and afterwards the court charged the jury, excluding from their consideration the question of exemplary damages, the failure of the court, of its own accord, to instruct the jury not to consider the evidence thus admitted, is not ground for reversal."⁷⁵

§ 421. Instructions requiring jury to disregard evidence offered or excluded.

Excluded evidence will not usually be considered by a jury in deciding as to the verdict, and accordingly it has been held proper to refuse instructions requiring a disregard of such excluded evidence.⁷⁶ However, some decisions hold that the court may properly warn the jury against the consideration of such evidence;⁷⁷ but it is certainly under no obligation to do so, especially where no instruction on the subject is requested.⁷⁸ If the court excludes evidence at the time it is offered on objection raised, and the party objecting is apprehensive that the offered testimony may have affected the jury, he should request the court to instruct the jury to disregard such testimony, and, failing to so request, cannot assign as error the failure of the court to give the instruction.⁷⁹

73—*Brown v. Matthews*, 79 Ga. 1; *Rapids & I. R. Co. v. Horn*, 41 Ind. 479.
74—*Rollins v. O'Farrel*, 77 Tex. 90.

75—*Brown v. Bacon*, 63 Tex. 595.
76—*Pfaffenback v. Lake Shore & M. S. Ry. Co.*, 142 Ind. 246; *Grand*

77—*McCoy v. Bateman*, 8 Nev. 126.
78—*Russell v. Nall*, 79 Tex. 664.
79—*Russell v. Nall*, 79 Tex. 664.

CHAPTER XXXIV.

EXCEPTIONS AND OBJECTIONS TO INSTRUCTIONS AND REVIEW ON APPEAL.

- § 422. Necessity of objections to instructions in trial court.
- § 423. Necessity of exceptions to giving or refusal of instructions.
- § 424. Sufficiency of exceptions.
- § 425. Necessity that exceptions be specific.
- § 426. Necessity that exceptions be taken separately to instructions or parts of instructions.
- § 427. Time of taking exceptions.
- § 428. Necessity of bill of exceptions.
- § 429. Sufficiency of record on appeal in general.
- § 430. Preserving instructions in record.
- § 431. Preserving evidence in record.
- § 432. Presumption against error on appeal.
- § 433. Presumption of prejudice on appeal.
- § 434. Invited error.
- § 435. Instructions given or refused on party's own motion.
- § 436. Instructions given by consent.
- § 437. Harmless and prejudicial error.
- § 438. Error harmless in view of evidence.
- § 439. Error in appellant's favor.

§ 422. Necessity of objections to instructions in trial court.

In order to be available for review, error in the giving or refusal of instructions should be called to the attention of the trial judge in such court, when the error is committed. It is a well settled rule that errors predicated upon instructions cannot be considered when raised for the first time on appeal.¹ The reasons advanced in favor of this

1—Arkansas. Burgess v. State, 773; Dawson v. Coston, 18 Colo. 493, 33 Pac. 189; Denver & R. G. 108 Ark. 508; Clardy v. State, 96 Ark. 52. R. Co. v. Ryan, 17 Colo. 98, 28 Pac. 79; Wray v. Carpenter, 16 Colo. Pac. R. Co., 110 Cal. 457, 42 Pac. 974. 271, 25 Am. St. Rep. 265, 27 Pac. Colorado. Portland Gold Min. Co. 248; McFeters v. Pierson, 15 Colo. v. O'Hara, 45 Colo. 416, 101 Pac. 201, 22 Am. St. Rep. 388, 24 Pac.

rule are that the trial court must be given an opportunity to correct its own errors, frequently the result of inadver-

1076; *Brewster v. Crossland*, 2 Colo. App. 446, 31 Pac. 236.

Florida. *Jones v. Greeley*, 25 Fla. 629.

Georgia. *Chattahoochee Brick Co. v. Sullivan*, 86 Ga. 50; *Ricks v. State*, 16 Ga. 600; *Ellenberg v. Southern R. Co.*, 7 Ga. App. 388.

Illinois. *McDaneld v. Logi*, 143 Ill. 487; *Peck v. Boggess*, 1 Scam. 281; *People v. Klimek*, 184 Ill. App. 59; *Napierkowski v. Chicago Title & Trust Co.*, 181 Ill. App. 308; *Ricks Sheep Co. v. Oregon Short Line R. Co.*, 180 Ill. App. 220; *Hartwig v. Knapwurst*, 178 Ill. App. 409; *Atchison, T. & S. F. R. Co. v. Feehan*, 47 Ill. App. 66; *Lake Erie & W. R. Co. v. Rosenberg*, 31 Ill. App. 47.

Indiana. *Hindman v. Troxell*, 15 Ind. 123; *State v. Manly*, 15 Ind. 8; *Ridge v. Sunman*, 14 Ind. 540; *Fleming v. Potter*, 14 Ind. 486; *Little v. Norris*, 14 Ind. 375; *Daily v. Nuttman*, 14 Ind. 339; *Lomax v. Strange*, 14 Ind. 21; *Carpenter v. O'Neal*, 14 Ind. 19; *Boxley v. Carney*, 14 Ind. 17; *Baxter v. Baxter*, 46 Ind. App. 514.

Iowa. *State v. Callahan*, 96 Iowa 304; *Peet v. Chicago, M. & St. P. Ry. Co.*, 88 Iowa 520; *Bellows v. Litchfield*, 83 Iowa 36; *Norris v. Kipp*, 74 Iowa 444; *Seekel v. Norman*, 71 Iowa 264; *Kirk v. Litterst*, 71 Iowa 71.

Kansas. *Colwell v. Parker*, 81 Kan. 295, 105 Pac. 524; *Kansas Farmers' Fire Ins. Co. v. Hawley*, 46 Kan. 746, 27 Pac. 176; *State v. Probasco*, 46 Kan. 310, 26 Pac. 749; *Connor v. Wilkie*, 1 Kan. App. 492, 41 Pac. 71.

Kentucky. *Jeffries v. Com.*, 9 Ky.

L. Rep. 875; *Lanham v. Com.*, 3 Bush 528.

Louisiana. *State v. Sheard*, 35 La. Ann. 543; *Stewart v. Harper*, 16 La. Ann. 181.

Maine. *Pope v. Machias Water Power & Mill Co.*, 52 Me. 535.

Maryland. *Franklin v. Clafin*, 49 Md. 24; *Newman v. McComas*, 43 Md. 70; *Worthington v. Tormey*, 34 Md. 182.

Massachusetts. *Burr v. Joy*, 151 Mass. 295; *Rawson v. Plaisted*, 151 Mass. 71.

Michigan. *Middlebrook v. Slocum*, 152 Mich. 286; *People v. Caldwell*, 107 Mich. 374; *People v. Rahe*, 92 Mich. 165, 31 Am. St. Rep. 575; *Fraser v. Haggerty*, 86 Mich. 521.

Minnesota. *Minneapolis, St. P., R. & D. Elec. Traction Co. v. Enggren*, 111 Minn. 373; *Stoakes v. Larson*, 108 Minn. 234; *Lawrence v. Bucklen*, 45 Minn. 195; *Shatto v. Abernethy*, 35 Minn. 538; *State v. Brin*, 30 Minn. 522; *Evans v. St. Paul & S. C. R. Co.*, 30 Minn. 489.

Mississippi. *Middleton v. State*, 97 Miss. 278.

Missouri. *Green v. Terminal R. Ass'n of St. Louis*, 211 Mo. 18; *State v. Bayne*, 88 Mo. 604; *Carlisle v. Keokuk Northern Line Packet Co.*, 82 Mo. 40; *Lohart v. Buchanan*, 50 Mo. 201; *Walsh v. Allen*, 50 Mo. 181; *Welch v. Kansas City Midland Coal & Mining Co.*, 151 Mo. App. 438; *Connelly v. Shamrock Benev. Society*, 43 Mo. App. 283; *Ritzenger v. Hart*, 43 Mo. App. 183; *Lafayette Mut. Bldg. Ass'n v. Kleinhoffer*, 40 Mo. App. 388; *Wheeler v. Metropolitan Mfg. Co.*, 23 Mo. App. 190; *Naughton v. Stag*, 4 Mo. App. 271.

tence, and that in this manner the delay and expense of an appeal can be avoided;² and that parties should be prevented from speculating on the chance or opportunity of securing a favorable verdict in spite of error, when the verdict and judgment are subject to reversal if unfavorable.³

The general rule thus stated has been illustrated in a vast number of cases. Thus, a defect in the form of an instruction, in that its language might have been couched in plainer terms, should be met by a specific objection,⁴ and

Montana. *Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70; *Yergy v. Helena Light & Railway Co.*, 39 Mont. 213, 18 Ann. Cas. 1201, 102 Pac. 310; *Gum v. Murray*, 6 Mont. 10, 9 Pac. 447.

Nebraska. *Downing v. Glenn*, 26 Neb. 323; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb. 475; *Schreckengast v. Ealy*, 16 Neb. 510.

New Jersey. *Murphy v. Borough of Atlantic Highlands*, 77 N. J. L. 452.

New Mexico. *Territory v. O'Donnell*, 4 N. M. 196, 12 Pac. 743.

New York. *Broyer v. Ritter*, 13 N. Y. Supp. 574.

North Carolina. *McFarland v. Southern Improvement Co.*, 107 N. C. 368; *Lytle v. Lytle*, 94 N. C. 522; *Ray v. Lipscomb*, 48 N. C. 185.

Oklahoma. *Finch v. Brown*, 27 Okla. 217, 111 Pac. 391; *Carter v. Missouri Mining & Lumber Co.*, 6 Okla. 11, 41 Pac. 356.

Pennsylvania. *Guemple v. Philadelphia Rapid Transit Co.*, 224 Pa. 327.

South Carolina. *Fleming v. Fleming*, 33 S. C. 505, 26 Am. St. Rep. 694.

Tennessee. *National Hosiery & Yarn Co. v. Napper*, 124 Tenn. 155;

Knoxville Iron Co. v. Dobson, 15 Lea 409; *Knoxville v. Bell*, 12 Lea 157; *East Tennessee, V. & G. R. Co. v. Toppins*, 10 Lea 63; *Malone v. Seairight*, 8 Lea 95; *Hayes v. Cheatham*, 6 Lea 9; *Hatton v. Stewart*, 2 Lea 236.

Texas. *Hollingsworth v. Hols-housen*, 17 Tex. 41; *Thatcher v. Mills*, 14 Tex. 13, 65 Am. Dec. 95; *Leeper v. State*, 29 Tex. App. 63; *Hill v. State*, 22 Tex. App. 579; *Cook v. State*, 22 Tex. App. 511; *Haynes v. State*, 2 Tex. App. 84; *Houston & T. C. R. Co. v. Lemair*, 55 Tex. Civ. App. 237; *Yoakum v. Mettasch* (Tex. Civ. App.) 26 S. W. 129; *Hinman v. State*, 59 Tex. Cr. App. 29; *Eckermann v. State*, 57 Tex. Cr. App. 287.

Washington. *Kenway v. Hoffman*, 51 Wash. 105, 98 Pac. 98.

Wisconsin. *Tomlinson v. Wallace*, 16 Wis. 224; *Bogert v. Phelps*, 14 Wis. 88; *Graves v. State*, 12 Wis. 591.

See also, cases cited in previous note.

2—*State v. Fenlason*, 78 Me. 495.

3—*State v. Beaird*, 34 La. Ann. 104.

4—*Dierks Lumber & Coal Co. v. Coffman*, 96 Ark. 505.

In an action for the death of an

objections to instructions as being misleading,⁵ ambiguous,⁶ contradictory,⁷ or too general⁸ cannot be considered when raised for the first time on appeal. And error in failing to define terms used in instructions will be deemed waived or abandoned if not called to the attention of the trial court.⁹ The rule also applies when it is contended that the instructions state the law erroneously,¹⁰ or inadequately;¹¹ or that the instructions are not warranted by the issues in the case,¹² or state the issues erroneously;¹³ or when it is contended that issues of law are submitted,¹⁴ that the province of the jury is invaded,¹⁵ that the evidence does not warrant an instruction,¹⁶ or that facts are assumed to be uncontroverted which are in fact controverted.¹⁷ So, error in the

employee who was killed by a switch engine, an instruction which was faulty in that negligence and contributory negligence was not defined could not be objected to on appeal when not excepted to on motion for a new trial. *Torkelson v. Minneapolis & St. L. R. Co.*, 117 Minn. 73.

5—*Pellum v. State*, 89 Ala. 28.

6—*People v. Olsen*, 80 Cal. 122, 22 Pac. 125; *Holm v. Sandberg*, 32 Minn. 427; *Box v. Kelso*, 5 Wash. 360, 31 Pac. 973.

7—*Williams v. Southern Pac. R. Co.*, 110 Cal. 457, 42 Pac. 974; *Sierra Union Water & Mining Co. v. Baker*, 70 Cal. 572, 8 Pac. 305, 11 Pac. 654.

8—*Hutchinson v. Dearing*, 20 Ala. 798; *People v. Olsen*, 80 Cal. 122, 22 Pac. 125; *Rogers v. Wallace*, 10 Ore. 387.

9—*People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *Johnson v. Missouri Pac. Ry. Co.*, 96 Mo. 340, 9 Am. St. Rep. 351; *Texas & P. Ry. Co. v. O'Donnell*, 58 Tex. 27; *Cogswell v. West Street & N. E. Elec. Ry. Co.*, 5 Wash. 46, 31 Pac. 411.

10—*Bourke v. Van Keuren*, 20 Colo. 95, 36 Pac. 882; *Bergh v. Sloan*, 53 Minn. 116; *Williamson v. State*, 30 Tex. App. 330.

11—*Goldhammer v. Dyer*, 7 Colo. App. 29, 42 Pac. 177; *Davis v. Roosevelt*, 53 Tex. 305; *Box v. Kelso*, 5 Wash. 360, 31 Pac. 973; *Chesapeake Transit Co. v. Mott*, 95 C. C. A. 41, 169 Fed. 543.

12—*Shaw v. New York & N. E. R. Co.*, 150 Mass. 182.

Contra. Where an instruction submits an issue not raised by the pleadings, the error is fundamental and can be urged on appeal without objection having been raised in the trial court. *Cooper & Jones v. Hall*, — Tex. Civ. App. —, 168 S. W. 465.

13—*Milmo v. Adams*, 79 Tex. 526.

14—*Stansbury v. Fogle*, 37 Md. 369.

15—*Atchison, T. & S. F. R. Co. v. Worley* (Tex. Civ. App.), 25 S. W. 478.

16—*Newman v. McComas*, 43 Md. 70.

17—*State v. Fenlason*, 78 Me. 495.

statement of the evidence cannot be raised for the first time on appeal.¹⁸

An objection that the writing of two instructions on the same sheet is error,¹⁹ that the court failed to number and sign the instructions,²⁰ that written communications were sent to the jury room,²¹ that a written instruction was orally modified,²² or that the word "given" was not written on the margin of instructions given to the jury,²³ should be called to the attention of the court below, to be available on appeal.

In this connection a distinction must be observed between the giving of erroneous instructions and the failure to give correct and adequate instructions. In the former case the objection is sufficiently called to the attention of the trial court by a single objection and exception, and it is not necessary to request and submit a correct instruction to be given in place of the erroneous one.²⁴ But in the case of a mere failure to give correct instructions covering the case, the error is not available on appeal, in the absence of a request by the appellant for a proper instruction.²⁵ Thus

18—*Rumph v. Hiott*, 35 S. C. 444; *State v. Davis*, 27 S. C. 609; *Muetze v. Tuteur*, 77 Wis. 236, 20 Am. St. Rep. 115, 9 L. R. A. 86.

19—*Davenport v. Cummings*, 15 Iowa 219.

20—*Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348.

21—*Thorp v. Riley*, 57 N. Y. Super. Ct. 589; *Boss v. Northern Pac. R. Co.*, 2 N. D. 128, 33 Am. St. Rep. 756n.

22—*Louisville & N. R. Co. v. Hall*, 91 Ala. 112, 24 Am. St. Rep. 863. See also, *Baxter v. Baxter*, 46 Ind. App. 514.

23—*Knight v. Chicago, R. I. & P. Ry. Co.*, 81 Iowa 310.

24—*Allis v. Leonard*, 58 N. Y. 288.

25—*Mead v. State*, 53 N. J. L. 601. For a full discussion and collection

of authorities on the necessity of requesting instructions, see ch. XV, *ante*, "Requests for Instructions."

Excepting to instructions given will not raise the objection that they do not fully state the law on all the issues. Additional instructions covering the omitted points should be asked. *Adams v. Stringer*, 78 Ind. 175; *Jones v. Hathaway*, 77 Ind. 14; *Davis v. Roosevelt*, 53 Tex. 305.

If a party desires more definite and comprehensive instructions upon a point, it is his duty to prepare and submit instructions, which meet his desires, to the trial court. *Eichel v. Senhenn*, 2 Ind. App. 208.

A general exception that all the issues are not covered by a charge that a certain issue is the only issue in the case is insufficient, in the ab-

a mere exception to the charge as given is insufficient to call the attention of the trial court to its failure to define the meaning of terms used therein.²⁶ So a general exception to the whole charge raises no question as to the omission of a proper instruction, or the want of modification of one given,²⁷ or as to the sufficiency or explicitness of those given. The necessary supplementary instructions must be asked.²⁸

As has been seen elsewhere, either party has a right, upon request, to a charge upon any material point in the case; but in the absence of any request the points to be covered by the charge are discretionary with the court, and in the absence of a request a mere failure to charge upon any point is not error.²⁹ A request to charge must specifically call to the attention of the court the point sought to be made, in order to make its refusal available on appeal.³⁰

sence of any request for further instructions. *Newton v. Whitney*, 77 Wis. 515.

26—*Texas & P. Ry. Co. v. O'Donnell*, 58 Tex. 27. In *People v. Flynn*, 73 Cal. 511, 15 Pac. 102, the failure to define the term "reasonable doubt," and in *Johnson v. Missouri Pac. Ry. Co.*, 96 Mo. 340, 9 Am. St. Rep. 351, the failure to define the meaning of "reasonable care and diligence," was held not to be error, in the absence of a request for a definition.

27—*Wrighton v. Butler*, — Tex. Civ. App. —, 128 S. W. 472; *Kellogg v. Chicago & N. W. Ry. Co.*, 26 Wis. 223.

"Where a charge to the jury is susceptible of two constructions,—the one warranted by the case, the other erroneous,—a party cannot take advantage of his exception, without presenting the modification necessary to free the charge from ambiguity." *Springstead v. Law-*

son, 14 Abb. Pr. (N. Y.) 328, 23 How. Pr. (N. Y.) 302.

28—*Adams v. Stringer*, 78 Ind. 175; *Jones v. Hathaway*, 77 Ind. 14.

"The appellate court will not reverse on account of a charge which asserts a correct legal proposition, although it may be objectionable from its generality. It is the duty of the party, in such case, to ask more specific and definite instructions." *Hutchinson v. Dearing*, 20 Ala. 798.

A defendant cannot complain that an instruction was not sufficiently certain and specific, when the attention of the court below was called to it, and no more specific instruction was requested. *People v. Olsen*, 80 Cal. 122, 22 Pac. 125.

29—*Mead v. State*, 53 N. J. L. 601. And see ch. XV, *ante*, "Requests for Instructions."

30—*McDonald v. Johnson*, 46 N. Y. St. Rep. 838. See also, *Staser v. Hogan*, 120 Ind. 225.

§ 423. Necessity of exceptions to giving or refusal of instructions.

On the trial of a case, when an error is committed, the usual practice is to call the attention of the court to the error by interposing a proper objection, and if the court fails to correct such error, an exception should be noted. This rule applies to error in the giving or refusing of instructions. And it is almost universally held that such exception must be saved, in order to authorize a review of the action of the trial court either when an erroneous instruction is given³¹ or when an instruction offered by one

31—**Alabama.** Mobile Electric Co. v. Sanges, 169 Ala. 341, Ann. Cas. 1912 B 461n.

Arkansas. American Ins. Co. v. Haynie, 91 Ark. 43; Frauenthal v. Bridgeman, 50 Ark. 348.

California. Williams v. Southern Pac. R. Co., 110 Cal. 457, 42 Pac. 974; Merguire v. O'Donnell, 103 Cal. 50, 36 Pac. 1033; Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846; Carpenter v. Ewing, 76 Cal. 487, 18 Pac. 432; Sierra Union Water & Mining Co. v. Baker, 70 Cal. 572, 8 Pac. 305, 11 Pac. 654; Clark v. His Creditors, 57 Cal. 639; Chester v. Bower, 55 Cal. 46; Russell v. Dennison, 45 Cal. 337; Lightner v. Menzel, 35 Cal. 452; Holverstot v. Bugby, 13 Cal. 43.

Colorado. Moffatt v. Tenney, 17 Colo. 189, 30 Pac. 348; Wray v. Carpenter, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248; Gilpin v. Gilpin, 12 Colo. 504, 21 Pac. 612; Price v. Buchanan, 12 Colo. 366, 21 Pac. 144; Gibbs v. Wall, 10 Colo. 153, 14 Pac. 216; Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323, 29 Pac. 21.

Florida. McSwain v. Howell, 29 Fla. 248; Phillips v. State, 28 Fla. 77; White v. State, 26 Fla. 602; Jacksonville, T. & K. W. Ry. Co. v.

Hunter, 26 Fla. 308; Jones v. Greeley, 25 Fla. 629; Emerson v. Ross' Ex'x, 17 Fla. 122.

Georgia. Nashville, C. & St. L. Ry. Co. v. Peavler, 134 Ga. 618.

Idaho. State v. Harris, 18 Idaho 620, 111 Pac. 406.

Illinois. West Chicago St. R. Co. v. Martin, 154 Ill. 523; Willard v. Pettitt, 153 Ill. 663; East St. Louis Elec. Ry. Co. v. Stout, 150 Ill. 9; England v. Vandermark, 147 Ill. 76; Indianapolis, B. & W. Ry. Co. v. Rhodes, 76 Ill. 285; Emory v. Addis, 71 Ill. 273; Toledo, P. & W. Ry. Co. v. Miller, 55 Ill. 448; McClurkin v. Ewing, 42 Ill. 283; Gulliver v. Adams Exp. Co., 38 Ill. 503; Sedgwick v. Phillips, 22 Ill. 183; Buckmaster v. Cool, 12 Ill. 74; Phillips v. Abbott, 52 Ill. App. 328.

Indiana. Lowell v. Gathright, 97 Ind. 313; Coffeen v. McCord, 83 Ind. 593; Indianapolis & M. Rapid Transit Co. v. Walsh, 45 Ind. App. 42; City of Evansville v. Thacker, 2 Ind. App. 370.

Iowa. Jamison & Smyth v. Ranck, 150 Iowa 5; State v. Finley, 147 Iowa 563; Leach v. Hill, 97 Iowa 81; Dean v. Zenor, 96 Iowa 752; State v. Black, 89 Iowa 737; Stan-

of the parties and requested to be given is erroneously

hope v. Swafford, 80 Iowa 45; Lewis v. Lewis, 75 Iowa 669; Duncombe v. Powers, 75 Iowa 185; Gray v. Chicago, M. & St. P. Ry. Co., 75 Iowa 100; Norris v. Kipp, 74 Iowa 444; Paddleford v. Cook, 74 Iowa 433; Arneson v. Thorstad, 72 Iowa 145; Kirk v. Litterst, 71 Iowa 71; Wilcox v. McCune, 21 Iowa 294; May v. Wilson, 21 Iowa 79; Morse v. Close, 11 Iowa 93.

Kansas. Werner v. Jewett, 54 Kan. 530, 38 Pac. 793; Russell v. Bradley, 47 Kan. 438, 28 Pac. 176; Kansas Farmers' Fire Ins. Co. v. Hawley, 46 Kan. 746, 27 Pac. 176.

Kentucky. Jackson v. Com., 12 Ky. L. Rep. 575.

Maine. Sanford v. Kimball, 106 Me. 355, 138 Am. St. Rep. 345; Dugan v. Thomas, 79 Me. 221.

Maryland. Norfolk & W. R. Co. v. Hoover, 79 Md. 253, 47 Am. St. Rep. 392.

Massachusetts. Monjeau v. Metropolitan Life Ins. Co., 208 Mass. 1, 28 L. R. A. (N. S.) 200n; McCart v. Squire, 150 Mass. 484.

Michigan. McKinnon v. Atkins, 60 Mich. 418.

Minnesota. Matteson v. United States & Canada Land Co., 112 Minn. 190; Stoakes v. Larson, 108 Minn. 234; Anderson v. St. Croix Lumber Co., 47 Minn. 24; Smith v. Bean, 46 Minn. 138; Lawrence v. Bucklen, 45 Minn. 195; State v. Hair, 37 Minn. 351; Mackey v. Fisher, 36 Minn. 348; Spencer v. St. Paul & S. C. R. Co., 22 Minn. 29.

Mississippi. Georgia Pac. Ry. Co. v. West, 66 Miss. 310; Smokey v. Johnson (Miss.), 4 So. 788; Bourland v. Board Sup'rs Itawamba Co.,

60 Miss. 1001; Fisher v. Fisher, 43 Miss. 212.

Missouri. State v. Hilsabeck, 132 Mo. 348; State v. Pollard, 132 Mo. 288; State v. Paxton, 126 Mo. 500; State v. Keinade, 121 Mo. 405; State v. Cantlin, 118 Mo. 100; State v. Patrick, 107 Mo. 147; Haniford v. City of Kansas, 103 Mo. 172; State v. Griffin, 98 Mo. 672; Union Loan, Storage & Mercantile Co. v. Farbstain, 148 Mo. App. 216; Shannon v. Hannibal & St. J. Ry. Co., 54 Mo. App. 223; Lefkow v. Allred, 54 Mo. App. 141; McDonald v. Cobb, 44 Mo. App. 167; Wright v. Gillespie, 43 Mo. App. 244; Ritzenger v. Hart, 43 Mo. App. 183; Morgan v. Rice, 35 Mo. App. 591.

Montana. Yergy v. Helena Light & Railway Co., 39 Mont. 213, 18 Ann. Cas. 1201, 102 Pac. 310; Territory v. Hart, 7 Mont. 489, 17 Pac. 718; Woods v. Berry, 7 Mont. 195, 14 Pac. 758; Kelley v. Cable Co., 7 Mont. 70, 14 Pac. 633; McKinney v. Powers, 2 Mont. 466; Davis v. Germaine, 1 Mont. 210.

Nebraska. Walters v. Village of Exeter, 87 Neb. 125; City of Kearney v. Smith, 47 Neb. 408; Herzog v. Campbell, 47 Neb. 370; Romberg v. Hediger, 47 Neb. 201; American Building & Loan Ass'n v. Mordock, 39 Neb. 413; Richardson & Boynton Co. v. Winter, 38 Neb. 288.

Nevada. Lobdell v. Hall, 3 Nev. 507.

New Jersey. Packard v. Bergen Neck Ry. Co., 54 N. J. L. 553.

New Mexico. Territory v. O'Donnell, 4 N. M. (Gild.) 196, 12 Pac. 743.

New York. Wheeler v. Sweet, 137 N. Y. 435; People v. Buddensieck, 103 N. Y. 487, 57 Am. Rep. 766.

refused.³² Thus it has been held that a failure to except

North Carolina. *Riley & Co. v. W. T. Sears & Co.*, 151 N. C. 187; *Chemical Co. of Canton v. Johnson*, 101 N. C. 223; *Ware v. Nesbit*, 94 N. C. 664; *White v. Clark*, 82 N. C. 6.

North Dakota. *Paulsen v. Modern Woodmen of America*, 21 N. D. 235.

Ohio. *Everett v. Sumner*, 32 Ohio St. 562; *Berry v. State*, 31 Ohio St. 219, 27 Am. Rep. 506; *Adams v. State*, 25 Ohio St. 584; *Kline v. Wynne*, 10 Ohio 223.

Oklahoma. *Gann v. Ball*, 26 Okla. 26, 110 Pac. 1067; *Berry v. Smith*, 2 Okla. 345, 35 Pac. 576.

Oregon. *E. H. Moorehouse & Co. v. Weister Co.*, 56 Ore. 126, 108 Pac. 121, 107 Pac. 470, 95 Pac. 497; *Kearney v. Snodgrass*, 12 Ore. 311, 7 Pac. 309.

South Carolina. *McPherson v. McPherson*, 21 S. C. 267; *Sullivan v. Sullivan*, 20 S. C. 511.

South Dakota. *Lawver v. Globe Mut. Ins. Co.*, 25 S. D. 549.

Texas. *Hilcher v. State*, 60 Tex. Cr. App. 180; *Tear v. State*, 60 Tex. Cr. App. 155. (Applying rule to misdemeanor cases.)

Washington. *Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185; *State v. Williams*, 13 Wash. 335, 43 Pac. 15; *Seattle & M. Ry. Co. v. Gilchrist*, 4 Wash. St. 509, 30 Pac. 738; *Johnson v. Tacoma Cedar Lumber Co.*, 3 Wash. St. 722, 29 Pac. 451; *Cunningham v. Seattle Elec. Railway & Power Co.*, 3 Wash. St. 471, 28 Pac. 745; *Smith v. United States*, 1 Wash. T. 262; *Brown v. Forest*, 1 Wash. T. 201.

Wisconsin. *Pfister v. Milwaukee Free Press Co.*, 139 Wis. 627; *Hawley v. Harran*, 79 Wis. 379; *Mane-*

gold v. Grange, 70 Wis. 575; *Tomlinson v. Wallace*, 16 Wis. 224; *Bogert v. Phelps*, 14 Wis. 88.

United States. *Herencia v. Gutzman*, 219 U. S. 44, 55 L. Ed. 81; *Tucker v. United States*, 151 U. S. 164, 38 L. Ed. 112; *Hedden v. Iselin*, 142 U. S. 676, 35 L. Ed. 1155; *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 32 L. Ed. 979; *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 32 L. Ed. 439; *Hanna v. Maas*, 122 U. S. 24, 30 L. Ed. 1117; *Little Rock Granite Co. v. Dallas County*, 13 C. C. A. 620, 66 Fed. 522; *Cohen v. West Chicago St. Ry. Co.*, 9 C. C. A. 223, 60 Fed. 698; *Sutherland v. Round*, 6 C. C. A. 428, 57 Fed. 467; *Colorado Cent. Consol. Min. Co. v. Turek*, 4 C. C. A. 313, 54 Fed. 262.

32—**California.** *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; *Leahy v. Southern Pac. R. Co.*, 65 Cal. 150, 3 Pac. 622.

Illinois. *East St. Louis Elec. Ry. Co. v. Stout*, 150 Ill. 9; *Burns v. People*, 126 Ill. 282; *Krug v. Ward*, 77 Ill. 603; *McPherson v. Hall*, 44 Ill. 264; *Burkett v. Bond*, 12 Ill. 87; *Phillips v. Abbott*, 52 Ill. App. 328.

Indiana. *Horner v. Hoadley*, 97 Ind. 600; *Stewart v. Murray*, 92 Ind. 543, 47 Am. Rep. 167.

Iowa. *State v. Brewer*, 70 Iowa 384.

Kansas. *Keeling v. Kuhn*, 19 Kan. 441.

Massachusetts. *Bonino v. Caledonio*, 144 Mass. 299.

Minnesota. *Beardmore v. Barton*, 108 Minn. 28.

Montana. *Yergy v. Helena Light*

to an omission to number instructions waives the error,³³ and an omission to mark instructions "given" or "refused," as required by statute, is not subject to review unless an exception is noted.³⁴ The failure of the judge to sign the instructions, as required by the statute, cannot be taken advantage of on appeal in the absence of exceptions,³⁵ and the same rule applies where a requested instruction is erroneously modified.³⁶

Properly speaking, the rule that an exception must be saved at the time when the error complained of is committed is more immediately for the protection of the trial court. Accordingly when the trial judge follows a custom that counsel are assumed to have excepted to the ruling of the court in the giving and refusing of instructions, such action will not be interfered with on appeal, the matter being within the discretionary power of the court.³⁷

The necessity of submitting requested instructions to counsel before they are given to the jury has been referred to in a prior chapter.³⁸ Under such a statute, requiring

& Railway Co., 39 Mont. 213, 18 Ann. Cas. 1201, 102 Pac. 310.

Nebraska. City of Kearney v. Smith, 47 Neb. 408; City of Omaha v. McGavock, 47 Neb. 313.

Ohio. Interurban Railway & Terminal Co. v. Broadus, 82 Ohio St. 396.

South Dakota. Lyons v. Chicago, M. & St. P. R. Co., 26 S. D. 333, Ann. Cas. 1913 B 285n.

Texas. Shaw v. State (Tex. Cr. App.), 33 S. W. 1083; Ward v. State (Tex. Cr. App.) 29 S. W. 274.

Wisconsin. Monaghan v. Northwestern Fuel Co., 140 Wis. 457; Thrasher v. Postel, 79 Wis. 503.

United States. Little Rock Granite Co. v. Dallas County, 13 C. C. A. 620, 66 Fed. 522.

33—Moffatt v. Tenney, 17 Colo. 189, 30 Pac. 348; Gibbs v. Wall, 10

Colo. 153, 14 Pac. 216; Jolly v. State, 43 Neb. 857; Cunningham v. Seattle Elec. Railway & Power Co., 3 Wash. St. 471, 28 Pac. 745.

34—Barnewall v. Murrell, 108 Ala. 366; Holley v. State, 75 Ala. 14; Tyree v. Parham's Ex'r, 66 Ala. 424; Knight v. Chicago, R. I. & P. Ry. Co., 81 Iowa 310; Fish v. Chicago, R. I. & P. Ry. Co., 81 Iowa 280; City of Chadron v. Glover, 43 Neb. 732.

35—Tyree v. Parham's Ex'r, 66 Ala. 424; Jones v. Greeley, 25 Fla. 629; Southern Exp. Co. v. VanMeter, 17 Fla. 783, 35 Am. Rep. 107.

36—Tracey v. State, 46 Neb. 361. 37—Union Loan, Storage & Mercantile Co. v. Farbstain, 148 Mo. App. 216.

38—See ch. XV, § 177, *ante*.

instructions to be settled before they are read to the jury, counsel must have an opportunity to reserve exceptions to any instructions which they deem to be injurious to the rights of their client.³⁹ And when the trial court refuses to submit instructions in a case to the attorneys for their inspection before the instructions are read to the jury, a defendant will be entitled to such objections and exceptions as he might have had if the instructions had been previously submitted to his counsel.⁴⁰ In some states statutory provisions exist rendering exceptions unnecessary,⁴¹ and in some

39—*Fowler v. State*, 8 Okla. Cr. App. 130, 126 Pac. 831.

40—*Fowler v. State*, 8 Okla. Cr. App. 130, 126 Pac. 831.

41—**Alabama.** Exceptions are unnecessary to the giving or refusal of instructions. *Choate v. Alabama Great Southern R. Co.*, 170 Ala. 590; *Whitaker v. State*, 106 Ala. 30. Formerly the rule was otherwise. See *Alabama Great Southern R. Co. v. Tapia*, 94 Ala. 226; *Tennile v. Walshe*, 81 Ala. 160.

California. *Randall v. Freed*, 154 Cal. 299, 97 Pac. 669.

Exceptions are unnecessary in criminal cases as to charges requested by either party, but the statute does not apply to the charge which the court may give of its own motion. *People v. Hart*, 44 Cal. 598.

Illinois. Under Municipal Court Act, § 24, par. 8, *Jones & Addington's Ann. St.* ¶ 3335 (8), exceptions are unnecessary. *Alexander v. Potts*, 151 Ill. App. 587. See also, *Frank Prox Co. v. Bryan*, 162 Ill. App. 381; *Siegmund v. Strackbein*, 140 Ill. App. 454.

Kansas. *Cobe v. Coughlin Hardware Co.*, 83 Kan. 522, 112 Pac. 115.

Montana. Exceptions either to the giving or refusal of instructions are not required. *Gassert v. Bogk*, 7

Mont. 585, 19 Pac. 281, 1 L. R. A. 240n.

New York. The appellate division or general term has power to reverse a judgment and grant a new trial for errors in the charge, even in the absence of any exception.

Under N. Y. Code Civ. Proc. § 992. *Wilmarth v. Heine*, 137 App. Div. (N. Y.) 526.

See also, *Levine v. Rosenschein*, 134 App. Div. (N. Y.) 157; *Engler v. Richardson*, 133 App. Div. 419; *People v. Weiss*, 129 App. Div. (N. Y.) 671; *Lackawanna Steel Co. v. Pioneer S. S. Co.*, 69 Misc. (N. Y.) 104; *Lessler v. Bernstein*, 65 Misc. (N. Y.) 58; *Wehle v. Haviland*, 42 How. Pr. 399; *Whittaker v. Delaware & H. Canal Co.*, 49 Hun 400; *Gowdey v. Robbins*, 3 N. Y. Ann. Cas. 231; *Pettis v. Pier*, 4 Thomps. & C. 690. In *Lattimer v. Hill*, 8 Hun 171, the general term is quoted as saying: "If the charge is erroneous, it is the duty of the court to grant a new trial, as the failure to except did not injure the plaintiff." This case is cited in most of the later decisions as an authority that a reversal may be had upon erroneous instructions to the jury, though no exceptions have been taken. In *Gillett v. Trustees of Village of Kinder-*

criminal cases instructions have been reviewed although no

hook, 77 Hun 604, the judgment was reversed, in the absence of exceptions, for the reason that, during the trial, and on the submission of the case to the jury, an improper rule of damages was adopted. In *Jacobs v. Sire*, 4 Misc. 398, where the instructions given to the jury upon the question of exemplary damages were erroneous, the general term of the superior court held that it was called upon to rectify the damage by ordering a new trial, and that its power to do so did not depend upon an exception having been taken. The court of appeals has several times affirmed the power of the general term to reverse, in the absence of exception. See *Roberts v. Tobias*, 120 N. Y. 1; *Standard Oil Co. v. Amazon Ins. Co.*, 79 N. Y. 506; *Hamilton v. Third Avenue R. Co.*, 53 N. Y. 25. The doctrine that Code Civ. Proc. § 999 was intended to authorize a motion to set aside a verdict on the minutes, on the ground of an error in the charge to which no exception was taken, and which, if the attention of the trial judge had been directed to it by an exception, might have been corrected at the trial, was questioned in *Robson v. New York Cent. & H. River R. Co.*, 21 Hun 387, but the case was decided upon other grounds. In *Richardson v. Van Voorhis*, 20 N. Y. St. 667, there is a dictum that section 999 does not relieve a party from taking exceptions to the admission or rejection of evidence, or to the incorrect statements that may appear in the charge. In *Donahue v. New York Cent. & H. River R. Co.*, 15 Misc. 256, it was held that the court has power to grant a new trial, with or

without an exception, for a misdirection of the court to the jury respecting a question of law. The court refused to express an opinion as to whether such ground of error could be reached under section 999. In *Swartout v. Willingham*, 31 Abb. N. Cas. 66, it was held that a motion under section 999 does not raise the question whether the court's instructions to the jury were erroneous, for, though a verdict upon erroneous instructions may be contrary to law, it is an error for which the court and not the jury are responsible, and must be pointed out by exception (following *Richardson v. Van Voorhis*, *ante*).

To justify a reversal in the absence of an exception, it must be "evident that the court misunderstood the law, and, as a consequence, misdirected and misled the jury in the general effect of the charge." *Ackart v. Lansing*, 6 Hun 476. See also, *Lackawanna Steel Co. v. Pioneer S. S. Co.*, 69 Misc. (N. Y.) 104.

The court of appeals will not reverse for such errors in the absence of an exception. *Roberts v. Tobias*, 120 N. Y. 1; *Standard Oil Co. v. Amazon Ins. Co.*, 79 N. Y. 506; *Hamilton v. Third Avenue R. Co.*, 53 N. Y. 25. In *Vermilyea v. Palmer*, 52 N. Y. 471, there is the following dictum in a decision of the court of appeals: "So, if the court should mislead the jury by an erroneous charge upon the law, the error might, if fatal or important, be available in this court without an exception." But the doctrine here suggested has not been followed in

exception was saved to the action of the trial court.⁴²

§ 424. Sufficiency of exceptions.

While there are certain general and well-recognized rules as to taking exceptions,⁴³ it should also be noted that the manner of taking exceptions is usually controlled by statute,⁴⁴ and such statutory provisions must be complied with to render the exception available. Accordingly, it has

the later decisions, as appears from the cases above cited.

North Carolina. See *Ullery v. Guthrie*, 148 N. C. 417.

Ohio. Although exception to the charge or to the refusal to charge on certain points is general, the reviewing court will look to the whole record to see if error intervened to the prejudice of the party complaining of the instructions. *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318; *Weybright v. Fleming*, 40 Ohio St. 52; *Baker v. Pendergast*, 32 Ohio St. 494, 30 Am. Rep. 620; *Marietta & C. R. Co. v. Strader*, 29 Ohio St. 448.

Pennsylvania. The charge filed is made part of the record and error may be assigned without exceptions. *Grugan v. City of Philadelphia*, 158 Pa. 337; *Janney v. Howard*, 150 Pa. 339.

Texas. Exceptions are not prerequisite to a review of the charge in criminal cases. Rev. St. art. 1318 (see *Vernon's Sayle's Tex. Civ. St.* 1914 arts. 1607, 1612, 2061, 2062). *Atchison, T. & S. F. Ry. Co. v. Click*, 5 Tex. Civ. App. 224; *Missouri Pac. Ry. Co. v. Martin*, 2 Willson, Civ. Cas. Ct. App. § 656; *Landes v. Eichelberger*, 2 Willson, Civ. Cas. Ct. App. § 135; *Hill v. State*, 35 Tex. Cr. App. 371.

Except in prosecutions for misdemeanors, in which case exceptions

are necessary. *Purcell v. State*, 29 Tex. App. 1; *Garner v. State*, 28 Tex. App. 561; *Mixon v. State*, 28 Tex. App. 347; *Comer v. State*, 26 Tex. App. 509; *Burns v. State*, 23 Tex. App. 641; *White v. State*, 23 Tex. App. 154; *Hilcher v. State*, 60 Tex. Cr. App. 180; *Tear v. State*, 60 Tex. Cr. App. 155; *McMillan v. State*, 35 Tex. Cr. App. 370; *Anderson v. State*, 34 Tex. Cr. App. 96; *Patterson v. State* (Tex. Cr. App.), 29 S. W. 272; *Moore v. State* (Tex. Cr. App.), 28 S. W. 686; *Heitzelman v. State* (Tex. Cr. App.), 26 S. W. 729; *Garrett v. State* (Tex. Cr. App.), 25 S. W. 285; *Otto v. State* (Tex. Cr. App.), 25 S. W. 285; *Kennedy v. State* (Tex. Cr. App.), 24 S. W. 650; *Nance v. State* (Tex. Cr. App.), 22 S. W. 44.

42—In *People v. Leonardi*, 143 N. Y. 360, it was held that, in capital cases, an exception is not a prerequisite to a review on appeal of erroneous instructions, and in *Thompson v. People*, 4 Neb. 524, an instruction on the trial of an indictment for larceny was reviewed without any exception having been saved. See also, *Schlencker v. State*, 9 Neb. 300; *People v. Palister*, 138 N. Y. 601.

43—See §§ 425, 426, *post*.

44—*Gerber v. Ætna Indemnity Co.*, 61 Wash. 184, 112 Pac. 272.

been held that a statement "given and excepted to," written on the margin or at the bottom of each instruction given by the court of its own motion, though dated and signed, does not save any exception, as it does not show who excepted to the same.⁴⁵

In one case where the respective attorneys were at their places at the attorneys' table, and dictated their exceptions to the stenographer in a low tone of voice, it was held that an objection that the court did not hear the exceptions, could not be sustained, as it was the judge's duty to hear such exceptions.⁴⁶

§ 425. Necessity that exceptions be specific.

Inasmuch as only such errors will be considered on appeal as are called to the attention of the trial court, it follows that exceptions must specify particularly the alleged error complained of.⁴⁷ "A party excepting must make his exception so specific that the matter relied on as error will

45—*Habieh v. University Park Bldg. Co.*, 177 Ind. 193.

46—*Ongaro v. Twohy*, 49 Wash. 93, 94 Pac. 916.

47—*Arkansas*. *Missouri & N. A. R. Co. v. Daniels*, 98 Ark. 352; *El Dorado Ice & Planing Mill Co. v. Kinard*, 96 Ark. 184; *St. Louis, I. M. & S. R. Co. v. Dunn*, 94 Ark. 407; *Ames Shovel & Tool Co. v. Anderson*, 90 Ark. 231.

California. *Frost v. Grizzly Bluff Creamery Co.*, 102 Cal. 525, 36 Pac. 929; *Gillaspie v. Hagans*, 90 Cal. 90, 27 Pac. 34.

Colorado. *Portland Gold Min. Co. v. O'Hara*, 45 Colo. 416, 101 Pac. 773; *City of Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403.

District of Columbia. *Bell v. Sheridan*, 21 D. C. 370; *Thomas v. Presbrey*, 23 Wash. L. Rep. 123.

Georgia. *Millen & S. W. R. Co. v. Allen*, 130 Ga. 656; *Barber v.*

State, 112 Ga. 584; *Fordham v. State*, 112 Ga. 228; *Central of Georgia Ry. Co. v. Bond*, 111 Ga. 13; *Whelan v. Georgia Midland & G. R. Co.*, 84 Ga. 506; *Thompson v. Kelsey*, 8 Ga. App. 23.

Illinois. *Pecararo v. Halberg*, 246 Ill. 95.

Indiana. *Stevens v. Templeton*, 174 Ind. 129; *Baker v. McGinniss*, 22 Ind. 257.

Iowa. *Davenport Gas Light & Coke Co. v. City of Davenport*, 13 Iowa 229; *Abbott v. Striblen*, 6 Iowa 191.

In Iowa, before the Code, a general exception was not sufficient, but under the Code where exceptions are taken to instructions to the jury at the time they are given, the ground of exception need not be stated. *Williams v. Barrett*, 52 Iowa 637; *Johnson v. Chicago, R. I. & P. R. Co.*, 51 Iowa 25; *Hale v. Gibbs*, 43

be apparent to his adversary, and to the primary court. For his adversary, having his attention directed to the special matter relied on as erroneous, has the right and privilege of waiving such matter, rather than, by insisting on it, incur the hazard and delay of an appeal to a superior tribunal. The court, having its attention directed to the erroneous matter, might be satisfied of the error, into which

Iowa 380; *Van Pelt v. City of Davenport*, 42 Iowa 308, 20 Am. Rep. 622n.

But if the exceptions are not taken until after verdict, then the Code expressly requires that the exception shall specify the part of the instruction objected to, and the ground of the objection. *Byford v. Girton*, 90 Iowa 661; *Benson v. Lundy*, 52 Iowa 265; *Miller v. Gardner*, 49 Iowa 234. See also, this section, *post*, as to exceptions to refusal of instructions.

An exception after verdict, which specifies, as the objection, that the instructions are "not applicable, and are not the law applicable to the case," is not specific enough. *Miller v. Gardner, ante*.

Kansas. *Isnard v. Edgar Zine Co.*, 81 Kan. 765, 106 Pac. 1003; *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314; *Sanford v. Gates*, 38 Kan. 405, 16 Pac. 807; *State v. Gurnee*, 14 Kan. 111.

Louisiana. *State v. Chopin*, 10 La. Ann. 458.

Massachusetts. *Howard v. Fall River Iron Works Co.*, 203 Mass. 273; *Emmons v. Alvord*, 177 Mass. 466; *Rock v. Indian Orchard Mills*, 142 Mass. 522.

Michigan. *Keystone Lumber & Salt Mfg. Co. v. Dole*, 43 Mich. 370.

Minnesota. *Dallemand v. Janney*, 51 Minn. 514; *Elmborg v. St. Paul*

City Ry. Co., 51 Minn. 70; *Bishop v. St. Paul City Ry. Co.*, 48 Minn. 26; *Larrabee v. Minnesota Tribune Co.*, 36 Minn. 141; *Clapp v. Minneapolis & St. L. R. Co.*, 36 Minn. 6, 1 Am. St. Rep. 629; *Hunter v. Jones*, 13 Minn. 307 (Gil. 282); *Dodge v. Chandler*, 9 Minn. 97 (Gil. 87); *Foster v. Berkey*, 8 Minn. 351 (Gil. 310).

New Hampshire. *Matthews v. Clough*, 70 N. H. 600.

New York. *Mattice v. Wilcox*, 147 N. Y. 624; *Pratt v. Foote*, 9 N. Y. 463.

North Carolina. *Jackson v. Williams*, 152 N. C. 203; *Kendrick v. Dellinger*, 117 N. C. 491; *Everett v. Williamson*, 107 N. C. 204; *Dugger v. McKesson*, 100 N. C. 1; *Leak v. Covington*, 99 N. C. 559; *Sellers v. Sellers*, 98 N. C. 13; *Boggan v. Horne*, 97 N. C. 268; *State v. Gardner*, 94 N. C. 953; *Williams v. Johnston*, 94 N. C. 633.

Ohio. *Serviss v. Stockstill*, 30 Ohio St. 418; *Moody v. Thomas*, 1 Disn. 294.

Oregon. *Simpson v. Miller*, 57 Ore. 61, 29 L. R. A. (N. S.) 680n, Ann. Cas. 1912 D 1349n, 110 Pac. 485; *Mahon v. Rankin*, 54 Ore. 328, 103 Pac. 53, 102 Pac. 608; *Kearney v. Snodgrass*, 12 Ore. 311, 7 Pac. 309.

Pennsylvania. *Grantz v. Price*, 130 Pa. St. 415.

South Carolina. *Goodwin v.*

it may have fallen through inadvertence, and could voluntarily correct it by a reversal of its rulings, and thus protect the party excepting from all injury.”⁴⁸

The exceptions should not be less definite and specific than when made in the appellate court,⁴⁹ and exceptions which do not clearly and specifically point out the objectionable part of an instruction cannot be sustained.⁵⁰ It should also be noted that upon obvious principles, only those grounds of exception will be considered on appeal which were stated to the trial court.⁵¹ As an exception to

Atlantic Coast Line R. Co., 82 S. C. 321; **Davis v. Elmore**, 40 S. C. 533; **Norton v. Livingston**, 14 S. C. 178.

South Dakota. **Comeau v. Hurley**, 24 S. D. 255.

Texas. **Quintana v. State**, 29 Tex. App. 401; **Cleburne St. Ry. Co. v. Barnes**, — Tex. Civ. App. —, 168 S. W. 991.

Utah. **Morris v. Salt Lake City**, 35 Utah, 474, 101 Pac. 373.

Vermont. **Goodwin v. Perkins**, 39 Vt. 598.

Washington. **Carroll v. Washington Water Power Co.**, 56 Wash. 467, 105 Pac. 1026; **Maling v. Crummey**, 5 Wash. 222, 31 Pac. 600.

Wisconsin. **Coreoran v. Harran**, 55 Wis. 120; **Hamlin v. Haight**, 32 Wis. 237.

United States. **Newport News & M. V. Co. v. Pace**, 158 U. S. 36, 39 L. Ed. 887; **Cleveland, C., C. & St. L. Ry. Co. v. Zider**, 10 C. C. A. 151, 61 Fed. 908.

48—**Irvin v. State**, 50 Ala. 181. See also, **Jacobs v. Mitchell**, 2 Colo. App. 456, 31 Pac. 235.

49—**Cleburne St. Ry. Co. v. Barnes**, — Tex. Civ. App. —, 168 S. W. 991.

In Texas, “all that is required is that general exception be taken at the time, with a request for time to

prepare a bill containing the specific objections, to be prepared before the verdict is returned, in order that the court may have an opportunity to correct the charge, if so desired.” **Phillips v. State**, 19 Tex. App. 158.

50—**Burton v. West Jersey Ferry Co.**, 114 U. S. 474, 29 L. Ed. 215; **Connecticut Mut. Life Ins. Co. v. Union Trust Co.**, 112 U. S. 250, 28 L. Ed. 708; **Washington & G. R. Co. v. Varnell**, 98 U. S. (9 Otto) 479, 25 L. Ed. 233.

51—**California.** **Ryall v. Central Pac. R. Co.**, 76 Cal. 474, 18 Pac. 430.

Iowa. **Price v. Burlington, C. R. & N. R. Co.**, 42 Iowa 16.

Kansas. **Sanford v. Gates**, 38 Kan. 405, 16 Pac. 807.

Minnesota. **Cole v. Curtis**, 16 Minn. 182 (Gil. 161).

New York. **Richmond v. Second Ave. R. Co.**, 76 Hun 233; **Grier v. Hazard, Hazard & Co.**, 39 N. Y. St. 74.

North Carolina. **Phipps v. Pierce**, 94 N. C. 514.

So, an exception to one instruction raises no question as to another instruction, which was not excepted to. **Ryall v. Central Pac. R. Co.**, 76 Cal. 474, 18 Pac. 430. See also, **Varnum v. Taylor**, 10 Bosw. (N. Y.) 148.

the general rule, it may be stated that in a few states the rule requiring exceptions to be specific does not prevail.⁵²

The reports abound with cases illustrative of the general rule that the exceptions must be specific.⁵³ Thus an exception to an entire charge on the ground that the court presented the case in a manner calculated to prejudice the jury against the accused should indicate some particular in which harm was done.⁵⁴ An objection that an instruction abstractly correct is inapplicable to the case must point out how and why it was inappropriate,⁵⁵ and an objection that an instruction contains an assumption of fact must call attention to the specific ground of the objection.⁵⁶ "An assignment of error to the effect that the charge of the

52—California. *Shea v. Potrero & B. V. R. Co.*, 44 Cal. 414; *McCreery v. Everding*, 44 Cal. 246.

Kentucky. *Williams v. Com.*, 80 Ky. 313.

Montana. *Woods v. Berry*, 7 Mont. 195, 14 Pac. 758.

Ohio. *City of Cincinnati v. Anderson*, 19 Ohio Cir. Ct. 603, 10 Ohio Cir. Dec. 522 (construing Rev. St. § 5298; now Page & Adams Ann. Ohio Gen. Code § 11560).

Vermont. *Fowlie's Adm'x v. McDonald, Cutler & Co.*, 82 Vt. 230.

Washington. *Sexton v. School Dist. No. 34*, 9 Wash. 5, 36 Pac. 1052.

United States. *Pritchett v. Sullivan*, 104 C. C. A. 624, 182 Fed. 480.

53—The following cases present good illustrations of the rule:

Alabama. *Treadwell v. State*, 168 Ala. 96.

Iowa. *Benson v. Lundy*, 52 Iowa 265.

Montana. *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

Nevada. *Hochschultz v. Potosi Zinc Co.*, 33 Nev. 198, 110 Pac. 713.

New York. *People v. Upton*, 29 N. Y. St. 777.

North Carolina. *State v. Bowman*, 152 N. C. 817; *Shober v. Wheeler*, 113 N. C. 370.

South Carolina. *State v. Davenport*, 38 S. C. 348; *Greene v. Duncan*, 37 S. C. 239; *Dobson v. Cothran*, 34 S. C. 518.

South Dakota. *Comeau v. Hurley*, 24 S. D. 275.

Texas. *Holman v. Herscher (Tex.)*, 16 S. W. 984.

Utah. *People v. Thiede*, 11 Utah 241, 39 Pac. 837.

Washington. *Carroll v. Washington Water Power Co.*, 56 Wash. 467, 105 Pac. 1026.

United States. *Allis v. United States*, 155 U. S. 117, 39 L. Ed. 91; *Western Coal & Mining Co. v. Ingraham (C. C. A.)*, 70 Fed. 219.

54—*State v. Varner*, 115 N. C. 744.

55—*Central of Georgia Ry. Co. v. Bond*, 111 Ga. 13.

56—*Emmons v. Alvord*, 177 Mass. 466.

court is conflicting, coupled with a failure to point out or suggest the precise nature of the conflict, no exception upon this ground being made upon the trial, and no conflict appearing to the court, is not available."⁵⁷ Also, no question as to the correctness of the instructions is presented for review by an exception to the verdict or findings as being contrary to the instructions or unsupported by the evidence.⁵⁸ An exception "to such portions of a charge" as are variant from the requests made, the variance not being pointed out, is insufficient.⁵⁹ A mere exception, while it challenges the correctness of an instruction, does not point out specifically wherein it is incorrect. But if instructions are paragraphed, an exception to each separate paragraph may be sufficient.⁶⁰ An exception to the portions of the charge on the measure of damages has been held sufficiently specific to raise the question of the correctness of the charge on one element of damages, since the measure of damages is made up of all the elements.⁶¹

An objection that a charge is not a correct statement of the law in reference to the matters dealt with, is too general to require any consideration by the court,⁶² and the objection that instructions were given at an improper time is not raised by a general exception to all the instructions.⁶³ Failure to comply with a statute requiring the word "given" to be written in the margin is not available error under a general exception.⁶⁴ And an exception generally "to the ruling of the court in not permitting the cause to go to the jury upon the questions of fact involved"

57—*Emerson v. Ross' Ex'x*, 17 Fla. 122.

58—*Britt v. Aylett*, 11 Ark. 475, 52 Am. Dec. 282; *Floyd v. Ricks*, 11 Ark. 454; *Carlson v. Dow*, 47 Minn. 335.

59—*Beaver v. Taylor*, 93 U. S. 46, 23 L. Ed. 797.

60—*City of Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403.

61—*Wales v. Pacific Elec. Motor Co.*, 130 Cal. 521, 62 Pac. 932, 1120.

62—*Reed v. State*, — Tex. Cr. App. —, 168 S. W. 541.

63—*City of Topeka v. Heitman*, 47 Kan. 739, 28 Pac. 1096.

64—The exception must assign that specific ground. *Omaha & F. Land & Trust Co. v. Hansen*, 32 Neb. 449.

is insufficient, where no particular question of fact is specified.⁶⁵

Objections that the court below did not review and analyze the evidence, and did not instruct the jury sufficiently as to the rules for weighing the value of testimony, are not sufficiently specific.⁶⁶ And a general exception to a charge that testimony of any witnesses found by the jury to have sworn falsely may be disregarded unless corroborated is not sufficiently explicit as an exception to the court's omission of the words "knowingly and wilfully."⁶⁷ "A general objection will be insufficient where the special point of the objection insisted upon is such that, if it had been specifically pointed out at the trial, it might have been obviated, or where the general objection was calculated to divert the attention from the special objection on which the party intended to rely." Therefore, a general objection to an instruction waives the right to assert its inconsistency with other instructions.⁶⁸

An objection to the whole of an instruction defining the duty an employer owes to an employee as to the safety of the place for working, is insufficient to raise the point that the word "reasonably" was omitted before the word "safe."⁶⁹ Also, a simple exception to an instruction that a passenger was not guilty of contributory negligence, unless he knew of the danger in time to get out and avoid the injury, by remaining in a caboose after the train broke loose, and the conductor, who had sent back to flag another train, had told him it was following, and he had better watch out for it, and, if he saw it, get out of the way, is too general.⁷⁰

Under a statute requiring the "ground of objection" to

65—*Guggenheim v. Kirchhofer*, 14 C. C. A. 72, 66 Fed. 755.

66—*Grantz v. Price*, 130 Pa. 415.

67—*Dallemand v. Janney*, 51 Minn. 514.

68—*Matthews v. Clough*, 70 N. H. 600.

69—*Western Coal & Mining Co. v. Ingraham*, 17 C. C. A. 71, 70 Fed. 219.

70—*Newport News & M. V. Co. v. Pace*, 158 U. S. 36, 39 L. Ed. 887.

be stated when exception to an instruction is taken after verdict by filing the same within three days, an exception stating "that the court erred in submitting instruction No. 5," is not sufficient to entitle the party to review of the instruction complained of.⁷¹

§ 426. Necessity that exceptions be taken separately to instructions or parts of instructions.

Exceptions must be taken to the instructions, or portion or portions complained of, separately, and not *en masse*, or to the charge as a whole.⁷² It is necessary that excep-

71—Iowa Code, § 3709. Hardenburg & Co. v. Roberts, 146 Iowa 696.

72—**Alabama.** Marbury Lumber Co. v. Lamont, 169 Ala. 33; Southern Hardware & Supply Co. v. Standard Equipment Co., 165 Ala. 582; Sharp v. Robertson's Ex'rs, 76 Ala. 343; Farley v. State, 72 Ala. 170; Stovall v. Fowler, 72 Ala. 77; Smith v. Sweeney, 69 Ala. 524; South & N. A. R. Co. v. McLendon, 63 Ala. 266; Gray v. State, 63 Ala. 66; Bernstein v. Humes, 60 Ala. 582, 31 Am. Rep. 52; South & N. A. R. Co. v. Jones, 56 Ala. 507; Caldwell v. Parmer's Adm'r, 56 Ala. 405; Jacobson v. State, 55 Ala. 151; Holland v. Barnes, 53 Ala. 83, 25 Am. Rep. 595; Irvin v. State, 50 Ala. 181; Cohen v. State, 50 Ala. 108.

Arkansas. Delaney v. Johnson, 95 Ark. 131.

California. Brown v. Kentfield, 50 Cal. 129; Shea v. Potrero & B. V. R. Co., 44 Cal. 414.

Colorado. Melcher v. Beeler, 48 Colo. 233, 139 Am. St. Rep. 273, 110 Pac. 781; Pacific Mut. Life Ins. Co. v. Van Fleet, 47 Colo. 401, 107 Pac. 1087; Coon v. Rigden, 4 Colo. 275.

Florida. Stringfellow v. Coons, 57 Fla. 158, 131 Am. St. Rep. 1089.

Georgia. Central Railroad & Banking Co. v. Ogletree, 97 Ga. 325; Thomas v. State, 84 Ga. 613; Rogers v. Rogers, 74 Ga. 598; Smith v. Atwood, 14 Ga. 402.

Illinois. Haskins v. Haskins, 67 Ill. 446.

Indiana. Sherlock v. First Nat. Bank of Bloomington, 53 Ind. 73.

Kansas. Young v. Youngman, 45 Kan. 65, 25 Pac. 209; Fullenwider v. Ewing, 25 Kan. 69; Wheeler v. Joy, 15 Kan. 389.

Maine. State v. Pike, 65 Me. 111; State v. Flaherty (Me.), 5 Atl. 563, 2 New Eng. Rep. 699.

Massachusetts. Bartow v. Parsons Pulp & Paper Co., 208 Mass. 232; Hunting v. Downer, 151 Mass. 275.

Michigan. Geary v. People, 22 Mich. 220.

Minnesota. Rheiner v. Stillwater St. Railway & Transfer Co., 31 Minn. 193.

Montana. Gassert v. Bogk, 7 Mont. 585, 1 L. R. A. 240, 19 Pac. 281; Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576; Woods v. Berry, 7 Mont. 195, 14 Pac. 758; Gum v

tions shall be specific, and it follows that this rule as to exceptions being taken to the portion of a charge complained

Murray, 6 Mont. 10, 9 Pac. 447;
Griswold v. Boley, 1 Mont. 545.

Nebraska. **Brooks v. Dutcher**, 22 Neb. 644; **Dodge v. People**, 4 Neb. 220.

New Jersey. **Engle v. State**, 50 N. J. L. 272.

New Mexico. **Hagin v. Collins**, 15 N. M. 621, 110 Pac. 840; **Probst v. Trustees of Board of Domestic Missions**, 3 N. M. (Gild.) 373, 5 Pac. 702.

New York. **Ostrander v. State**, 192 N. Y. 415; **Wallace v. Williams**, 37 N. Y. St. 812.

North Carolina. **Hemphill v. Morrison**, 112 N. C. 756; **Ward v. Albe-marle & Raleigh R. Co.**, 112 N. C. 168; **State v. Brabham**, 108 N. C. 793; **State v. Harrell**, 107 N. C. 944; **State v. McDuffie**, 107 N. C. 885; **State v. Howell**, 107 N. C. 835; **Thompson v. Western Union Tel. Co.**, 107 N. C. 449; **Everett v. Williamson**, 107 N. C. 204; **State v. Parker**, 106 N. C. 711; **Lindsey v. Sanderlin**, 104 N. C. 331; **Carlton v. Wilmington & Weldon R. Co.**, 104 N. C. 365; **McKinnon v. Morrison**, 104 N. C. 354; **Hammond v. Schiff**, 100 N. C. 161; **Caudle v. Fallen**, 98 N. C. 411; **Barber v. Roseboro**, 97 N. C. 192; **State v. Nipper**, 95 N. C. 653; **McDonald v. Carson**, 94 N. C. 497.

Ohio. **Behrens v. Behrens**, 47 Ohio St. 323, 21 Am. St. Rep. 820; **Powers v. Hazelton & L. Ry. Co.**, 33 Ohio St. 429; **Everett v. Sumner**, 32 Ohio St. 562; **Western Ins. Co. of Cincinnati v. Tobin**, 32 Ohio St. 77; **Pittsburgh, Ft. W. & C. Ry. v. Probst**, 30 Ohio St. 104; **Butcher's Melting Ass'n v. Commercial Bank of Cincinnati**, 2 Disn. 46.

Oklahoma. **Farquhar Co. v. Sherman**, 22 Okla. 17, 97 Pac. 565.

South Carolina. **Bauskett v. Keitt**, 22 S. C. 200; **Lanier v. Tolleson**, 20 S. C. 62; **Walker v. Walker**, 17 S. C. 338; **Paris v. Dupre**, 17 S. C. 288; **State v. Gilreath**, 16 S. C. 105; **Norton v. Livingston**, 14 S. C. 177.

Texas. **Gonzalez v. State**, 30 Tex. App. 203; **Graham v. State**, 29 Tex. App. 31; **Eddy v. Still**, 3 Tex. Civ. App. 346; **Thompson v. State**, 32 Tex. Cr. App. 265.

Utah. **Grow v. Utah Light & Railway Co.**, 37 Utah 41, 106 Pac. 514; **Ryan v. Curlew Irrigation & Reservoir Co.**, 36 Utah 382, 104 Pac. 218; **Haun v. Rio Grande W. Ry. Co.**, 22 Utah 346, 62 Pac. 908.

Vermont. **Needham v. Boston & M. R. Co.**, 82 Vt. 518; **Goodwin v. Perkins**, 39 Vt. 598.

Washington. **Rush v. Spokane Falls & N. Ry. Co.**, 23 Wash. 501, 63 Pac. 500; **Patchen v. Parke & Lacy Mach. Co.**, 6 Wash. 486, 33 Pac. 976.

Wisconsin. **Agnew v. Baldwin**, 136 Wis. 263; **Smith v. Coleman**, 77 Wis. 343; **Butler v. Carns**, 37 Wis. 61; **Hamlin v. Haight**, 32 Wis. 237.

United States. **Holder v. United States**, 150 U. S. 91, 37 L. Ed. 1010; **Block v. Darling**, 140 U. S. 234, 35 L. Ed. 476; **Burton v. West Jersey Ferry Co.**, 114 U. S. 474, 29 L. Ed. 215; **Connecticut Mut. Life Ins. Co. v. Union Trust Co.**, 112 U. S. 250, 28 L. Ed. 708; **Mobile & M. Ry. Co. v. Jurey**, 111 U. S. 584, 28 L. Ed. 527; **Washington & G. R. Co. v. Varnell**, 98 U. S. (8 Otto) 479, 25 L. Ed. 233; **Pennsylvania Co. v. Whitney**, 95 C. C. A. 70, 169 Fed. 572; **Morgan v. United States**, 94 C. C. A. 518,

of is a corollary, or an application of the rule stated in the previous section,⁷³ and it is held that an exception which is "descriptive only—not the reservation of an exception to a particular, exactly designated statement of the judge," is abortive.⁷⁴ Also, an exception taken which is a joint one, if not good as to one defendant, is not available to the others.⁷⁵

A general exception to the whole charge only raises the question as to its correctness as a whole,⁷⁶ and where an exception to two or more instructions is taken in gross, it is not available if any one or more of the instructions are correct.⁷⁷ Thus, it has been stated that the practice of allowing a general exception to the refusal to charge a mass of requests should not be followed.⁷⁸ A general ex-

169 Fed. 242; *St. Louis, I. M. & S. Ry. Co. v. Spencer*, 18 C. C. A. 114, 71 Fed. 93; *Thom v. Pittard*, 10 C. C. A. 352, 62 Fed. 232; *Price v. Pankhurst*, 10 U. S. App. 497, 3 C. C. A. 551, 53 Fed. 312.

73—See § 25, *ante*.

74—*Birmingham Ry., Light & Power Co. v. Friedman*, — Ala. —, 65 So. 939.

75—*Jones v. Gould*, 209 N. Y. 419.

76—*Arkansas. Delaney v. Johnson*, 95 Ark. 131.

Florida. *Stringfellow v. Coons*, 57 Fla. 158, 131 Am. St. Rep. 1089; *May v. Gamble*, 14 Fla. 467.

Idaho. *Snyder v. Viola Mining & Smelting Co.*, 2 Idaho 771.

Iowa. *Eddy v. Howard*, 23 Iowa 175.

Kansas. *Hentig v. Kansas Loan & Trust Co.*, 28 Kan. 617; *Wheeler v. Joy*, 15 Kan. 389; *Ferguson v. Graves*, 12 Kan. 39.

Nebraska. *Redman v. Voss*, 46 Neb. 512.

New York. *Cronk v. Canfield*, 31 Barb. 171.

Ohio. *Weber v. Wiggins*, 11 Ohio Cir. Ct. 18.

Wisconsin. *Buffalo Barb Wire Co. v. Phillips*, 67 Wis. 129.

77—*Habich v. University Park Bldg. Co.*, 177 Ind. 193.

78—*People v. Katz*, 209 N. Y. 311, Ann. Cas. 1915 A 501n. In this case 102 requests to charge were submitted, and a general exception to each and every charge was permitted.

See also, *Bell v. Kendall*, 93 Ala. 489; *Nelson v. Warren*, 93 Ala. 408; *Goley v. State*, 87 Ala. 57; *Black v. Pratt Coal & Coke Co.*, 85 Ala. 504; *Stevenson v. Moody*, 83 Ala. 418; *East Tennessee, V. & G. R. Co. v. Cary*, 81 Ala. 159; *Mayberry v. Leech*, 58 Ala. 339; *Irvin v. State*, 50 Ala. 181; *Murphy v. Lemay*, 32 Ark. 223; *Dunnington v. Frick Co.*, 60 Ark. 250; *Oxley Stave Co. v. Staggs*, 59 Ark. 370; *Fordyce v. Russell*, 59 Ark. 312; *Quertermous v. Hatfield*, 54 Ark. 16; *Gill v. Schneider*, 48 Colo. 382, 110 Pac. 62; *Melrose Mfg. Co. v. Kennedy*, 59 Fla. 312..

ception to each and all of instructions reserved, without calling the court's attention to the particular error asserted, or giving the court opportunity to correct such error is insufficient.⁷⁹ And such objection will be overruled unless the charge or part to which such exception is directed is wholly erroneous.⁸⁰ An exception to the "refusal and charge of the court," where the whole charge is contained in the bill of exceptions, and the record shows that six instructions were asked, of which two were given, one declined except as covered by the general charge, is insufficient.⁸¹

The addition of such words as "specifically,"⁸² or "severally and separately,"⁸³ or "every line, sentence and paragraph,"⁸⁴ adds nothing to the force of such an exception and it will nevertheless be overruled if any portion of the charge is correct. Thus an exception as a matter of

79—*Eisminger v. Beman*, 32 Okla. 818, 124 Pac. 289; *McCabe & Steen Const. Co. v. Wilson*, 17 Okla. 355, 87 Pac. 320; *Glaser v. Glaser*, 13 Okla. 389, 74 Pac. 944.

80—*Alabama*. *Savage v. Milum*, 170 Ala. 115; *Mayberry v. Leech*, 58 Ala. 339.

California. *Cavallaro v. Texas & P. Ry. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918; *Moore v. Moore (Cal.)*, 34 Pac. 90.

Colorado. *Edwards v. Smith*, 16 Colo. 529, 27 Pac. 809; *Keith v. Wells*, 14 Colo. 321, 23 Pac. 991.

Michigan. *McAllister v. Engle*, 52 Mich. 56.

Minnesota. *Shull v. Raymond*, 23 Minn. 66; *Foster v. Berkey*, 8 Minn. 351 (Gil. 310).

New York. *Caldwell v. Murphy*, 11 N. Y. 416; *Jones v. Osgood*, 6 N. Y. 233; *Piper v. New York Cent. & H. R. R. Co.*, 89 Hun 75.

South Dakota. *Banbury v. Sherin*, 4 S. D. 88.

Utah. *Seoville v. Salt Lake City*, 11 Utah 60, 39 Pac. 481.

Washington. *Meeker v. Gardella*, 1 Wash. St. 139, 23 Pac. 837.

Wisconsin. *Luedtke v. Jeffery*, 89 Wis. 136; *Yates v. Bachley*, 33 Wis. 185.

United States. *Block v. Darling*, 140 U. S. 234, 35 L. Ed. 476.

Contra, *Dady v. Condit*, 188 Ill. 234, rev'g 87 Ill. App. 250; *Kansas Pac. R. Co. v. Nichols*, 9 Kan. 235, 12 Am. Rep. 949n; *Lorie v. Adams*, 51 Kan. 692, 33 Pac. 599.

81—*Jones v. East Tennessee, V. & G. R. Co.*, 157 U. S. 682, 39 L. Ed. 856.

82—*People v. Bristol*, 23 Mich. 117.

83—*Syndicate Ins. Co. v. Catchings*, 104 Ala. 176; *Kirby v. State*, 89 Ala. 63; *Edgell v. Francis*, 86 Mich. 232.

84—*Danielson v. Dyckman*, 26 Mich. 168.

precaution to "each and every word, sentence, subdivision, phrase and each and every of the various allegations and instructions given by the court and each and every one of the instructions given by the court to the jury," is of no avail.⁸⁵ But it has been held that the use of the word "each" in excepting to several instructions is not appropriate to designate several collectively and independently of each other, without considering them severally, but is sufficient to raise objections to instructions severally when designated by it as excepted to.⁸⁶ And where the record reads as follows: "At the time of reading the above instructions to the jury, the defendant duly excepted to all and to each and every one of them,"—it will be presumed that exceptions were duly taken to each of the instructions separately.⁸⁷

If the charge consists of a series of distinct propositions or instructions, any one of which is correct, a general exception to the whole charge must be overruled.⁸⁸ An

85—*Carroll v. Washington Water Power Co.*, 56 Wash. 467, 105 Pac. 1026.

86—*Delaney v. Jackson*, 95 Ark. 131.

87—*Atchison, T. & S. F. R. Co. v. Retford*, 18 Kan. 245.

88—**Alabama.** *Savage v. Milum*, 170 Ala. 115; *Mobile & O. R. Co. v. George*, 94 Ala. 199.

Arkansas. *Atkins v. Swope*, 38 Ark. 528.

California. *Cavallaro v. Texas & P. Ry. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918; *Ryall v. Central Pac. R. Co.*, 76 Cal. 474, 18 Pac. 430; *Cockrill v. Hall*, 76 Cal. 192, 18 Pac. 318.

Colorado. *Gill v. Schneider*, 48 Colo. 382, 110 Pac. 62; *Wooton v. Seigel*, 5 Colo. 424; *Kansas Pac. Ry. Co. v. Ward*, 4 Colo. 31; *Cowell v. Colorado Springs Co.*, 3 Colo. 82.

But see *Melcher v. Beeler*, 48 Colo. 233, 139 Am. St. Rep. 273, 110 Pac. 181.

District of Columbia. *Mackey v. Baltimore, etc., R. Co.*, 18 Wash. L. Rep. 767.

Florida. *Stringfellow v. Coons*, 57 Fla. 158, 131 Am. St. Rep. 1089; *Campbell v. Carruth*, 32 Fla. 264; *Wood v. State*, 31 Fla. 221; *Smith v. State*, 29 Fla. 408; *Pinson v. State*, 28 Fla. 735; *Post v. Bird*, 28 Fla. 1; *Burroughs v. State*, 17 Fla. 643; *John v. State*, 16 Fla. 554; *Dupuis v. Thompson*, 16 Fla. 69; *May v. Gamble*, 14 Fla. 467.

Georgia. *Willis v. State*, 93 Ga. 208; *Ozburn v. State*, 87 Ga. 173.

Illinois. *Hickam v. People*, 137 Ill. 75; *Hayward v. Catton*, 1 Ill. App. 577.

Indiana. *State v. Gregory*, 132 Ind. 387; *Sherlock v. First Nat.*

exception to several propositions *en masse* is insufficient if

Bank of Bloomington, 53 Ind. 73; **Garrigus v. Burnett**, 9 Ind. 528; **Kelly v. John**, 13 Ind. App. 579; **Buchart v. Ell**, 9 Ind. App. 353.

Iowa. **Hallenbeck v. Garst**, 96 Iowa 509; **Reeves v. Harrington**, 85 Iowa 741; **Norris v. Kipp**, 74 Iowa 444; **Pitman v. Molsberry**, 49 Iowa 339; **Moore v. Gilbert**, 46 Iowa 508; **Ruter v. Foy**, 46 Iowa 132; **Bartle v. City of Des Moines**, 38 Iowa 414; **Cook v. Sioux City & P. R. Co.**, 37 Iowa 426; **Brown v. Scott County**, 36 Iowa 140; **Mershon v. National Ins. Co.**, 34 Iowa 87; **McCaleb v. Smith**, 24 Iowa 591; **Redman v. Malvin**, 23 Iowa 296; **Carpenter v. Parker**, 23 Iowa 450; **Verholf v. Van Houwenlengen**, 21 Iowa 429; **Spray v. Scott**, 20 Iowa 473; **Shepherd v. Brenton**, 20 Iowa 41; **Lyons v. Thompson**, 16 Iowa 62; **Armstrong v. Pierson**, 15 Iowa 476; **Jack v. Naber**, 15 Iowa 450; **Cousins v. Westcott**, 15 Iowa 253; **Loomis v. Simpson**, 13 Iowa 532; **Davenport Gas Light & Coke Co. v. City of Davenport**, 13 Iowa 229.

Kansas. **Crosby v. Wilson**, 53 Kan. 565, 36 Pac. 985; **Fleming v. L. D. Latham & Co.**, 48 Kan. 773, 30 Pac. 166; **Ryan v. Madden**, 46 Kan. 245, 26 Pac. 679.

Maine. **Crosby v. Maine Cent. R. Co.**, 69 Me. 418; **Macintosh v. Bartlett**, 67 Me. 130; **Merrill v. Merrill**, 67 Me. 70.

Massachusetts. **Bartow v. Parsons Pulp & Paper Co.**, 208 Mass. 232; **Com. v. Tolman**, 149 Mass. 229, 14 Am. St. Rep. 414, 3 L. R. A. 747n; **Adams v. Inhabitants of Chiscopee**, 147 Mass. 440; **Dwyer v. Fuller**, 144 Mass. 420.

Michigan. **Edgell v. Francis**, 86

Mich. 232; **McAllister v. Engle**, 52 Mich. 56; **Prescott v. Patterson**, 49 Mich. 622; **McKay v. Evans**, 48 Mich. 597; **Hopkins Mfg. Co. v. Aurora F. & M. Ins. Co.**, 48 Mich. 148; **Goodsell v. Seeley**, 46 Mich. 623, 41 Am. Rep. 183; **Wheeler & Wilson Mfg. Co. v. Walker**, 41 Mich. 239; **Lange v. Kaiser**, 34 Mich. 317; **Tupper v. Kilduff**, 26 Mich. 394; **Mandigo v. Mandigo**, 26 Mich. 349; **Danielson v. Dyckman**, 26 Mich. 169; **People v. Garbutt**, 17 Mich. 9, 97 Am. Dec. 162n.

Minnesota. **Main v. Oien**, 47 Minn. 89; **Russell v. St. Paul, M. & M. Ry. Co.**, 33 Minn. 210; **Shull v. Raymond**, 23 Minn. 66; **Ferson v. Wilcox**, 19 Minn. 449 (Gil. 388); **Cole v. Curtis**, 16 Minn. 182 (Gil. 161); **Castner v. The Steamboat Dr. Franklin**, 1 Minn. 73 (Gil. 51).

Montana. **Woods v. Berry**, 7 Mont. 195, 14 Pac. 758.

Nebraska. **Bankers Life Ass'n v. Lisco**, 47 Neb. 340; **Hedrick v. Strauss**, 42 Neb. 485; **Gillilan v. Rollins**, 41 Neb. 540.

New Hampshire. **Reynolds v. Boston & M. R. Co.**, 43 N. H. 580.

New Jersey. **Engle v. State**, 50 N. J. L. 272; **Oliver v. Phelps**, 21 N. J. L. 597.

New Mexico. **Hagin v. Collins**, 15 N. M. 621, 110 Pac. 840.

New York. **Wells v. Higgins**, 132 N. Y. 459; **Newall v. Bartlett**, 114 N. Y. 399; **Patton v. Royal Baking Powder Co.**, 114 N. Y. 1.

North Carolina. **Hooks v. Houston**, 109 N. C. 623; **Hammond v. Schiff**, 100 N. C. 161; **Dugger v. McKesson**, 100 N. C. 1; **Leak v. Covington**, 99 N. C. 559; **Caudle v. Fallen**, 98 N. C. 411; **Sellers v. Sell-**

any one of them is correct.⁸⁹ And the same rule applies where the exception is to the whole or a part of the charge, which part itself contains more than one proposition.⁹⁰ An

ers, 98 N. C. 13; *Boggan v. Horne*, 97 N. C. 268.

Ohio. *Berry v. State*, 31 Ohio St. 219, 27 Am. Rep. 506; *Adams v. State*, 25 Ohio St. 584; *Wright v. Denham*, 2 Cleve. L. Rep. 146.

Texas. *Gross v. Hays*, 73 Tex. 515; *Peace v. State*, 27 Tex. App. 83; *Cordway v. State*, 25 Tex. App. 405.

Utah. *Holt v. Nielson*, 37 Utah 566, 109 Pac. 470; *People v. Hart*, 10 Utah 204, 37 Pac. 330.

Vermont. *Rowell v. Fuller's Estate*, 59 Vt. 688.

Washington. *Lichty v. Tannatt*, 11 Wash. 37, 39 Pac. 260.

Wisconsin. *Green v. Hanson*, 89 Wis. 597; *Kessler's Estate*, 87 Wis. 660, 41 Am. St. Rep. 74; *C. Aultman & Co. v. Case*, 68 Wis. 612; *Hulehan v. Green Bay, W. & St. P. R. Co.*, 68 Wis. 520; *Bouck v. Enos*, 61 Wis. 660; *Dean v. Chicago & N. W. Ry. Co.*, 43 Wis. 305; *Nisbet v. Gill*, 38 Wis. 657.

United States. *Newport News & M. V. Co. v. Pace*, 158 U. S. 36, 39 L. Ed. 887; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 39 L. Ed. 624; *Anthony v. Louisville & N. R. Co.*, 132 U. S. 172, 33 L. Ed. 301; *White v. Barber*, 123 U. S. 392, 31 L. Ed. 243; *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 28 L. Ed. 527; *Cooper v. Schlesinger*, 111 U. S. 148, 28 L. Ed. 382; *Worthington v. Mason*, 101 U. S. (11 Otto) 149, 25 L. Ed. 848; *Beaver v. Taylor*, 93 U. S. (3 Otto) 46, 23 L. Ed. 797; *Johnston v. Jones*, 1 Black (U. S.) 210, 17 L. Ed. 117; *Lincoln v. Claf-*

lin, 7 Wall. (U. S.) 132, 19 L. Ed. 106; *Harvey v. Tyler*, 2 Wall. (U. S.) 328, 17 L. Ed. 871; *Rogers v. The Marshal*, 1 Wall. (U. S.) 644, 17 L. Ed. 714; *Pennsylvania Co. v. Whitney*, 95 C. C. A. 70, 169 Fed. 572; *Masonic Benev. Ass'n of Central Illinois v. Lyman*, 9 C. C. A. 104, 60 Fed. 498; *Walker v. Windsor Nat. Bank*, 5 C. C. A. 421, 56 Fed. 76; *Gulf, C. & S. F. Ry. Co. v. Johnson*, 4 C. C. A. 447, 54 Fed. 474; *McClellan v. Pyeatt*, 1 C. C. A. 613, 50 Fed. 686.

89—It is only to this extent that the court will examine the instructions under a general exception to the whole charge. *City of Omaha v. McGavock*, 47 Neb. 313; *Oltmanns v. Findlay*, 47 Neb. 289.

90—**Alabama.** *Rice v. Schloss*, 90 Ala. 416; *Dick v. State*, 87 Ala. 61; *Dunn v. State*, 8 Ala. App. 382; *Maxwell v. State*, 3 Ala. App. 169.

Colorado. *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948.

District of Columbia. *Hughes v. Heyman*, 22 Wash. L. Rep. 737.

Florida. *John D. C. v. State*, 16 Fla. 554.

Georgia. *Small v. Williams*, 87 Ga. 681.

Minnesota. *Main v. Oien*, 47 Minn. 89.

New York. *Board of Water Com'rs v. Burr*, 35 N. Y. Super. Ct. 523.

Oregon. *Langford v. Jones*, 18 Ore. 307, 22 Pac. 1064.

Utah. *Beaman v. Martha Wash-*

exception that "the court erred in giving to the jury instruction No. —, and to the giving of which plaintiff duly excepted," is a general exception, and cannot be considered unless the whole instruction is incorrect.⁹¹ An exception to a charge in its entirety, and "to the following portions thereof," followed by a series of ten or more propositions embracing substantially all the charge, except the statement of the case, is not available if any one of the portions excepted to is good.⁹²

An exception to so much of the charge as is inclosed in brackets,⁹³ or to so much as is not inclosed in brackets,⁹⁴ must be overruled unless the whole of the designated part is erroneous.⁹⁵ Where, however, the whole charge or part excepted to amounts merely to the assertion of a single proposition, a general exception is sufficient to present the question of the correctness of such proposition.⁹⁶

These principles apply to the erroneous refusal of instructions, as well as to the giving of erroneous instructions. Therefore, a general exception to a refusal of a request to charge which contains several instructions or propositions must be overruled, if any one of them is properly refused.⁹⁷ Where several distinct requests for instruc-

ington Min. Co., 23 Utah 139, 63 Pac. 631.

Vermont. Dickerman v. Quincy Mut. Fire Ins. Co., 67 Vt. 609.

Washington. Rush v. Spokane Falls & N. Ry. Co., 23 Wash. 501, 63 Pac. 500.

Wisconsin. Coreoran v. Harraan, 55 Wis. 120.

91—Haun v. Rio Grande W. Ry. Co., 22 Utah 346, 62 Pac. 908.

See also, Beaman v. Martha Washington Min. Co., 23 Utah 139, 63 Pac. 631.

92—Vider v. O'Brien, 18 U. S. App. 711, 10 C. C. A. 385, 62 Fed. 326.

93—Tucker v. Salem Flouring

Mills Co., 15 Ore. 581, 16 Pac. 426.

94—Crosby v. Maine Cent. R. Co., 69 Me. 418.

95—See also, Stroud v. State, 55 Ala. 77; Bouck v. Enos, 61 Wis. 660.

96—Boyce v. Wabash Ry. Co., 63 Iowa 70, 50 Am. Rep. 730; Requa v. Holmes, 16 N. Y. 193; Smith v. Matthews, 9 Misc. Rep. (N. Y.) 427; Nickum v. Gaston, 24 Ore. 380, 33 Pac. 671, 35 Pac. 31; Haun v. Rio Grande W. Ry. Co., 22 Utah 346, 62 Pac. 908.

97—Alabama. Pearson v. Adams, 129 Ala. 157; Teague v. Lindsey, 106 Ala. 266; Noblin v. State, 100 Ala. 13; Welsh v. State, 97 Ala. 1; Jones

tions to the jury have been presented to the court, most of which were in substance embodied in the general charge, and one of which was erroneous, an "exception to the refusal of the court to charge the jury as requested" is not sufficient to authorize a review as to the refusal of any of the specific requests.⁹⁸ An exception to refusal to give "the four requests as asked for by defendant," without specifying which four of eight requests the court refused, is insufficient.⁹⁹

But where five distinct requests to charge, separately numbered, were submitted to the court, who ruled upon—

v. State, 96 Ala. 102; *Nelson v. Warren*, 93 Ala. 408; *Walker v. State*, 91 Ala. 76; *Stitt v. State*, 91 Ala. 10, 24 Am. St. Rep. 853; *Woods v. State*, 76 Ala. 35, 52 Am. Rep. 314; *Stovall v. Fowler*, 72 Ala. 77; *Smith v. Sweeney*, 69 Ala. 524; *Williams v. State*, 68 Ala. 551; *Kilpatrick v. Pickens County*, 66 Ala. 422; *McGehee v. State*, 52 Ala. 224.

Colorado. *Gill v. Schneider*, 48 Colo. 382, 110 Pac. 62.

Florida. *Melrose Mfg. Co. v. Kennedy*, 59 Fla. 312.

Kansas. *Fleming v. L. D. Latham & Co.*, 48 Kan. 773, 30 Pac. 166; *Bailey v. Dodge*, 28 Kan. 72.

Louisiana. *Wimbish v. Hamilton*, 47 La. Ann. 246.

Massachusetts. *Murphy v. McNulty*, 145 Mass. 464.

Michigan. *Edgell v. Francis*, 86 Mich. 232.

Minnesota. *Webb v. Fisher*, 57 Minn. 441; *Delude v. St. Paul City Ry. Co.*, 55 Minn. 63; *Rosquist v. D. M. Gilmore Furniture Co.*, 50 Minn. 192; *Carroll v. Williston*, 44 Minn. 287; *Ferson v. Wilcox*, 19 Minn. 449 (Gil. 388).

New Jersey. *Gardner v. State*, 55 N. J. L. 17.

New York. *Bishop v. Village of Goshen*, 120 N. Y. 337; *Caldwell v. Murphy*, 11 N. Y. 416.

Ohio. *Powers v. Hazelton & L. Ry. Co.*, 33 Ohio St. 429; *Everett v. Sumner*, 32 Ohio St. 562; *Voelckel v. Banner Brewing Co.*, 9 Ohio Cir. Ct. 318.

Oregon. *Salomon v. Cress*, 22 Ore. 177, 29 Pac. 439.

South Carolina. *Stackhouse v. Wheeler*, 17 S. C. 105.

Utah. *Marks v. Tompkins*, 7 Utah 421, 27 Pac. 6.

Wisconsin. *Welcome v. Mitchell*, 81 Wis. 566, 29 Am. St. Rep. 913.

United States. *Bogk v. Gassert*, 149 U. S. 17, 37 L. Ed. 631; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. Ed. 644; *Beaver v. Taylor*, 93 U. S. (3 Otto) 46, 23 L. Ed. 797; *Morgan v. United States*, 94 C. C. A. 518, 169 Fed. 242; *City of Key West v. Baer*, 13 C. C. A. 572, 66 Fed. 440; *Walker v. Windsor Nat. Bank*, 5 C. C. A. 421, 56 Fed. 76; *McClellan v. Pyeatt*, 1 C. C. A. 613, 50 Fed. 686.

98—*State v. Adamson*, 43 Minn. 196.

99—*Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224.

denying or modifying—each separately, and counsel “excepted to said refusals and modifications of said instructions as given,” it was held that such exception was sufficiently specific, and would be understood as applying to the ruling on each proposition.¹

Exceptions to certain “paragraphs” of the charge to the jury are insufficient when much, if not all, of the matter embraced in each paragraph is unobjectionable, and no particular proposition is indicated by the exceptions.²

But if all the instructions asked were proper, and in such form that they should all have been given, then a general exception to the refusal to charge will be sufficient.³ There would seem to be less reason for applying the rule to the case of a refusal of a request for several specific instructions than exists in the case of errors in instructions given. In the former case it might well be held that the attention of the court was sufficiently directed to the alleged errors by a general exception, and this is the rule in a few states.⁴

In the federal courts, the practice is governed by a rule of the supreme court,⁵ as to bills of exceptions which

1—Schurmeier v. Johnson, 10 Minn. 319 (Gil. 250). See also, Planters' Bank of Prince George's County v. Bank of Alexandria, 10 Gill & J. (Md.) 346.

2—Rheiner v. Stillwater St. Ry. & Transp. Co., 31 Minn. 193.

3—Ocheltree v. McClung, 7 W. Va. 232; Strohn v. Detroit & M. R. Co., 23 Wis. 126, 99 Am. Dec. 114n. It has been held, however, that, when only one of plaintiff's requests was refused, a general exception is sufficient. Sellers v. Hancock, 42 S. C. 40. Where a requested instruction contains propositions which might properly be given, but in connection with other propositions which should be refused, the whole instruction is properly refused, and a general exception is of no avail.

Marshall v. Oakes, 51 Me. 308; People v. Holms, 6 Parker Cr. R. (N. Y.) 25.

4—See Weber v. Kansas City Cable Ry. Co., 100 Mo. 194, 18 Am. St. Rep. 541. In Iowa, provided the exception is taken at the time a request for several instructions is refused, a general exception will be sufficient to raise the question of error in refusing any one of them. Harvey v. Tama County, 53 Iowa 228; Williamson v. Chicago, R. I. & P. R. Co., 53 Iowa 126, 36 Am. Rep. 206n; Davenport Gas Light & Coke Co. v. City of Davenport, 13 Iowa 229; Eyser v. Weissgerber, 2 Iowa 463.

5—See rule 4 of supreme court rules in 56 Law Ed. Appendix V “Bill of Exceptions.”

directs that "No bill of exceptions shall be allowed which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court." A similar rule exists in the circuit court of appeals. The rule is mandatory.⁶ The rule has sometimes been held to be even stricter than as here laid down, and it has been held that a general exception to an entire charge containing several propositions is insufficient to raise any question on appeal, either as to the sufficiency or insufficiency of the instructions.⁷

§ 427. Time of taking exceptions.

As a general rule, exceptions to instructions should be taken at the time such instructions are given to the jury,⁸ and before the jury retire;⁹ and a like rule applies to the

6—Price v. Pankhurst, 10 U. S. App. 497, 3 C. C. A. 551, 53 Fed. 312. As to rule in Circuit Court of Appeals, see Rule 10, 150 Fed. XXVII.

7—Ferson v. Wilcox, 19 Minn. 449 (Gil. 388); Judson v. Reardon, 16 Minn. 431 (Gil. 387); Baldwin v. Blanchard, 15 Minn. 489 (Gil. 403); State v. Staley, 14 Minn. 105 (Gil. 75).

8—Illinois Cent. R. Co. v. Ferrell, 108 Ill. App. 659; Patterson v. State, 4 Okla. Cr. App. 542, 113 Pac. 216.

9—Alabama. Reynolds v. State, 68 Ala. 507; City Council of Montgomery v. Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

California. Garoutte v. Williamson, 108 Cal. 135, 41 Pac. 35, 413; Mallett v. Swain, 56 Cal. 171.

Colorado. McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388,

24 Pac. 1076; Taylor v. Randall, 3 Colo. 399; Smith v. Cisson, 1 Colo. 29.

Florida. Gibson v. State, 26 Fla. 109; Baker v. Chatfield, 23 Fla. 540; Southern Exp. Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107; Baker v. State, 17 Fla. 406; Coker v. Hayes, 16 Fla. 368. But see Morrison v. State, 42 Fla. 149.

Illinois. Illinois Cent. R. Co. v. Modglin, 85 Ill. 481; Armstrong v. Mock, 17 Ill. 166; Love v. Moynehan, 16 Ill. 277, 63 Am. Dec. 306; Hill v. Ward, 7 Ill. 285; Updike v. Armstrong, 4 Ill. 564; Gibbons v. Johnson, 4 Ill. 61; Leigh v. Hodges, 4 Ill. 15; Illinois Cent. R. Co. v. Ferrell, 108 Ill. App. 659. But see Keck v. Bushway, 242 Ill. 441, rev'g 146 Ill. App. 4; Collins Ice-Cream Co. v. Stephens, 189 Ill. 200.

Kansas. Board Com'rs Allen Co. v. Boyd, 31 Kan. 765, 3 Pac. 523;

refusal of instructions,¹⁰ to the necessity of numbering instructions¹¹ or to the necessity of marking instructions

Joseph v. First Nat. Bank of Eldorado, 17 Kan. 256.

Kentucky. *Poston v. Smith's Ex'r*, 8 Bush 589.

Louisiana. *Buel v. New York Steamer*, 17 La. 541; *Penn v. Collins*, 5 Rob. 213.

Maine. *State v. Fenlason*, 78 Me. 495; *State v. Wilkinson*, 76 Me. 317.

Massachusetts. *Mooar v. Harvey*, 125 Mass. 574; *Lee v. Gibbs*, 10 Allen 248.

Michigan. *Garton v. Union City Nat. Bank*, 34 Mich. 279; *Doyle v. Stevens*, 4 Mich. 87.

Minnesota. *O'Connor v. Chicago, M. & St. P. Ry. Co.*, 27 Minn. 166, 38 Am. Rep. 288n.

Missouri. *State v. Westlake*, 159 Mo. 669; *State v. Burk*, 89 Mo. 635; *State v. Reed*, 89 Mo. 168; *Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608; *Boyse v. Crickard*, 31 Mo. 530; *Dozier v. Jerman*, 30 Mo. 216; *Powers v. Allen*, 14 Mo. 367; *Gordon v. Gordon*, 13 Mo. 215; *Randolph v. Alsey*, 8 Mo. 656; *State v. Hayden*, 61 Mo. App. 662.

Nebraska. *Schroeder v. Rinehard*, 25 Neb. 75; *Sherwin v. O'Connor*, 24 Neb. 603; *Nyce v. Shaffer*, 20 Neb. 507; *Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835n.

North Carolina. *Harrison v. Chappell*, 84 N. C. 258; *State v. Crockett*, 82 N. C. 599. Under the Code (see Pell's Rev. 1908 §§ 554, 542), exceptions may be taken at any time. *Smith v. Smith*, 108 N. C. 365; *State v. Eliason*, 91 N. C. 564.

Ohio. *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324.

Texas. *Mooring v. State*, 42 Tex. 85; *Martin v. State*, 25 Tex. App. 557; *Hobbs v. State*, 7 Tex. 117;

Williams v. State, 4 Tex. App. 5; *Grant v. State*, 2 Tex. App. 164; *Alderson v. State*, 2 Tex. App. 10; *Porter v. State*, 1 Tex. App. 477.

Vermont. *State v. Clark*, 37 Vt. 471.

West Virginia. *Wickes v. Baltimore & O. R. Co.*, 14 W. Va. 157; *Robinson v. Pitzer*, 3 W. Va. 336; *Nadenbousch v. Sharer*, 2 W. Va. 285.

Wisconsin. *Butler v. Carns*, 37 Wis. 61.

United States. *Railway Co. v. Heck*, 102 U. S. (12 Otto) 120, 26 L. Ed. 58; *Barton v. Forsyth*, 20 How. 532, 15 L. Ed. 1012; *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900; *Phelps v. Mayer*, 15 How. 160, 14 L. Ed. 643; *Wells Fargo & Co. v. Zimmer*, 108 C. C. A. 242, 186 Fed. 130; *Berwind-White Coal Min. Co. v. Firment*, 95 C. C. A. 1, 170 Fed. 151; *MacDonald v. United States*, 12 C. C. A. 339, 63 Fed. 426; *Park Bros. & Co. v. Bushnell*, 9 C. C. A. 138, 60 Fed. 583; *Bracken v. Union Pac. Ry. Co.*, 5 C. C. A. 548, 56 Fed. 447.

10—Instructions refused must be excepted to at the time, and before the retirement of the jury:

Florida. *Shepherd v. State*, 36 Fla. 374.

Massachusetts. *Reed v. Call*, 5 Cush. 14.

Missouri. *Dozier v. Jerman*, 30 Mo. 216.

Nebraska. *Tagg v. Miller*, 10 Neb. 442.

North Carolina. *Branton v. O'Briant*, 93 N. C. 99.

11—*Gibson v. Sullivan*, 18 Neb. 558.

“given” or “refused.”¹² Accordingly, it is held that an exception to the giving of instructions,¹³ or their refusal,¹⁴ is too late if taken after the verdict is rendered.

The failure to number instructions as required by statute cannot be objected to for the first time on motion for a new trial,¹⁵ and a similar rule applies to the giving¹⁶ or

The objection that special instructions given at the request of the adverse party were not numbered and signed as required by Mills' Ann. Code Colo., § 187, subd. 5, will not be considered on a motion for new trial, or on appeal, unless made in apt time. *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348.

12—*Barnewall v. Murrell*, 108 Ala. 366; *Holley v. State*, 75 Ala. 14; *Tagg v. Miller*, 10 Neb. 442.

13—*Alabama*. *Bynum v. Southern Pump & Pipe Co.*, 63 Ala. 462.

Idaho. *State v. O'Donald*, 4 Idaho 343, 39 Pac. 556.

Illinois. *Fitzgerald v. James*, 160 Ill. App. 434.

Indiana. *Neff v. Masters*, 173 Ind. 196.

Massachusetts. *Nixon v. Hammond*, 12 Cush. 285; *Leach v. Woods*, 14 Pick. 461; *Inhabitants of Buckland v. Inhabitants of Charlemon*, 3 Pick. 173.

Minnesota. *Barker v. Todd*, 37 Minn. 370.

North Carolina. *State v. Hart*, 116 N. C. 976; *Tayloe v. Old Dominion Steamship Co.*, 88 N. C. 15.

Virginia. *Washington & N. O. Tel. Co. v. Hobson*, 15 Gratt. 122.

West Virginia. *Wustland v. Potterfield*, 9 W. Va. 438.

United States. *Thiede v. Utah Territory*, 159 U. S. 510, 40 L. Ed. 237; *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 36 L. Ed. 162.

14—*State v. Debnam*, 98 N. C. 712; *Davis v. Council*, 91 N. C. 725. But see *State v. Varner*, 115 N. C. 744.

15—*Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348.

16—*Arkansas*. *Carroll v. Bowler*, 40 Ark. 168.

Florida. *West v. Blackshear*, 20 Fla. 457.

Illinois. *Illinois Cent. R. Co. v. Modglin*, 85 Ill. 481; *Diekhut v. Durrell*, 11 Ill. 72. *Contra*, *Collins Ice-Cream Co. v. Stephens*, 189 Ill. 200 (decided under Practice Act 1872, § 53; see *Jones & Addington's Ill. St. Ann.* ¶¶ 8618, 8620).

Indiana. *Louisville, N. A. & C. Ry. Co. v. Hart*, 119 Ind. 273, 4 L. R. A. 549; *Jaqua v. Cordesman & Egan Co.*, 106 Ind. 141.

Iowa. *Snyder v. Nelson*, 31 Iowa 238; *Snyder v. Eldridge*, 31 Iowa 129; *Garland v. Wholebau*, 20 Iowa 271; *Curtis v. Hunting*, 6 Iowa 536; *Whitney v. Olmstead*, 5 Iowa 373; *McKell v. Wright*, 4 Iowa 504.

Minnesota. *Barker v. Todd*, 37 Minn. 370.

Mississippi. *Barney v. Scherling*, 40 Miss. 320.

Missouri. *State v. Meyers*, 99 Mo. 107; *State v. Rambo*, 95 Mo. 462; *Gordon v. Gordon*, 13 Mo. 215; *State v. Hayden*, 61 Mo. App. 662.

North Carolina. *Harrison v. Chappell*, 84 N. C. 258.

North Dakota. *Boss v. Northern*

refusing¹⁷ of instructions, although in one jurisdiction, at least, the exception will be deemed abandoned, and is unavailable unless renewed and made the basis of a motion for a new trial.¹⁸ So, the failure to mark instructions "given" or "refused," as required by statute, cannot be taken advantage of on motion in arrest of judgment,¹⁹ nor for the first time on appeal.²⁰ It will be presumed on appeal, in the absence of any showing to the contrary, that the exceptions were taken in proper time.²¹

Under some statutes, objections and exceptions must be presented to the court before the charge is read to the jury,²² and other statutes provide that exceptions to either the giving or refusal of instructions may be taken within three days after verdict,²³ on motion for a new trial,²⁴ or at any time before final judgment is entered.²⁵

In one state, it has been held that the judge "has power to extend the time within which exceptions to a charge may

Pac. R. Co., 2 N. D. 128, 33 Am. St. Rep. 756n.

Texas. Vanwey v. State, 41 Tex. 639; Goode v. State, 2 Tex. App. 520; Franklin v. State, 2 Tex. App. 8; Edwards v. State, — Tex. Cr. App. —, 166 S. W. 517.

17—Shepherd v. State, 36 Fla. 374; State v. Halford, 104 N. C. 874.

18—State v. Grote, 109 Mo. 345; Haynes v. Town of Trenton, 108 Mo. 123; State v. Nelson, 101 Mo. 477.

Objection for failure to mark instructions "Given" or "Refused" must be renewed in motion for a new trial. Tagg v. Miller, 10 Neb. 442.

19—Holley v. State, 75 Ala. 14.

20—Knight v. Chicago, R. I. & P. Ry. Co., 81 Iowa 310; Fish v. Chicago, R. I. & P. Ry. Co., 81 Iowa 280.

21—Strickfaden v. Zipprick, 49

Ill. 286; Wakeman v. Lyon, 9 Wend. (N. Y.) 241.

22—Gutierrez v. State, — Tex. Cr. App. —, 170 S. W. 717; Eldridge v. Citizens' Ry. Co., — Tex. Civ. App. —, 169 S. W. 375.

Under Act of April 5, 1913, amending article 737, Code Civ. Proc., objections cannot be considered when not made before charge is read to jury. Hawkins v. State, — Tex. Cr. App. —, 168 S. W. 93.

23—Maxon v. Chicago, M. & St. P. Ry. Co., 67 Iowa 226; Bailey v. Anderson, 61 Iowa 749; Harrison v. Charlton, 42 Iowa 573. Formerly, the practice in Iowa was in accord with the general rule. Rawlins v. Tucker, 3 Iowa 213.

24—Barney v. Scherling, 40 Miss. 320.

25—Collins Ice-Cream Co. v. Stephens, 189 Ill. 200; Uhe v. Chicago, M. & St. P. Ry. Co., 4 S. D. 505.

be taken, either before or after such time has elapsed.”²⁶

In another state, under a statutory provision that the party objecting to the decision of the court must except at the time the decision is made, the rule is stated to be that exceptions to instructions must be taken before the jury have delivered their verdict. Whether this is a more liberal rule than the one above stated is not clear, but it certainly does not restrict the taking of objections to the precise time of the giving of the instructions.²⁷

Under a statute dispensing with the necessity of taking exceptions to the giving, refusing or modifying of instructions, it has been held that the legislature will not be deemed to have intended to do away with the necessity for making objections in some appropriate manner, so as to give the trial court an opportunity to correct errors.²⁸

§ 428. Necessity of bill of exceptions.

As a general rule, where there are no statutory provisions governing the subject, the instructions given at the trial form no part of the record, and are not subject to review, on appeal, unless brought into the record by a formal bill of exceptions.²⁹ And it is usually held that a formal bill of

26—Lindblom v. Sonsteli, 10 N. D. 140 (construing Rev. Code, § 5298; see N. Dak. Comp. St. 1913, § 7653).

27—Vaughn v. Ferrall, 57 Ind. 182; Wood v. McClure, 7 Ind. 155; Roberts v. Higgins, 5 Ind. 542; Jones v. Van Patten, 3 Ind. 107.

28—Denver & R. G. R. Co. v. Ryan, 17 Colo. 98, 28 Pac. 79. See also, City of Durango v. Luttrell, 18 Colo. 123, 31 Pac. 853; Wray v. Carpenter, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248; Keith v. Wells, 14 Colo. 321, 23 Pac. 991.

29—Alabama. North Birmingham Lumber Co. v. Sims & White, 157 Ala. 595.

Arkansas. McKinley v. Broom,

94 Ark. 147; Cheaney v. State, 36 Ark. 74.

Colorado. Big Kanawha Co. v. Jones, 45 Colo. 381, 102 Pac. 171; Witcher v. Watkins, 11 Colo. 548, 19 Pac. 540; Brink v. Posey, 11 Colo. 521, 19 Pac. 467; Banks v. Hoyt, 11 Colo. 399, 18 Pac. 448; McDonald v. Clough, 10 Colo. 59, 14 Pac. 121.

Florida. Richardson v. State, 28 Fla. 349; Parrish v. Pensacola & A. R. Co., 28 Fla. 252.

Illinois. Indiana, D. & W. Ry. Co. v. Hendrian, 190 Ill. 501, aff'g 92 Ill. App. 462; City Cab Co. v. Taylor, 30 Ill. App. 47; Liverpool, L. & G. Ins. Co. v. Sanders, 26 Ill. App. 559; Obermark v. People, 24 Ill. App.

exceptions is necessary although the instructions may be

259. See also, *Loeb v. Alexander*, 174 Ill. App. 143; *Devine v. Chicago City Ry. Co.*, 166 Ill. App. 177.

Indiana. *Clanin v. Fagan*, 124 Ind. 305; *Landwerlen v. Wheeler*, 106 Ind. 523; *Starnes v. Schofield*, 5 Ind. App. 4; *Henley v. Bronnenberg* (Ind. App.), 31 N. E. 583; *Steeg v. Walls*, 4 Ind. App. 18; *Ellebarger v. Swiggett*, 1 Ind. App. 598.

Iowa. *Lewis v. May*, 22 Iowa 599; *Pierce v. Locke*, 11 Iowa 454; *State v. Jones*, 11 Iowa 11; *Jordan v. Quick*, 11 Iowa 9; *Green v. McFaddin*, 5 Iowa 549; *Garber v. Morrison*, 5 Iowa 476; *Harmon v. Chandler*, 3 Iowa 150; *Ewing v. Scott*, 2 Iowa 447; *Claussen v. La Franz*, 1 Iowa 226; *Parker v. Pierce*, 4 Greene 452; *Reed v. Hubbard*, 1 Greene 153.

Kansas. *Moore v. Wade*, 8 Kan. 380.

Kentucky. *Forest v. Crenshaw*, 81 Ky. 51.

Louisiana. *State v. McClanahan*, 9 La. Ann. 210. "Although in writing, the judge's charge was not excepted to. We held, in *State v. Ricks*, 32 La. Ann. 1098, that, where the charge was in writing, and embodied in the record, we would notice errors, under proper assignment thereof, although not presented by bill of exceptions. While not now overruling this opinion, which, however, is contrary to prior authority (10 La. Ann. 450), and therefore to be strictly construed, we deem it proper to say that it is in every way preferable that charges should be excepted to when given, in order that the judge may have an opportunity of explaining or correcting his charge at the time; otherwise,

the defendant would be at liberty to take his chances of acquittal on the charge as delivered, and, if convicted, to urge his objection in subsequent proceedings. Only in case of gross and unambiguous error will we sustain objections to the charge not made and presented by bill of exceptions at time of delivery." *State v. Beaird*, 34 La. Ann. 104.

Maryland. *Sowerwein v. Jones*, 7 Gill & J. 335.

Michigan. *Wagar v. Peak*, 22 Mich. 368.

Mississippi. *Peden v. State*, 61 Miss. 267; *Haynie v. State*, 32 Miss. 403.

Montana. *Robinson v. Helena Light & Railroad Co.*, 38 Mont. 222, 99 Pac. 837.

Nevada. *State v. Ah Mook*, 12 Nev. 369; *State v. Forsha*, 8 Nev. 137.

Ohio. *City of Toledo v. Preston*, 50 Ohio St. 361; *Pettett v. VanFleet*, 31 Ohio St. 536.

Pennsylvania. *Yardley v. Cuthbertson*, 14 Wkly. Notes Cas. 29.

Tennessee. *Chesapeake, O. & S. W. R. Co. v. Foster*, 88 Tenn. 671; *Huddleston v. State*, 7 Baxt. 55; *Bass v. State*, 6 Baxt. 580; *Owens v. State*, 16 Lea 1; *McGhee v. Grady*, 12 Lea 89; *Hardwick v. State*, 6 Lea 229.

Texas. *Texas Telegraph & Telephone Co. v. Seiders*, 9 Tex. Civ. App. 431; *Gulf, C. & S. F. Ry. Co. v. Holt*, 1 Willson Civ. Cas. Ct. App., § 835.

Utah. *People v. Pettit*, 5 Utah 241, 14 Pac. 337.

Vermont. *Fletcher v. Howard*, 2 Aiken 115, 16 Am. Dec. 686.

Wisconsin. *Collins v. Breen*, 75

improperly embodied in the record.³⁰ An instruction cannot be proved by witnesses, and an alleged error therein can be examined only by a bill of exceptions.³¹

In a number of states, however, the statutes provide that the instructions shall be a part of the record, and in the states where such statutes exist, the instructions may be reviewed without a bill of exceptions.³² And it has

Wis. 606; *Koenigs v. Jung*, 73 Wis. 178; *Mullen v. Reinig*, 68 Wis. 408.

30—**California.** *People v. Beaver*, 83 Cal. 419, 23 Pac. 321; *People v. Keeley*, 81 Cal. 210, 22 Pac. 593; *People v. Rogers*, 81 Cal. 209, 22 Pac. 592; *People v. January*, 77 Cal. 179, 19 Pac. 258.

Colorado. *Witcher v. Watkins*, 11 Colo. 548, 19 Pac. 540; *Banks v. Hoyt*, 11 Colo. 399, 18 Pac. 448.

Illinois. *Chicago, M. & St. P. Ry. Co. v. Yando*, 127 Ill. 214; *Shedd v. Dalzell*, 30 Ill. App. 356; *City Cab Co. v. Taylor*, 30 Ill. App. 47; *Obermark v. People*, 24 Ill. App. 259.

Indiana. *Archibald v. State*, 122 Ind. 122; *Marquadt v. Sieberling*, 121 Ind. 307; *Delhaney v. State*, 115 Ind. 499; *Louisville, N. A. & C. Ry. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432; *Brown v. State*, 111 Ind. 441; *Whetton v. Clayton*, 111 Ind. 360; *Hollingsworth v. State*, 111 Ind. 289.

Iowa. *State v. Hall*, 79 Iowa 674.

Kansas. *State v. Sipe*, 38 Kan. 201, 16 Pac. 257; *State v. Smith*, 38 Kan. 194, 16 Pac. 254.

Kentucky. *Goldsbury v. May*, 1 Litt. 254.

Montana. *Scherrer v. Hale*, 9 Mont. 63, 22 Pac. 151.

Nebraska. *Chamberlain v. Brown*, 25 Neb. 434; *Yates v. Kinney*, 23 Neb. 648.

Tennessee. *Chesapeake, O. & S. W. R. Co. v. Foster*, 88 Tenn. 671.

Utah. *People v. Pettit*, 5 Utah 241, 14 Pac. 337.

Wisconsin. *Collins v. Breen*, 75 Wis. 606.

31—*State v. McClanahan*, 9 La. Ann. 210.

32—**Indiana.** In this state, it is held that instructions may be brought up for review in either of two modes, i. e., under the statute by compliance with its provisions, or by bill of exceptions in the usual way. *Clanin v. Fagan*, 124 Ind. 304. And see *Fowler v. Ft. Wayne & W. Val. Traction Co.*, 45 Ind. App. 441; *Wiseman v. Gouldsberry*, 45 Ind. App. 677. Either is sufficient: *Jeffersonville, M. & I. R. Co. v. Cox*, 37 Ind. 325; *Newby v. Warren*, 24 Ind. 161. Compare *Cross v. Pearson*, 17 Ind. 612.

By statute, instructions are made a part of the record, and it is provided that if a party wishes to except, it shall be sufficient to write on the margin or at the close of each instruction the words, "Refused and excepted to," or "Given and excepted to," which memorandum must be signed by the judge, and dated. This statute does not apply where the instructions are properly made part of the bill of exceptions. *Plank v. Jackson*, 128 Ind. 424. (See also, *Muncie & P. Traction Co. v. Black*, 173 Ind. 142.) But "they must be brought into the record by a bill of exceptions, or

been held that where a statute requires the instructions to

signed by the judge, and filed as a part of the record." *Vandalia Coal Co. v. Yemm*, 175 Ind. 524; *Muncie & P. Traction Co. v. Hall*, 173 Ind. 95; *Clanin v. Fagan*, 124 Ind. 304; *Bottorff v. Bottorff*, 45 Ind. App. 692; *Fowler v. Ft. Wayne & W. Val. Traction Co.*, 45 Ind. App. 441; *Mace v. Clark*, 42 Ind. App. 506. Where all the instructions are in the record, as provided by Rev. St. Ind. 1881, § 535 (see *Burns' Ann. St.* 1914, § 558), it is not necessary that the question of their property be presented by bill of exceptions, as provided by Id. § 630 (see *Burns' Ann. St.* 1914, § 561), for the presentation of reserved questions of law. *Richardson v. Coleman*, 131 Ind. 210, 31 Am. St. Rep. 429. See also, *Butt v. Iffert*, 171 Ind. 554; *Lower v. Franks*, 115 Ind. 334; *Cumberland Telephone & Telegraph Co. v. Hatter*, 44 Ind. App. 625; *Supreme Tent Knights of Maccabees of World v. Ethridge*, 43 Ind. App. 475. As it originally stood, the statute required the memorandum to be signed by the party or his attorney. *Sutherland v. Hankins*, 56 Ind. 343; *Maghee v. Baker*, 15 Ind. 254; *Bush v. Durham*, 15 Ind. 252; *State v. Rabourn*, 14 Ind. 300. And the signature by the judge, which is now required, was insufficient. *Newby v. Warren*, 24 Ind. 161; *Ledley v. State*, 4 Ind. 580. If an instruction asked for is put in writing, signed by the party or his attorney, and an entry made of the exception to its being given or refused, and also signed in the same manner, it becomes part of the record without the authentication of the judge, or being put into a bill

of exceptions. *Jeffersonville, M. & I. R. Co. v. Cox*, 37 Ind. 325.

Iowa. By statutory provision (Code, § 2789; see Code 1897, §§ 2789, 3675), instructions and the action of the court thereon in giving or refusing them constitute a part of the record, and need not be set out in the bill of exceptions in order to bring them before the supreme court. *Allison v. Jack*, 76 Iowa 205; *Roberts v. Leon Loan & Abstract Co.*, 63 Iowa 76. Although the trial court may settle a bill of exceptions in accordance with the prior practice. *State v. Kehr*, 137 Iowa 91. Where the giving and refusal of instructions and exceptions to such rulings are noted on the margins of the instructions, the supreme court can review such rulings, although they are not preserved by a bill of exceptions. *Wells v. Burlington, C. R. & N. R. Co.*, 56 Iowa 520. The instructions, when filed, become a part of the record, and may be certified by the clerk. *Parker v. Middleton*, 65 Iowa 200. While it is not essential that instructions should be preserved by bill of exceptions when they have been filed and made part of the record, yet it is essential that they be certified by the clerk of the trial court to the supreme court; and, if they cannot be made a part of such transcript, error in the giving of them cannot be considered. *Bonney v. Cocke*, 61 Iowa 303. Before the enactment of the statutory provision above referred to, it was held that instructions were not a part of the record unless made so by a bill of exceptions. *Pierce v. Locke*, 11 Iowa 454; *Ewing v. Scott*, 2 Iowa 447;

be filed with the clerk and entered in the court journal, they need not be brought up in the bill of exceptions.³³

§ 429. Sufficiency of record on appeal in general.

On appeal, the court is confined solely to the matters appearing in the record, in examining the case, and it follows that the appealing party must see that the record is sufficient to show conclusively that the court below committed error warranting reversal of the judgment.³⁴ Ac-

Claussen v. La Franz, 1 Iowa 226; *Parker v. Pierce*, 4 Greene 452.

Kansas. "In civil actions, the statute seems to provide that instructions reduced to writing and signed by the judge shall, when filed, become a part of the record." *State v. Lewis*, 10 Kan. 157. "Instructions not embodied in a formal bill of exceptions, nor signed by the judge of the court below, as provided by statute [Gen. St. pp. 682, 686, §§ 276, 303; see Gen. St. 1909, § 6170], nor embodied in a case made for the supreme court, as provided by statute [Gen. St. p. 737, §§ 546-549; Laws 1871, p. 274; see Gen. St. 1909, § 6170], form no part of the record, and will not be considered by the supreme court." *Kshinka v. Cawker*, 16 Kan. 63. Instructions given by the court in a criminal case, not preserved by a bill of exceptions, form no part of the record, and cannot be considered on an appeal to the supreme court. *State v. Ratner*, 44 Kan. 429, 24 Pac. 953; *State v. Smith*, 38 Kan. 194, 16 Pac. 254. And see *State v. Lewis*, 10 Kan. 157. "The charge of the court in a criminal cause only becomes a part of the record by means of a bill of exceptions." *State v. Smith*, 38 Kan. 194, 16 Pac. 254. In a criminal prosecution, "instructions asked for by

the defendant, and refused by the trial court, cannot become a part of the record unless they are embodied in a bill of exceptions." *State v. McClintock*, 37 Kan. 40, 14 Pac. 511.

Kentucky. *Latham v. Lindsay*, 33 Ky. L. Rep. 985; *Tharp v. Chambers*, — Ky. —, 128 S. W. 67.

Texas. Rev. St. Tex., art. 1318, provides that the charge is to be filed, "and shall constitute a part of the record of the cause, and shall be regarded as excepted to, and subject to revision for errors therein, without the necessity of taking any bill of exceptions." (See *Vernon's Sayles' Tex. Civ. St.* 1914, art. 2058.) *Redus v. Burnett*, 59 Tex. 581; *Missouri Pac. R. Co. v. Rabb*, 3 Willson, Civ. Cas. Ct. App. § 39.

33—*Eaton v. Carruth*, 11 Neb. 231.

34—*McAbee v. Wiley*, 92 Ark. 245; *Castle v. Clark*, 45 Ind. App. 192; *MacKinnon Boiler & Mach. Co. v. Central Michigan Land Co.*, 156 Mich. 11; *St. Louis, B. & M. Ry. Co. v. Yznaga*, — Tex. Civ. App. —, 122 S. W. 267. To authorize a reversal because of the refusal to give a charge, the record must affirmatively show that the charge was correct and justified by the evidence. *Wyatt v. Stewart*, 34 Ala. 716. See also, *Birmingham Railway, Light & Power Co. v. Mosely*, 164 Ala. 111.

The burden of showing reversible

cordingly, the propriety of giving or refusing instructions will not be considered on appeal unless the record shows that the charge or request was relevant and material to some question in the case,³⁵ and an appellate court "will not review erroneous instructions upon mere abstract principles of law."³⁶ The record must show that an exception was taken below³⁷ at the proper time.³⁸ And it is held that objections to instructions must be raised on appeal by assignment of error,³⁹ and only the errors assigned will be considered.⁴⁰ So, where the refusal of a request to charge is assigned for error, the record must show a proper formal request.⁴¹ And if a cautionary instruction is requested to counteract improper remarks of counsel in argument, a

error in the proceedings below rests upon the party asserting it, i. e., upon the appellant. See *Patchell v. Jaqua*, 6 Ind. App. 70; *Linton v. Allen*, 154 Mass. 432; *Athens Cotton Oil Co. v. Harper*, — Tex. Civ. App. —, 126 S. W. 323; *King v. State* (Tex. Cr. App.) 21 S. W. 190. See also, §§ 423-433, *post*, "Presumptions on appeal."

35—Illinois. *Leavitt v. Randolph Co.*, 85 Ill. 507; *Wilson v. White*, 176 Ill. App. 183.

Indiana. *Castle v. Clark*, 45 Ind. App. 192; *Amick v. O'Hara*, 6 Blackf. 258.

Iowa. *Kelleher v. City of Keokuk*, 60 Iowa 473; *Murphy v. Johnson*, 45 Iowa 57.

Texas. *Ashworth v. State*, 9 Tex. 490; *Hill v. Crownover*, 4 Tex. 8; *Chandler v. State*, 2 Tex. 305; *Holman v. Britton*, 2 Tex. 297.

Virginia. *Valley Mut. Life Ass'n v. Teewalt*, 79 Va. 421.

Washington. *Yelm Jim v. Territory*, 1 Wash. T. 63.

United States. *New Orleans Ins. Ass'n v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358.

36—*Yelm Jim v. Territory*, 1 Wash. T. 63.

37—*Indianapolis, B. & W. Ry. Co. v. Rhodes*, 76 Ill. 285; *Toledo, P. & W. Ry. Co. v. Miller*, 55 Ill. 448; *Buckmaster v. Cool*, 12 Ill. 74; *Keeling v. Kuhn*, 19 Kan. 441.

38—*Love v. Moynihan*, 16 Ill. 277, 63 Am. Dec. 306. See also, § 427, *ante*, "Time of taking exceptions."

39—*Bender v. Peyton*, 4 Tex. Civ. App. 57.

40—Where the bill of exceptions shows that exception was taken to the giving of instructions, the ruling may be assigned for error, though it does not appear upon what grounds the motion for a new trial was based. "The whole case is put, by the bill of exceptions, on the misdirection of the court, and that is the only question now properly before us." *McClurkin v. Ewing*, 42 Ill. 283.

41—Thus, where requests for instructions must be in writing, the bill of exceptions must show that a written request was made. *Nickless v. Pearson*, 126 Ind. 477.

refusal to so charge will not be reviewed unless the objectionable remarks of counsel are preserved in the bill of exceptions.⁴² Where the record showed that the court below erred in charging that the jury might take with them into the jury room an account book introduced in evidence, but failed to show that the jury in fact did so, it was held that the record did not show reversible error, as the error was harmless, unless the jury took the book with them into the jury room.⁴³

§ 430. Preserving instructions in record.

Instructions which have been excepted to and upon which a party appealing relies for reversal, must be brought up in the bill of exceptions or in the manner authorized.⁴⁴ When the refusal of requested instructions is assigned as error, the instructions refused must be embodied in the bill of exceptions,⁴⁵ and where the modification of an instruction is excepted to, the bill of exceptions must show

42—*Kepperly v. Ramsden*, 83 Ill. 354.

43—*First Nat. Bank of Porter Co. v. Williams*, 4 Ind. App. 501.

44—**Alabama.** *Birmingham Railway, Light & Power Co. v. Mosely*, 164 Ala. 111.

Arkansas. *McKinley v. Broom*, 94 Ark. 147; *Cheaney v. State*, 36 Ark. 74; *Hicks v. Britt*, 21 Ark. 422.

California. *Freeborn v. Norcross*, 49 Cal. 313.

Georgia. *Barco v. Taylor*, 5 Ga. App. 372.

Indiana. *McKinsey v. McKee*, 109 Ind. 209; *Helms v. Wayne Agricultural Co.*, 73 Ind. 325, 38 Am. Rep. 147; *Indianapolis & M. Rapid Transit Co. v. Walsh*, 45 Ind. App. 42.

Missouri. *Montgomery v. Harker*, 81 Mo. 63; *Greenabaum v. Millsaps*, 77 Mo. 474; *Johnson v. Greenleaf*, 73 Mo. 671; *State v. Shehane*, 25 Mo.

565; *Stroup v. Thomas*, 140 Mo. App. 430; *Hoyt v. Quinn*, 20 Mo. App. 72; *Davis v. Hilton*, 17 Mo. App. 319; *Cadmus v. St. Louis Bridge & Tunnel Co.*, 15 Mo. App. 86.

Nevada. *State v. Rover*, 11 Nev. 343; *State v. Burns*, 8 Nev. 251; *State v. Forsha*, 8 Nev. 137.

Tennessee. *Pelican Assur. Co. v. American Feed & Grocery Co.*, 122 Tenn. 652.

Wisconsin. *Collins v. Breen*, 75 Wis. 606.

45—*Pierson v. State*, 12 Ala. 149; *State v. Schuessler*, 3 Ala. 419; *Gill v. Skelton*, 54 Ill. 158; *Prindeville v. People*, 42 Ill. 217; *Wilmington Coal Min. & Mfg. Co. v. Barr*, 2 Ill. App. 84; *Kleinschmidt v. McDermott*, 12 Mont. 309, 30 Pac. 393; *Renshaw v. Switzer*, 6 Mont. 464, 13 Pac. 127. See also, *Keeling v. Kuhn*, 19 Kan. 441.

what the modifications were, and also the instruction as modified.⁴⁶

The court cannot judge of the correctness of instructions given, refused or modified without having such instructions or modifications before it, and, as has been seen in a previous section, instructions are not ordinarily a part of the record, and therefore are not before the court unless embodied in a bill of exceptions.⁴⁷ Where the error complained of is one that might be cured by other instructions in the case, all the instructions must be brought up in the record, so that the court may see that the error was not in fact cured;⁴⁸ otherwise there can be no reversal.⁴⁹ Thus, where the refusal of an instruction is assigned as error, and the record does not purport to contain all the instructions, such refusal cannot be reviewed on appeal, because, *non constat*, the instruction may have been refused because already once given.⁵⁰ The burden of showing error in such

46—*St. Louis, I. M. & S. Ry. Co. v. Hecht*, 38 Ark. 357; *Viera v. Atchison, T. & S. F. R. Co.*, 10 Cal. App. 267, 101 Pac. 690; *Burns v. People*, 126 Ill. 285; *Gulliver v. Adams Exp. Co.*, 38 Ill. 503; *Balance v. Leonard*, 37 Ill. 43; *Boies v. Henney*, 32 Ill. 130; *Missouri Pac. Ry. Co. v. Williams*, 75 Tex. 4, 16 Am. St. Rep. 867.

47—See § 428, *ante*, "Necessity of bill of exceptions."

"When the bad practice is adopted by the court, of answering the legal propositions submitted by counsel seriatim, and then separately giving what is sometimes called a 'general charge,' and counsel take an exception to the answers, and not to the general charge, the bill of exceptions does not put the general charge on the record; but when the answers refer to the general charge, so much of the latter as is thus referred to will

come up with the answers, and be considered a part of them." *Wissler v. Hershey*, 23 Pa. St. 333.

48—*Marshall v. Lewark*, 117 Ind. 377; *Lake Erie & W. R. Co. v. Carson*, 4 Ind. App. 185; *Oregon R. & Nav. Co. v. Galliher*, 2 Wash. T. 70, 3 Pac. 615.

49—*Board Com'rs Brown Co. v. Roberts*, 22 Kan. 762.

"Where all the instructions given to the jury do not appear, there can be no reversal merely because it appears that the court instructed the jury to consider all the facts, and render such a verdict as they should deem just and right." *Mitchell v. Tomlinson*, 91 Ind. 167.

50—*Illinois*. *Reavely v. Harris*, 239 Ill. 526; *Wilmington Coal Min. & Mfg. Co. v. Barr*, 2 Ill. App. 84.

Iowa. *Huff v. Aultman*, 69 Iowa 71, 58 Am. Rep. 213; *State v. Williamson*, 68 Iowa 351; *State v. Stan-*

a case can only be sustained by showing either that no instructions were given on the point in question, or that the instructions given upon such point were erroneous.⁵¹ So, where the error alleged is the failure of the lower court to properly and fully instruct the jury, all the instructions given must be set out in the record, for the obvious reason that the court cannot otherwise determine whether the instructions covered the case or not.⁵² Where, however, the error committed is one that could not have been cured by other instructions in the case, the court may reverse, although all the instructions are not contained in the record.⁵³ In the United States Supreme Court, the rule has been long established that only so much of the charge as is excepted to should be embodied in the bill of excep-

ley, 48 Iowa 221; *Moody v. St. Paul & S. C. R. Co.*, 41 Iowa 284; *State v. Nichols*, 38 Iowa 110; *Chase v. Scott*, 33 Iowa 309; *Bower v. Stewart*, 30 Iowa 579; *State v. Johnson*, 19 Iowa 230.

Kansas. *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565; *State v. Teissedre*, 30 Kan. 210, 476, 2 Pac. 108, 650; *Keeling v. Kuhn*, 19 Kan. 441; *Shepard v. Pratt*, 16 Kan. 209; *Pacific R. Co. v. Brown*, 14 Kan. 469; *Wolfley v. Rising*, 12 Kan. 535; *Norton v. Foster*, 12 Kan. 44; *Ferguson v. Graves*, 12 Kan. 39; *Da Lee v. Blackburn*, 11 Kan. 190; *Marshall v. Shibley*, 11 Kan. 114; *Washington Life Ins. Co. v. Haney*, 10 Kan. 525; *Morgan v. Chapple*, 10 Kan. 216; *Wilson v. Fuller*, 9 Kan. 176.

Maine. *Hearn v. Shaw*, 72 Me. 187.

Massachusetts. *Linton v. Allen*, 154 Mass. 432.

Montana. *Robinson v. Helena Light & Railroad Co.*, 38 Mont. 222, 99 Pac. 837.

51—*Patchell v. Jaqua*, 6 Ind. App.

70; *Linton v. Allen*, 154 Mass. 434; *King v. State* (Tex. Cr. App.) 21 S. W. 190.

52—*State v. Hamilton*, 32 Iowa 572; *State v. Rhea*, 25 Kan. 576; *Berrenberg v. City of Boston*, 137 Mass. 231, 50 Am. Rep. 296n.

53—"This court will not ordinarily reverse on account of erroneous instructions, unless the record contains all those given; but where the instructions given contain errors that could not be cured by others, it may be" otherwise. *Meyer v. Temme*, 72 Ill. 574.

If any instruction given is so far erroneous that any modification thereof properly presenting the law would have been in conflict with it, the error will be ground for reversal, although all the instructions are not before the court; but it will be otherwise if there might have been, in another instruction, modifications or limitations such as, with the instruction complained of, would have correctly presented the law. *Bland v. Hixenbaugh*, 39 Iowa 532.

tions,⁵⁴ and in some states the practice seems to be the same.⁵⁵ It has also been held that, "In a motion for a new trial, if the rule *nisi* states the charge differently from the charge itself, as written out by the judge, and sent up with the record, the appellate court will be governed by the charge as written" by the judge.⁵⁶

§ 431. Preserving evidence in record.

In a prior section⁵⁷ it was stated that the record on appeal must show that the instructions or requests presented for review were relevant and material to the issues involved on the trial of the case. Accordingly, the bill of exceptions must usually show so much of the evidence as the instructions or requests were based upon.⁵⁸ And it has

54—*Phoenix Life Ins. Co. v. Rad-din*, 120 U. S. 183, 30 L. Ed. 644, citing *United States v. Rindskopf*, 105 U. S. (15 Otto) 418, 26 L. Ed. 1131; *Zeller's Lessee v. Eckert*, 4 How. (U. S.) 289, 11 L. Ed. 979; *Stimpson v. Westchester R. Co.*, 3 How. (U. S.) 553, 11 L. Ed. 722; *Gregg v. Sayre's Lessee*, 8 Pet. (U. S.) 244, 8 L. Ed. 932; *Magniac v. Thompson*, 7 Pet. (U. S.) 348, 8 L. Ed. 709; *Crane v. Crane*, 5 Pet. (U. S.) 190, 8 L. Ed. 92; *Carver v. Jackson*, 4 Pet. (U. S.) 1, 7 L. Ed. 761; *Evans v. Eaton*, 7 Wheat. (U. S.) 356, 5 L. Ed. 472. See also, *Conard v. Pacific Ins. Co.*, 6 Pet. (U. S.) 262, 8 L. Ed. 392; *Lincoln v. Claffin*, 7 Wall. (U. S.) 132, 19 L. Ed. 106. And this practice is enforced by an express rule of court. See Rule 4 of 1884, 108 U. S. 574; Rule 4 of 1858, 21 How. (U. S.) vi.; and Rule 38 of 1832, 6 Pet. (U. S.) iv, in 56 Law. Ed. Appendix V. See also, Rule 10 of Circuit Court of Appeals, 150 Fed. XXVII.

55—The bill of exceptions should

merely state the rulings upon points of law made at the trial, and not set out the charge at length. *Burt v. Merchants' Ins. Co.*, 115 Mass. 16, quoting with approval remarks of Mr. Justice Story to same effect in *Evans v. Eaton*, 7 Wheat. (U. S.) 356, 426, 5 L. Ed. 472, 490: "The insertion in the bill of exceptions of the general charge of the court, to which no exceptions were taken, cannot possibly injure the appellant. It furnishes no ground for reversal." *Hollingsworth v. Chapman*, 54 Ala. 8, citing *Grace v. McKissack*, 49 Ala. 163.

56—*Alston v. Grantham*, 26 Ga. 374.

57—See § 429, *ante*, "Sufficiency of record on appeal in general."

58—*Alabama*. *Koosa & Co. v. Warten*, 158 Ala. 496; *Hill v. State*, 43 Ala. 335; *Morris v. State*, 25 Ala. 57; *Jones v. Stewart*, 19 Ala. 701; *Leverett's Heirs v. Carlisle*, 19 Ala. 80; *Brazier v. Burt*, 18 Ala. 201; *Dent v. Portwood*, 17 Ala. 242; *Tharp v. State*, 15 Ala. 749; *King v.*

been held that where the record does not purport to contain all the evidence, the correctness of the court's action in giving or refusing instructions will not be considered on appeal, and error therein is not available as a ground for reversal.⁵⁹ Where none of the evidence appears in the record, and there is no statement of what it tended to prove, or that it raised the questions on which instructions

Crocheron, 14 Ala. 822; *Peden v. Moore*, 1 Stew. & P. 71, 21 Am. Dec. 649.

Colorado. *Greenlaw Lumber & Timber Co. v. Chambers*, 46 Colo. 587, 105 Pac. 1091.

Florida. *Blige v. State*, 20 Fla. 742, 51 Am. Rep. 628; *Stewart v. Mills*, 18 Fla. 57; *Sherman v. State*, 17 Fla. 888; *Southern Exp. Co. v. Van Meter*, 17 Fla. 783, 35 Am. Rep. 107; *McKay v. Friebele*, 8 Fla. 21.

Illinois. *Evans v. Lohr*, 3 Ill. 511; *Patrick v. McAleenan Boiler Co.*, 136 Ill. App. 563.

Indiana. *Hoffbauer v. Morgan*, 172 Ind. 273; *State v. Bartlett*, 9 Ind. 569.

Iowa. *Monson v. Carlstrom*, 141 Iowa 183; *Wilcox v. McCune*, 21 Iowa 294; *Potter v. Wooster*, 10 Iowa 334.

Massachusetts. *Whitecomb v. Whitcomb*, 205 Mass. 310, 18 Ann. Cas. 410; *Whitehead & A. Mach. Co. v. Ryder*, 139 Mass. 366; *O'Neil v. Wolffsohn*, 137 Mass. 134; *Horton v. Cooley*, 135 Mass. 589; *Salomon v. Hathaway*, 126 Mass. 482.

Missouri. *Phelps v. Conqueror Zinc Co.*, 218 Mo. 572.

Texas. *Holman v. Britton*, 2 Tex. 297.

United States. *Spreckels v. Brown*, 212 U. S. 208, 53 L. Ed. 476; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. Ed. 644; *Jones v. Buckell*, 104 U. S. (14

Otto) 554, 26 L. Ed. 842; *Worthington v. Mason*, 101 U. S. (11 *Otto*) 149, 25 L. Ed. 848; *Vasse v. Smith*, 6 Cranch 226, 3 L. Ed. 207; *Southwestern Virginia Improvement Co. v. Frari*, 7 C. C. A. 149, 58 Fed. 171.

59—**Alabama.** *Tracey, Irwine & Co. v. Warren*, 45 Ala. 408; *Green v. Tims*, 16 Ala. 541; *Brewer v. Strong's Ex'rs*, 10 Ala. 961, 44 Am. Dec. 514.

Illinois. *Love v. Moynahan*, 16 Ill. 277, 63 Am. Dec. 306.

Indiana. *Ward v. State*, 52 Ind. 454.

Iowa. *State v. Hamilton*, 32 Iowa 572; *Preston v. Walker*, 26 Iowa 205; *Nollen v. Wisner*, 11 Iowa 190.

Kansas. *Board Com'rs Allen Co. v. Boyd*, 31 Kan. 765, 3 Pac. 523; *Hymes v. Jungren*, 8 Kan. 392.

Texas. *Fulgham v. Bendy*, 23 Tex. 64; *Hutchins v. Wade*, 20 Tex. 7; *McMullen v. Kelso*, 4 Tex. 235; *Chandler v. State*, 2 Tex. 305; *Holman v. Britton*, 2 Tex. 297.

West Virginia. *Powell v. Terry's Adm'r*, 77 Va. 250.

A party seeking the revision of a general affirmative charge must either show that the evidence was conflicting, and the charge an invasion of the province of the jury, or he must set out all the evidence, that the appellate court may be able to determine whether the charge is

are based, the appellate court cannot, as a general rule, determine whether there was error in the rulings of the court as to the instructions or not.⁶⁰ Where the charge is objected to on the ground of irrelevancy, all the evidence must be brought up by the bill of exceptions.⁶¹ And a judgment will not be reversed for a mere failure to instruct, in the absence of any evidence in the record showing the necessity and propriety of an instruction in regard to the omitted particulars.⁶² It has been held, however, that where the record contains no evidence or statement of facts, the instructions are to be regarded on appeal as abstract propositions, unconnected with the case or the issues, and not affecting the correctness of the judgment.⁶³

In some cases error in regard to instructions is available

authorized by it. *Tracey, Irwine & Co. v. Warren*, 45 Ala. 408; *Griffin v. Bland*, 43 Ala. 542; *Owens v. Callaway*, 42 Ala. 301; *Fleming v. Usery*, 30 Ala. 282; *Doe d. School Com'rs v. Godwin*, 30 Ala. 242; *Barnes v. Mobley*, 21 Ala. 232; *Gaines v. Harvin*, 19 Ala. 491.

60—*Leavitt v. Randolph County*, 85 Ill. 507; *Cleveland, C., C. & St. L. Ry. Co. v. Rudy*, — Ind. App. —, 87 N. E. 555; *State Ins. Co. v. Curry*, 44 Kan. 741, 25 Pac. 221; *Gray v. City of Emporia*, 43 Kan. 704, 23 Pac. 944; *Stetler v. King*, 43 Kan. 316, 23 Pac. 558; *State v. English*, 34 Kan. 629, 9 Pac. 761; *Town of Leroy v. McConnell*, 8 Kan. 273.

As instructions, abstractly correct, may be properly refused if not applicable under the evidence, a party complaining of the refusal to give an instruction must bring before the court on appeal the evidence showing such applicability. *Chase v. Scott*, 33 Iowa 309; *Wilcox v. McCune*, 21 Iowa 294; *Paden v. Griffith*, 12 Iowa 272; *Wisner v. Brady*, 11 Iowa 248; *Frost v. Inman*, 10

Iowa 587; *Hanan v. Hale*, 7 Iowa 153; *Gover v. Dill*, 3 Iowa 337; *Cutter v. Fanning*, 2 Iowa 580; *Youngerman v. Pugh*, — Iowa —, 125 N. W. 321; *Auld v. Kimberlin*, 7 Kan. 601.

61—*Muirhead v. Muirhead*, 8 Smedes & M. (Miss.) 211; *Law v. Merrills*, 6 Wend. (N. Y.) 268; *United States v. Morgan*, 11 How. (U. S.) 159, 13 L. Ed. 646; *Zeller's Lessee v. Eckert*, 4 How. (U. S.) 297, 11 L. Ed. 983.

62—*Hedrick v. Smith*, 77 Tex. 608. "Where the error complained of is that the court failed to give a special and separate instruction upon a single and collateral fact disclosed by the testimony, the entire testimony should ordinarily be presented, so that the court may see that the fact is of such importance as to require special and separate notice." *Head v. Dyson*, 31 Kan. 74, 1 Pac. 258.

63—*Hollingsworth v. Holsousen*, 17 Tex. 41; *Salinas v. Wright*, 11 Tex. 572; *Holman v. Britton*, 2 Tex. 297.

on appeal, notwithstanding that the record does not contain all the evidence. Thus the error may warrant reversal though all the evidence is not contained in the record, where the instructions are erroneous under any supposable state of facts,⁶⁴ where they are based on incompetent evidence,⁶⁵ or where the pleadings render them necessarily erroneous.⁶⁶ It has also been held that where no question is made on the evidence, it is sufficient to secure a review of instructions to state in the bill of exceptions that the evidence established or tended to prove certain facts, without setting it out *in extenso*.⁶⁷

§ 432. Presumption against error on appeal.

The rules as to presumption on appeal are often merely a statement as to the rules concerning what the record must contain, in order to authorize a review of the instructions given or refused, already referred to.⁶⁸

Thus the rule that the burden to show the existence of reversible error on the record is on the appellant is sometimes stated by saying that there is a presumption against error, and in the absence of an affirmative showing to the contrary, it will be presumed that the action of the trial court was correct under the circumstances.

64—Tharp v. State, 15 Ala. 749; Peden v. Moore, 1 Stew. & P. (Ala.) 71; Rowland v. Ladiga, 9 Port. (Ala.) 488; Vandalia Coal Co. v. Yemm, 175 Ind. 524; Hoffbauer v. Morgan, 172 Ind. 273; Palmer v. Wright, 58 Ind. 486; Blizzard v. Bross, 56 Ind. 74; Smathers v. State, 46 Ind. 447; Barlow v. Thompson, 46 Ind. 384; Woodruff v. Garner, 27 Ind. 4, 89 Am. Dec. 477n; Griffin v. Templeton, 17 Ind. 234; Ruffing v. Tilton, 12 Ind. 259; Jolly v. Terre Haute Drawbridge Co., 9 Ind. 417; Woolley v. State, 8 Ind. 502; New Albany & S. R. Co. v. Callow, 8 Ind. 471; Eward v. Lawrenceburgh & U. M. R. Co., 7 Ind. 711; Murray v.

Fry, 6 Ind. 371; Murphy v. Johnson, 45 Iowa 57; Lower v. Marceline Coal & Min. Co., 142 Mo. App. 351.

65—Lane v. Miller, 17 Ind. 58.

66—Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560; Mason v. McCampbell, 2 Ark. 506; Robins v. Fowler, 2 Ark. 143; Pfeuffer v. Maltby, 54 Tex. 454, 38 Am. Rep. 631.

67—Leavitt v. Randolph County, 85 Ill. 507; Schmidt v. Chicago & N. W. Ry. Co., 83 Ill. 405; Pennsylvania Co. v. Swan, 37 Ill. App. 85; Kelleher v. City of Keokuk, 60 Iowa 473; Mudge v. Agnew, 56 Iowa 297.

68—See § 430, *ante*.

It will generally be presumed on appeal that the trial court gave all the instructions which were required by the case, and it will also be presumed that such instructions were correct, unless the record shows the contrary,⁶⁹ al-

69—**Alabama.** *Davis v. Badders*, 95 Ala. 348; *Louisville & N. R. Co. v. Orr*, 94 Ala. 602; *Cobb v. Malone*, 87 Ala. 514; *Hyde v. Adams*, 80 Ala. 111; *Myatts v. Bell*, 41 Ala. 222; *English's Ex'r v. McNair's Adm'rs*, 34 Ala. 40.

Arkansas. *McAbee v. Wiley*, 92 Ark. 245; *Crisman v. McDonald*, 28 Ark. 8.

California. *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589; *Richardson v. City of Eureka*, 96 Cal. 443, 31 Pac. 458; *People v. Von*, 78 Cal. 1, 20 Pac. 35; *Carpenter v. Ewing*, 76 Cal. 487, 18 Pac. 432; *California Cent. Ry. Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599; *Shepherd v. Jones*, 71 Cal. 223, 16 Pac. 711; *People v. Bourke*, 66 Cal. 455, 6 Pac. 89; *People v. Gilbert*, 60 Cal. 108; *People v. Smith*, 57 Cal. 130; *Hinkle v. San Francisco & N. P. R. Co.*, 55 Cal. 627; *Brown v. Kentfield*, 50 Cal. 129; *Baldwin v. Bornheimer*, 48 Cal. 434; *People v. Strong*, 46 Cal. 303; *People v. Donahue*, 45 Cal. 321; *People v. Padillia*, 42 Cal. 535; *People v. Torres*, 38 Cal. 141; *People v. Dick*, 34 Cal. 663; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *Beckman v. McKay*, 14 Cal. 250.

Colorado. *Klink v. People*, 16 Colo. 467, 27 Pac. 1062; *Halsey v. Darling*, 13 Colo. 1, 21 Pac. 913.

District of Columbia. *Bunyea v. Metropolitan R. Co.*, 8 Mackey 76.

Florida. *Sammis v. Wightman*, 31 Fla. 10; *Gibson v. State*, 26 Fla. 109.

Georgia. *Pool v. Gramling*, 88 Ga. 653; *Chattahoochee Brick Co. v.*

Sullivan, 86 Ga. 50; *Christian v. Wahl*, 83 Ga. 395; *Wilson v. Atlanta & C. Ry. Co.*, 82 Ga. 386; *Carson v. State*, 80 Ga. 170.

Illinois. *Chicago, M. & St. P. Ry. Co. v. Yando*, 127 Ill. 214; *Meyer v. Temme*, 72 Ill. 574; *Hahn v. St. Clair Sav. & Ins. Co.*, 50 Ill. 526; *De Clerq v. Mungin*, 46 Ill. 112; *City of Abingdon v. Meadows*, 28 Ill. App. 442; *Wilmington Coal Min. & Mfg. Co. v. Barr*, 2 Ill. App. 84.

Indiana. *Stevens v. Templeton*, 174 Ind. 129; *Hilker v. Kelley*, 130 Ind. 356, 15 L. R. A. 622; *Lehman v. Hawks*, 121 Ind. 541; *Marshall v. Lewark*, 117 Ind. 377; *Lower v. Franks*, 115 Ind. 334; *Silver v. Parr*, 115 Ind. 113; *Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 460; *Joseph v. Mather*, 110 Ind. 114; *Ford v. Ford*, 110 Ind. 89; *Frank v. Grimes*, 105 Ind. 346; *Unruh v. State*, 105 Ind. 117; *Johns v. State*, 104 Ind. 557; *Elkhart Mut. Aid, Benevolent & Relief Ass'n v. Houghton*, 103 Ind. 286, 53 Am. Rep. 514; *Kennedy v. Anderson*, 98 Ind. 151; *Stockton v. Stockton*, 73 Ind. 510; *Stull v. Howard*, 26 Ind. 456; *Buntin v. Weddle*, 20 Ind. 449; *Cincinnati, L. & A. Electric St. R. Co. v. Cook*, 44 Ind. App. 303; *Patchell v. Jaqua*, 6 Ind. App. 70; *Walter v. Uhl*, 3 Ind. App. 219; *Gould v. O'Neal*, 1 Ind. App. 144.

Iowa. *Munn v. Shannon*, 86 Iowa 363; *Leiber v. Chicago, M. & St. P. Ry. Co.*, 84 Iowa 97; *Johnson v. Knudtson*, 82 Iowa 762; *State v. Moore*, 77 Iowa 449; *Fernbach v.*

though it is sometimes held that this rule applies only to

City of Waterloo, 76 Iowa 598; State v. Wyatt, 76 Iowa 328; Warbasse v. Card, 74 Iowa 306; State v. Broadwell, 73 Iowa 765; Muir v. Miller, 72 Iowa 585; Davis v. Walter, 70 Iowa 465; State v. Brewer, 70 Iowa 384; Armstrong v. Killen, 70 Iowa 51; Huff v. Aultman, 69 Iowa 71, 58 Am. Rep. 213; State v. Hunter, 68 Iowa 447; State v. Williamson, 68 Iowa 351; Holland v. Union County, 68 Iowa 56; State v. Hemrick, 62 Iowa 414; Wood v. Porter, 56 Iowa 161; McMillan v. Burlington & M. R. Co., 46 Iowa 231; Blackburn v. Powers, 40 Iowa 681; Rice v. City of Des Moines, 40 Iowa 638; Wallace v. Robb, 37 Iowa 192; Gantz v. Clark, 31 Iowa 254; Havelick v. Havelick, 18 Iowa 575; Bridgman v. Steamboat Emily, 18 Iowa 509; Abrams v. Foshee, 3 Iowa 274; Mainer v. Reynolds, 4 Greene 187.

Kansas. Wilson v. Fuller, 9 Kan. 176; Pacific R. Co. v. Nash, 7 Kan. 280; Linton v. Housh, 4 Kan. 536; Educational Ass'n v. Hitchcock, 4 Kan. 36.

Kentucky. Licking Rolling Mill Co. v. Fischer, 88 Ky. 176; Hunt v. Kemper, 10 Ky. L. Rep. 593.

Louisiana. State v. Bird, 38 La. Ann. 497.

Maryland. Regester v. Medcalf, 71 Md. 528; Baltimore & O. R. Co. v. Resley, 14 Md. 424; Burtles v. State, 4 Md. 273; Bullitt v. Musgrave, 3 Gill 31; Whiteford v. Burekmyer, 1 Gill 127.

Massachusetts. McGourty v. De Marco, 200 Mass. 57; Linton v. Allen, 154 Mass. 432; Com. v. Ford, 146 Mass. 131; Khron v. Brock, 144 Mass. 516.

Michigan. Stanton v. Estey Mfg. Co., 90 Mich. 12; Kimball v. Macomber, 50 Mich. 362; Kline v. Kline, 49 Mich. 419; Hart v. Newton, 48 Mich. 401; Brown v. Dunkel, 46 Mich. 29; People v. Niles, 44 Mich. 606; Paine v. Ringold, 43 Mich. 341; Farmers' Mut. Fire Ins. Co. v. Gargett, 42 Mich. 289; Cummins v. People, 42 Mich. 142; Hall v. Johnson, 41 Mich. 286; Fowler v. Gilbert, 38 Mich. 292; Wicks v. Ross, 37 Mich. 464; Hayes v. Homer, 36 Mich. 374; Herbstreit v. Beckwith, 35 Mich. 93; Greenlee v. Lowing, 35 Mich. 63; Curley v. Wyman, 34 Mich. 353; English v. Caldwell, 30 Mich. 362; Tupper v. Kilduff, 26 Mich. 394; Cook v. Hopper, 23 Mich. 511; Taff v. Hosmer, 14 Mich. 309; People v. McKinney, 10 Mich. 54.

Minnesota. Erd v. City of St. Paul, 22 Minn. 443; Siebert v. Leonard, 21 Minn. 442; Stearns v. Johnson, 17 Minn. 142 (Gil. 116); Cogley v. Cushman, 16 Minn. 397 (Gil. 354); Desnoyer v. L'Hereux, 1 Minn. 17 (Gil. 1).

Mississippi. Kellum v. State, 64 Miss. 226; Strickland v. Hudson, 55 Miss. 235.

Missouri. State v. Miller, 100 Mo. 606; State v. Mallon, 75 Mo. 355; State v. Brown, 75 Mo. 317; Cress v. Blodgett, 64 Mo. 449; McLain v. Winchester, 17 Mo. 49; Meade v. Weed, 45 Mo. App. 385; Whiting v. City of Kansas, 39 Mo. App. 259; Campbell v. Buller, 32 Mo. App. 646; Wilkerson v. Corrigan Consol. St. Ry. Co., 26 Mo. App. 144; Fink v. Regan, 22 Mo. App. 475; Estes v. Fry, 22 Mo. App. 80; Simpson v. Schulte, 21 Mo. App. 639; Field v.

an oral charge which will be presumed correct, whereas a different rule applies to written instructions.⁷⁰

“Where the error alleged is the giving of an instruction, it must appear that such instruction is so full and complete and so manifestly wrong that the whole law applicable to the case could not have been correctly presented to the jury without a contradiction of that given, before a reversal will be ordered.”⁷¹

Where the record contains enough to show error but not enough to show affirmatively that such error was corrected or cured in any manner, the presumption against error is rebutted or does not apply.⁷²

Creelius, 20 Mo. App. 302; **Tatum v. Anderson**, 8 Mo. App. 574.

Montana. **Territory v. Scott**, 7 Mont. 407, 17 Pac. 627.

Nebraska. **Malcom v. Hanson**, 32 Neb. 52; **Willis v. State**, 27 Neb. 98; **Birdsall v. Carter**, 16 Neb. 422.

New Hampshire. **Conway v. Town of Jefferson**, 46 N. H. 521.

New Mexico. **Lewis v. Baca**, 5 N. M. 289.

New York. **Vosburgh v. Teator**, 32 N. Y. 561; **New York Marine Bank v. Clements**, 6 Bosw. 166; **Winterson v. Eighth Ave. R. Co.**, 2 Hilt. 389; **Rumsey v. New York & N. E. R. Co.**, 63 Hun 200; **Flannery v. Van Tassell**, 56 Hun 647; **Crouse v. Owens**, 49 Hun 610; **Flannery v. Van Tassell**, 32 N. Y. St. 350.

North Carolina. **State v. Dickerson**, 98 N. C. 708; **Willey v. Norfolk Southern R. Co.**, 96 N. C. 408; **State v. Nipper**, 95 N. C. 653; **State v. Craige**, 89 N. C. 475, 45 Am. Rep. 698; **Chasteen v. Martin**, 84 N. C. 391; **Cowles v. Richmond & D. R. Co.**, 84 N. C. 309, 37 Am. Rep. 620; **Honeycut v. Angel**, 20 N. C. 306.

Oregon. **Coffin v. Taylor**, 16 Ore. 375, 18 Pac. 638.

Rhode Island. **Heaton v. Manhattan Fire Ins. Co.**, 7 R. I. 502.

Texas. **Seal v. State**, 28 Tex. 491; **King v. State**, (Tex. Cr. App.), 21 S. W. 190.

West Virginia. **Kinsley v. Monongalia County Court**, 31 W. Va. 464; **Hood v. Maxwell**, 1 W. Va. 219.

Wisconsin. **Benton v. City of Milwaukee**, 50 Wis. 368; **White v. Goodrich Transp. Co.**, 46 Wis. 493; **Darling v. Conklin**, 42 Wis. 478; **State v. Babcock**, 42 Wis. 138; **Brabbitts v. Chicago & N. W. Ry. Co.**, 38 Wis. 289; **Killips v. Putnam Fire Ins. Co.**, 28 Wis. 472, 9 Am. Rep. 506; **Kelley v. Kelley**, 20 Wis. 443; **Parish v. Eager**, 15 Wis. 532; **Graves v. State**, 12 Wis. 591; **O'Malley v. Dorn**, 7 Wis. 236, 73 Am. Dec. 403n; **Townsend v. Racine Bank**, 7 Wis. 185.

United States. **Ames v. Quimby**, 106 U. S. (16 Otto) 342, 27 L. Ed. 100; **Atchison, T. & S. F. R. Co. v. Howard**, 1 C. C. A. 229, 49 Fed. 206.

70—**Newton v. State**, 3 Tex. Cr. App. 245.

71—**Morgan v. Chapple**, 10 Kan. 216.

72—Thus, under a rule that it is

Where the record shows an objection to improper statements of counsel in argument to the jury, but not whether the court corrected the statements or not, it will be presumed that the court instructed the jury to disregard them.⁷³

It will be presumed that the parties had narrowed the issues to the questions stated by the court,⁷⁴ and objection to generality of instruction applicable to some of the issues, as to burden of proof, not being made, it is presumed, on appeal, to have been applied to proper issues only.⁷⁵

“Where the issue is distinctly set forth in the pleadings, and the evidence conforms to it, and the record does not show that the plaintiff took any ground inconsistent with the proofs, it is not to be assumed that the jury applied the language of the charge so as to make it cover anything foreign to the issue.”⁷⁶ The presumptions are also in favor of the proper consideration of evidence by the jury,⁷⁷ and if the charge contains an abstract proposition of law, having no particular reference to the evidence submitted, it will be presumed, although the language is general, that the jury properly applied it to the case before them.⁷⁸

fatal error, in a criminal case, to give oral instructions to the jury without the consent of the defendant, and the record shows that oral instructions were given, but fails to show the consent of defendant, the judgment will be reversed. *Territory v. Gertrude*, 1 Ariz. 74, 25 Pac. 473; *People v. Trim*, 37 Cal. 274; *People v. Ah Fong*, 12 Cal. 345.

73—*Fredericks v. Judah*, 73 Cal. 604, 15 Pac. 305.

74—*Legget v. Harding*, 10 Ind. 414; *Cory v. Silcox*, 6 Ind. 39.

75—*Rogers v. Wallace*, 10 Ore. 387.

76—*Pettibone v. Maclem*, 45 Mich. 381.

77—A jury will be presumed to have done their duty, and not to

have tampered with certain depositions excluded by the court, but inadvertently taken out upon retiring. *Phoenix Ins. Co. v. Underwood*, 12 Heisk. (Tenn.) 424. Where evidence was admitted upon condition that the party introducing it would prove another material and connected fact, which he was unable to prove, the jury should disregard such evidence; and, though they were not expressly instructed so to do, yet, as the proceedings were had in their presence, the court will presume they did disregard it. *Inhabitants of Bangor v. Inhabitants of Brunswick*, 30 Me. 398.

78—*People v. Reynolds*, 2 Mich. 422.

Where the evidence is not before the supreme court, it will be presumed in favor of the instruction that it was adapted to the evidence given on the trial and was correct.⁷⁹

An affirmative charge correct as a legal proposition under any state of facts that could have existed in the case will be presumed to have been authorized by the evidence, unless the contrary appears.⁸⁰ This presumption is rebutted, how-

79—Alabama. Southern Hardware & Supply Co. v. Standard Equipment Co., 165 Ala. 582; Tempe v. State, 40 Ala. 350; McLemore v. Nuckolls, 37 Ala. 662; Nesbitt v. Pearson's Adm'rs, 33 Ala. 668; Morris v. State, 25 Ala. 57; McElhaney v. State, 24 Ala. 71; Jones v. Stewart, 19 Ala. 701; Leverett's Heirs v. Carlisle, 19 Ala. 80; Moore v. State, 18 Ala. 532; Wilson v. Calvert, 18 Ala. 274.

Arkansas. Bach v. Cook, 21 Ark. 571; Duggins v. Watson, 15 Ark. 118; Pogue v. Joyner, 7 Ark. 463.

Indiana. Muncie & P. Traction Co. v. Hall, 173 Ind. 292; Beller v. State, 90 Ind. 448; Dennerline v. Gable, 73 Ind. 210; Pate v. Tait, 72 Ind. 450; City of Indianapolis v. Scott, 72 Ind. 196; Audleur v. Kuffel, 71 Ind. 543; Shinn v. State, 68 Ind. 423; Higbee v. Moore, 66 Ind. 263; Wilkinson v. Applegate, 64 Ind. 98; Merrick v. State, 63 Ind. 327; Wade v. Gupping, 60 Ind. 376; Lewellen v. Garrett, 58 Ind. 442, 26 Am. Rep. 74; Schoonover v. Irwin, 58 Ind. 287; Boyd v. Wade, 58 Ind. 138; Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Columbus, C. & I. C. Ry. Co. v. Powell, 40 Ind. 37; Stull v. Howard, 26 Ind. 456; List v. Kortepeter, 26 Ind. 27; Cleveland, C., C. & St. L. R. Co. v. Harvey, 45 Ind. App. 153.

Iowa. State v. Wyatt, 76 Iowa 328; Laughlin v. Main, 63 Iowa

580; Roby v. Appanoose County, 63 Iowa 113; State v. Hemrick, 62 Iowa 414; State v. Rice, 56 Iowa 431; Blackburn v. Powers, 40 Iowa 681; Rice v. City of Des Moines, 40 Iowa 638; McIntosh v. Kilbourne, 37 Iowa 420; Wallace v. Robb, 37 Iowa 192; Gantz v. Clark, 31 Iowa 254; Bridgman v. Steamboat Emily, 18 Iowa 509; State v. Postlewait, 14 Iowa 446.

Mississippi. Kellum v. State, 64 Miss. 226; Strickland v. Hudson, 55 Miss. 235.

Nevada. State v. Loveless, 17 Nev. 424, 30 Pac. 1080.

New Hampshire. Rowell v. Chase, 61 N. H. 135.

Ohio. Cresinger v. Welch's Lessee, 15 Ohio 156, 45 Am. Dec. 565.

Pennsylvania. Gifford v. Gifford, 27 Pa. St. 202.

United States. Wiggins v. Burkham, 10 Wall. 129, 19 L. Ed. 884.

80—Tempe v. State, 40 Ala. 350; Fleming v. Ussery, 30 Ala. 282; Doe d. School Com'rs v. Godwin, 30 Ala. 242; Morris v. State, 25 Ala. 57.

Instructions, not abstractly wrong, will be presumed applicable if the evidence is not in the record. Campbell v. Peterman, 56 Ind. 428; Newby v. Rogers, 54 Ind. 193; McKinney v. Shaw & Lippencott Mfg. Co., 51 Ind. 219; Overlin v. Kronenberger, 50 Ind. 365.

"A charge instructing the jury

ever, where the record purports to contain all the evidence,⁸¹ or where it is apparent that the instructions would be improper under any possible state of the evidence under the pleadings.⁸² The jury will be presumed to have considered the instruction as a whole, and therefore, if correct as a whole, no error is committed.⁸³ Where the charge makes reference to preceding parts of the charge, it will be presumed that the jury considered such preceding parts.⁸⁴ But where a charge is of excessive length, or involved, the presumption that the jury considered it as a whole may be

that the defendant is liable if the plaintiff's colt was killed 'under the circumstances' testified to by him will be presumed to have been correctly given, when there is nothing in the bill of exceptions showing what the 'circumstances' were." *South & North A. R. Co. v. Brown*, 53 Ala. 651.

Where it is assumed that agency has been established, such agency being material, such assumption will be presumed correct, where evidence is not in the record. *Bowen v. Polard*, 71 Ind. 177.

81—Where, upon review by the appellate court, "the bill of exceptions purports to contain all the evidence, an instruction not supported by the evidence thus preserved will not be presumed to have been properly given." *St. Louis Drug Co. v. Dart*, 7 Mo. App. 590.

82—*Indiana*. *Vandalia Coal Co. v. Yemm*, 175 Ind. 524; *Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 460; *Cates v. Bales*, 78 Ind. 288.

Iowa. *Warbasse v. Card*, 74 Iowa 306; *State v. Broadwell*, 73 Iowa 765; *McMillan v. Burlington & M. R. Co.*, 46 Iowa 231.

Kentucky. *Robards v. Wolfe*, 1 Dana 156.

Mississippi. *Kellum v. State*, 64 Miss. 226.

Nebraska. *Willis v. State*, 27 Neb. 98.

Nevada. *State v. Loveless*, 17 Nev. 424, 30 Pac. 1080.

Oklahoma. *Fisher v. United States*, 1 Okla. 252, 31 Pac. 195.

83—*Arkansas*. *Ward v. Blackwood*, 48 Ark. 396.

Florida. *Andrews v. State*, 21 Fla. 598.

Indiana. *Pennsylvania Co. v. McCormack*, 131 Ind. 250; *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218.

Iowa. *Davis v. Walter*, 70 Iowa 467; *State v. Williams*, 70 Iowa 52; *Gee v. Moss*, 68 Iowa 318; *State v. Mahan*, 68 Iowa 304.

Michigan. *Hart v. Newton*, 48 Mich. 401.

South Carolina. *Carolina, C. G. & C. Ry. Co. v. Seigler*, 24 S. C. 125.

Texas. *Missouri Pac. Ry. Co. v. James (Tex.)*, 10 S. W. 332; *Continental Ins. Co. v. Pruitt*, 65 Tex. 126; *Hodges v. State*, 22 Tex. App. 415; *St. Louis Southwestern R. Co. of Texas v. Holt*, 57 Tex. Civ. App. 19.

84—*Missouri Pac. Ry. Co. v. James (Tex.)*, 10 S. W. 332.

rebutted.⁸⁵ It will be presumed that instructions were properly given,⁸⁶ and that statements in the instructions are true.⁸⁷

The statements of a charge to the jury not corrected by the judge on a settlement of the case by him are assumed to be correct.⁸⁸

Where the record fails to show upon what point the jury desired further instructions, the answer of the court will be presumed to have been satisfactory and sufficient.⁸⁹ It will not, however, be presumed that instructions asked at a former trial were requested at a subsequent trial;⁹⁰ and it will not be presumed that the jury heard or were controlled by remarks of the court not addressed to them.⁹¹

“Where the bill of exceptions shows that an instruction was refused because not presented within the time required by the rule of practice in such court,—that is, before the commencement of the closing address to the jury,—in the

85—United States v. Hamilton, 4 Mackey (D. C.) 446; Louisville, N. A. & C. Ry. Co. v. Jones, 108 Ind. 551; Town of Rushville v. Adams, 107 Ind. 475, 57 Am. Rep. 124; Conrad v. Kinzie, 105 Ind. 281; Louisville, N. A. & C. Ry. Co. v. Grantham, 104 Ind. 353; Yocum v. Town of Trenton, 20 Mo. App. 489; State v. Truc, 20 Mo. App. 176, 2 Western Rep. 602; Kennedy v. Klein, 19 Mo. App. 15; Cumming v. Brooklyn City R. Co., 104 N. Y. 669.

86—In a criminal case, it will be presumed, in support of the judgment, unless the record shows the contrary, that further instructions, given after the retirement of the jury, were given in the presence of counsel. Pearce v. Com., 19 Ky. L. Rep. 782. So it will be presumed that the accused was present. State v. Miller, 100 Mo. 606.

87—All statements of fact in in-

structions given are presumed, *prima facie*, to be true. Wilson v. Atlanta & C. Ry. Co., 82 Ga. 386; Carson v. State, 80 Ga. 170; Stanton v. Estey Mfg. Co., 90 Mich. 12.

88—State v. Harden, 11 S. C. 366. A palpably erroneous instruction appearing in the record will not be presumed to be a mere mistake of the clerk who made the transcript. Stott v. Smith, 70 Ind. 298.

89—Herlstreit v. Beckwith, 35 Mich. 92.

90—McAlpin v. Ziller, 17 Tex. 508. In Wragge v. South Carolina & G. R. Co., 47 S. C. 105, 33 L. R. A. 191, 58 Am. St. Rep. 870, it was said that it would be assumed that requests were submitted in proper form, in the absence of objection on that ground.

91—Fraim v. National Fire Ins. Co., 170 Pa. 151, 50 Am. St. Rep. 753.

absence of any showing to the contrary in the bill of exceptions, it will be presumed there was such a rule of court, in writing, duly published and spread upon the records, and that the instruction was therefore properly refused.”⁹²

It will be presumed that the jury were capable of understanding and that they did understand the charge correctly.⁹³ If the legal definition of a word or phrase is given, and such word or phrase is used in the questions submitted and answered, it will be presumed, on appeal, that it was used by the court and jury with the meaning indicated by the definition.⁹⁴ Where the court’s charge is susceptible of two interpretations, one of which makes it erroneous, and the other makes it in accordance with law, it will be presumed that the jury, in the light of the whole charge, understood it in the latter sense,⁹⁵ especially where no objection is made to the charge in the trial court.⁹⁶

It cannot be assumed as a question of law that the jury understood an instruction given by the court in a sense different from that in which it is commonly understood by those outside the jury box.⁹⁷ The jury will be presumed to have correctly understood the terms “wilfully” and “maliciously,” used in the instructions without definition, where they were used in their ordinary sense, and the evidence was clear, as it will be presumed to be when it is not all contained in the bill of exceptions.⁹⁸ Where a judge

92—Illinois Cent. R. Co. v. Haskins, 115 Ill. 300.

93—California. People v. Bagnell, 31 Cal. 409.

Illinois. Massachusetts Mut. Life Ins. Co. v. Robinson, 98 Ill. 324; Gleason v. M. P. Byrne Const. Co., 178 Ill. App. 359.

Indiana. Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409; Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63; Browning v. Hight, 78 Ind. 257.

Michigan. Pray v. Cadwell, 50 Mich. 222.

Minnesota. Erd v. City of St. Paul, 22 Minn. 443; Siebert v. Leonard, 21 Minn. 442.

Texas. Ft. Worth & D. C. Ry. Co. v. Greathouse, 82 Tex. 104; Brunswig v. White, 70 Tex. 504.

94—Mooney v. Olsen, 22 Kan. 69.

95—Davis v. State, 25 Ohio St. 369.

96—Erd v. City of St. Paul, 22 Minn. 443; Siebert v. Leonard, 21 Minn. 442.

97—People v. Welch, 49 Cal. 174.

98—State v. Harkins, 100 Mo. 666.

told the jury that there was nothing said concerning a particular item, overlooking the fact that there was evidence given regarding such item, it will be assumed, notwithstanding, that the jury had that evidence in mind when considering the verdict.⁹⁹

It will also be presumed that instructions were given at the proper time,¹ even though no charge appears in the record;² and the presumptions are also in favor of compliance with statutory provisions requiring instructions to be written,³ or to be copied by a stenographer,⁴ or where

99—*Herst v. De Comeau*, 1 Sweeny (N. Y.) 590.

1—"The presumption, in the absence of anything in the record, is that the court below discharged its duty in charging the jury before they were allowed to separate." *Linton v. Housh*, 4 Kan. 536.

2—*Richardson v. City of Eureka*, 96 Cal. 443, 31 Pac. 458; *Flannery v. Van Tassell*, 32 N. Y. St. 350.

3—*Strong v. Kadlec*, 163 Ill. App. 298.

Under a statute requiring requests for instructions to be in writing, if the record does not show that the requests were in writing, their refusal is not ground for reversal, as it will be presumed that the requests were oral, and hence properly refused. *Louisville & N. R. Co. v. Orr*, 94 Ala. 602; *Bellinger v. State*, 92 Ala. 86; *Winslow v. State*, 76 Ala. 42; *Crosby v. Hutchinson*, 53 Ala. 5; *Milner v. Wilson*, 45 Ala. 478. The contrary ruling in *Myatts v. Bell*, 41 Ala. 222, is overruled by the above cases. It will be presumed that the instructions were in writing, where written instructions were necessary, and the record shows nothing to the contrary. *Lower v. Franks*, 115 Ind. 339; *Citizens' F. & M. Ins. Co. v. Short*, 62 Ind. 316; *Hardwick v.*

State, 6 Lea (Tenn.) 229; *Meshke v. Van Doren*, 16 Wis. 319. Or it may be presumed that a written charge was waived. *Hardwick v. State*, 6 Lea (Tenn.) 229. Where the record shows that the court read an extract from the opinion of the court contained in a law periodical, it will be presumed that such extract was transcribed into the written instructions given. *Citizens' F. & M. Ins. Co. v. Short*, 62 Ind. 316. Where the record does not show what the court said, it will be presumed that oral remarks were not of such character as to come within the rule requiring instructions to be in writing. *O'Hara v. King*, 52 Ill. 304.

4—"He asks for a reversal upon the ground that the court orally instructed the jury, and that such instructions, when given, were not taken down by the phonographic reporter, as contemplated by section 1093 of the Penal Code. If the facts are as contended for by appellant, he has shown reversible error; but he fails in establishing those facts. The minutes of the trial disclose that oral instructions were given to the jury, but we fail to find anything in the record showing that they were not taken down * * * by the

instructions are required to be marked "given" or "refused."⁵

The presumption is against error in the giving or refusing of instructions,⁶ and where the record does not contain all the instructions actually given, a refusal to give instructions will not be reviewed, as it will be presumed that the court properly instructed, of its own motion, on questions arising in the case,⁷ and that the charge was correct as a

phonographic reporter. The legal presumption is that such was the fact, and it is for the defendant to overthrow that presumption." *People v. Ludwig*, 118 Cal. 328, 50 Pac. 426, citing *People v. Ferris*, 56 Cal. 442. See also, to the same effect, *People v. Bumberger*, 45 Cal. 650; *State v. Preston*, 4 Idaho 215, 38 Pac. 694.

5—It will be presumed, nothing appearing to the contrary, that requests were properly marked "Given" or "Refused," as required by statute. *Allen v. State*, 74 Ala. 557.

Nothing appearing to the contrary, it will be presumed that the court conformed to the law in declaring in writing to the jury his rulings upon requests for instructions as presented, and pronounced the same to the jury as "Given" or "Refused." *Jones v. State*, 18 Fla. 889.

6—Counsel presented to the court thirteen requests to charge. The court, after remarking that there were certain requests to charge, which it would read, read nine, without stating in terms whether it gave them to the jury as the law; nor did the court refuse in terms to charge the four requests not read. Held, that the inference was that it was intended to charge the nine requests read, and to refuse to charge the

rest. *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538. "Where a number of instructions to the jury are asked for, and the record states an exception to the refusal to give a part of them only, the inference is that the court gave those to which no exception was taken." *Hood v. Maxwell*, 1 W. Va. 219. Where the record does not show the reason why an instruction was refused, nor exclude presumption that it was for some other reason than its supposed illegality, the appellate court will presume that ruling was correct. *Koile v. Ellis*, 16 Ind. 301.

7—**Alabama.** *Cobb v. Malone*, 87 Ala. 514.

Arkansas. *King v. Black*, 92 Ark. 598.

California. *Richardson v. City of Eureka*, 96 Cal. 443, 31 Pac. 458.

Colorado. *Klink v. People*, 16 Colo. 467, 27 Pac. 1062; *Halsey v. Darling*, 13 Colo. 1, 21 Pac. 913.

Indiana. *Marshall v. Lewark*, 117 Ind. 377; *Becknell v. Becknell*, 110 Ind. 42; *Frank v. Grimes*, 105 Ind. 346; *Town of Princeton v. Geiske*, 93 Ind. 102; *Morris v. Stern*, 80 Ind. 227; *Bowen v. Pollard*, 71 Ind. 177; *Myers v. Murphy*, 60 Ind. 282; *Freeze v. De Puy*, 57 Ind. 188; *Leeper v. State*, 12 Ind. App. 638; *Patchell v. Jaqua*, 6 Ind. App. 70.

Iowa. *Huff v. Aultman*, 69 Iowa

whole.⁸ So, instructions which are apparently erroneous will be presumed to have been modified by other instructions so as to be correct, where all the instructions do not appear in the record, provided, of course, the error is such as might have been cured by other instructions.⁹ If the

71, 58 Am. Rep. 213; *State v. Williamson*, 68 Iowa 351.

Kentucky. *Hunt v. Kemper*, 10 Ky. L. Rep. 593.

Maine. *Hewey v. Nourse*, 54 Me. 256; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527n.

Massachusetts. *Linton v. Allen*, 154 Mass. 432.

Michigan. *People v. Niles*, 44 Mich. 606; *English v. Caldwell*, 30 Mich. 362.

Missouri. *Meade v. Weed*, 45 Mo. App. 385; *Whiting v. City of Kansas*, 39 Mo. App. 259; *Wilkerson v. Corrigan Consol. St. Ry. Co.*, 26 Mo. App. 144.

Nebraska. *Malcom v. Hanson*, 32 Neb. 52.

New Mexico. *Lewis v. Baca*, 5 N. M. 289, 21 Pac. 343.

New York. *Flannery v. Van Tassel*, 56 Hun 647; *Crouse v. Owens*, 49 Hun 610.

Ohio. *Bean v. Green*, 33 Ohio St. 444; *Davis v. State*, 25 Ohio St. 369.

Texas. *Ross v. McGowen*, 58 Tex. 603; *Ft. Worth & R. G. R. Co. v. Eddleman*, 52 Tex. Civ. App. 181.

Wisconsin. *McPhee v. McDermott*, 77 Wis. 33; *Graves v. State*, 12 Wis. 591.

8—Where a single proposition selected from the charge by bill of exceptions is claimed to be erroneous, and other propositions to which it refers as given and to be given in connection with it, are not found in the record, a reviewing court in support of the judgment will presume

that the charge as a whole was a correct statement of the law of the case. *Bean v. Green*, 33 Ohio St. 444.

9—**California.** *People v. Von*, 78 Cal. 1, 20 Pac. 35; *Viera v. Atchison*, T. & S. F. R. Co., 10 Cal. App. 267, 101 Pac. 690.

Georgia. *Trice v. Rose*, 80 Ga. 408; *Massengill v. First Nat. Bank of Chattanooga*, 76 Ga. 341; *Johnson v. Latimer*, 71 Ga. 470; *Bray v. State*, 69 Ga. 765; *Bell v. State*, 69 Ga. 752; *Hunt v. Pond*, 67 Ga. 578.

Illinois. *Abingdon v. Meadows*, 28 Ill. App. 442.

Indiana. *Marshall v. Lewark*, 117 Ind. 377; *Stull v. Howard*, 26 Ind. 456.

Iowa. *Fernbach v. City of Waterloo*, 76 Iowa 598.

Minnesota. *Cogley v. Cushman*, 16 Minn. 397 (Gil. 354).

United States. *Atchison, T. & S. F. R. Co. v. Howard*, 1 C. C. A. 229, 49 Fed. 206.

Contra, *Cox v. People*, 109 Ill. 457; *Schmidt v. Chicago & N. W. R. Co.*, 83 Ill. 405; *Meyer v. Temme*, 72 Ill. 574.

Where the brief does not give the whole of the judge's charge, a detached fragment cannot be held to be erroneous. *Sawyer, Wallace & Co. v. Macauley*, 18 S. C. 548. Where it appears that instructions were given which were not before the court, which might have modified or changed those given which are insisted upon as being erroneous, the

error complained of is such that it could not be obviated by other correct instructions, there is no room for this presumption, and it may be proper to reverse, although all the instructions are not in the record.¹⁰

“Where the record contains charges asked by the appellant, but does not show whether they were given or refused, and the refusal of them is not assigned for error, it is to be presumed that they were given as asked.”¹¹

Ordinarily, the refusal of a request to charge is not available as reversible error, in the absence of all the evidence in the record,¹² and it will be presumed that requested instructions which were refused are unauthorized by the evidence,¹³

court cannot presume that there were not other instructions correcting any error in the one relied upon as being erroneous. *State v. Stanley*, 48 Iowa 221.

10—*Meyer v. Temme*, 72 Ill. 574.

11—*Seal v. State*, 28 Tex. 492.

12—See § 431, *ante*. Error in refusing to instruct that certain evidence constitutes a variance is not available when the evidence is not in the record. *Witz v. Spencer*, 51 Ind. 253.

13—**Alabama.** *Williams v. Barksdale*, 58 Ala. 288; *Gill v. State*, 43 Ala. 38.

Arkansas. *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560; *Pogue v. Joyner*, 7 Ark. 463.

California. *Carpenter v. Ewing*, 76 Cal. 487; *California Cent. Ry. Co. v. Hooper*, 76 Cal. 404.

District of Columbia. *Oliver v. Cameron*, *MacArthur & M.* 237.

Florida. *Sammis v. Wightman*, 31 Fla. 45; *Myrick v. Merritt*, 22 Fla. 335; *Livingston v. Cooper*, 22 Fla. 292; *Blige v. State*, 20 Fla. 742, 51 Am. Rep. 628; *Frisbee v. Timanus*, 12 Fla. 537; *Miller v. Kingsbury*, 8 Fla. 357; *McKay v. Friebele*,

8 Fla. 21; *Tompkins v. Eason*, 8 Fla. 14; *Burk v. Clark*, 8 Fla. 9; *Bailey v. Clark*, 6 Fla. 516; *Proctor v. Hart*, 5 Fla. 465; *Horn v. Gartman*, 1 Fla. 73.

Illinois. *Amos v. Sinnott*, 5 Ill. 440.

Indiana. *Silver v. Parr*, 115 Ind. 113; *Joseph v. Mather*, 110 Ind. 114; *Unruh v. State*, 105 Ind. 117; *Johns v. State*, 104 Ind. 557; *Shulse v. McWilliams*, 104 Ind. 512; *Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind. 88; *Elkhart Mut. Aid. B. & R. Ass'n v. Houghton*, 103 Ind. 286, 53 Am. Rep. 514; *Stout v. Turner*, 102 Ind. 418; *Blizzard v. Bross*, 56 Ind. 74.

Iowa. *State v. Moore*, 77 Iowa 449; *State v. Wyatt*, 76 Iowa 328; *State v. Daniels*, 76 Iowa 87; *Warbasse v. Card*, 74 Iowa 306; *State v. Brewer*, 70 Iowa 384; *Huff v. Aultman*, 69 Iowa 71, 58 Am. Rep. 213; *State v. Goode*, 68 Iowa 593; *State v. Hunter*, 68 Iowa 447; *State v. Williamson*, 68 Iowa 351; *Holland v. Union County*, 68 Iowa 56; *Stier v. City of Oskaloosa*, 41 Iowa 353; *Little v. Martin*, 28 Iowa 558; *Shepherd v. Brenton*, 20 Iowa 41.

Kansas. *State v. Cassady*, 12 Kan.

or, if all the instructions are not brought up, it will be presumed that the instruction was correctly refused because substantially embodied in other instructions given.¹⁴

551; *St. Joseph & D. C. R. Co. v. Orr*, 8 Kan. 419; *Missouri River, Ft. S. & G. R. Co. v. Owen*, 8 Kan. 409; *Educational Ass'n v. Hitchcock*, 4 Kan. 36.

Maryland. *Regester v. Medcalf*, 71 Md. 528.

Michigan. *Hayes v. Homer*, 36 Mich. 374; *Curley v. Wyman*, 34 Mich. 353; *Tupper v. Kilduff*, 26 Mich. 394.

Missouri. *Colburn v. Brunswick Flour Co.*, 49 Mo. App. 415; *Fink v. Regan*, 22 Mo. App. 473; *Field v. Crecelius*, 20 Mo. App. 302.

Montana. *Territory v. Scott*, 7 Mont. 407, 17 Pac. 627.

Nebraska. *Willis v. State*, 27 Neb. 98.

North Carolina. *State v. Dickerson*, 98 N. C. 708.

Ohio. *Davis v. State*, 25 Ohio St. 369; *Cresinger v. Welch's Lessee*, 15 Ohio 156.

Oregon. *Richards v. Fanning*, 5 Ore. 356.

South Carolina. *State v. Robinson*, 35 S. C. 340.

West Virginia. *Kinsley v. Monongalia County Court*, 31 W. Va. 464.

14—**Colorado.** *Klink v. People*, 16 Colo. 467, 27 Pac. 1062.

Georgia. *Pace v. Payne*, 73 Ga. 675.

Illinois. *Chicago, M. & St. P. Ry. Co. v. Yando*, 127 Ill. 214; *Gill v. Skelton*, 54 Ill. 158; *Hahn v. St. Clair Sav. & Ins. Co.*, 50 Ill. 526. See *Ives v. Vanscoyoc*, 81 Ill. 120; *Wilmington Coal Min. & Mfg. Co. v. Barr*, 2 Ill. App. 84.

Indiana. *Lehman v. Hawks*, 121 Ind. 541; *Clare v. McIntire*, 120 Ind.

262; *Vancleave v. Clark*, 118 Ind. 61, 3 L. R. A. 519; *Delaney v. State*, 115 Ind. 499; *Ford v. Ford*, 110 Ind. 89; *Garrett v. State*, 109 Ind. 527; *Taber v. Ferguson*, 109 Ind. 227; *Puett v. Beard*, 86 Ind. 104; *Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110; *Stott v. Smith*, 70 Ind. 298; *Coryell v. Stone*, 62 Ind. 307; *Myers v. Murphy*, 60 Ind. 282; *Freeze v. De Puy*, 57 Ind. 188; *Lockwood v. Beard*, 4 Ind. App. 505; *Sexson v. Hoover*, 1 Ind. App. 65.

Iowa. *Huff v. Aultman*, 69 Iowa 71.

Kansas. *Marshall v. Shibley*, 11 Kan. 114; *Washington Life Ins. Co. v. Haney*, 10 Kan. 525; *Pacific R. Co. v. Nash*, 7 Kan. 280.

Maine. *Hearn v. Shaw*, 72 Me. 187.

Massachusetts. *Linton v. Allen*, 154 Mass. 432.

Minnesota. *Stearns v. Johnson*, 17 Minn. 142 (Gil. 116).

Missouri. *Meade v. Weed*, 45 Mo. App. 385.

Nebraska. *Malcom v. Hanson*, 32 Neb. 52.

Ohio. *Bolen v. State*, 26 Ohio St. 371; *Woodward v. Stein*, 3 American L. Rec. 352.

Texas. *Texas & P. Ry. Co. v. Lowry*, 61 Tex. 149.

All the instructions must be embodied in the bill of exceptions, or a judgment will not be reversed for faulty instructions given (*Hahn v. St. Clair Sav. & Ins. Co.*, 50 Ill. 456), for it will be presumed that those given comprised the substance of those refused (*Weyhrich v. Foster*, 48 Ill. 115). The refusal of the

“It must be presumed that the court below acted correctly in refusing instructions, * * * unless it appear, by facts or testimony incorporated in the bill of exceptions, that the instructions were relevant or irrelevant to the cause.”¹⁵

“If instructions asked by either party be refused, and he excepts, it devolves upon him to set forth, in his exception, all or so much of the evidence with reference to which it may have been asked as will present the question of law designed to be made, else the appellate court would have to presume, in favor of the judgment, that the instruction was properly refused, unless the instruction contradicts or is inconsistent with the pleadings.”¹⁶ Where an instruction has been asked and refused, and the record states the instruction was given in a modified form, but how modified is not set forth, it will be presumed that, as modified, it embodied the law.¹⁷

§ 433. Presumption of prejudice on appeal.

As was seen in the preceding section, the burden is on the appellant to show error affirmatively upon the record; but there is considerable conflict in the decisions as to

court to modify certain instructions cannot be considered on appeal when all the instructions are not in the record. *Lehman v. Hawks*, 121 Ind. 541. The rule stated is subject to this exception: that, although the entire charge is not brought up in the record, if a request containing a correct statement of the law applicable to the facts is refused, and the court instructs to the contrary, the presumption in favor of the correctness of the instructions given is overcome. *Pace v. Payne*, 73 Ga. 670.

15—*Shepherd v. McQuilkin*, 2 W. Va. 90.

16—*Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560.

17—*Smith v. Childress*, 27 Ark. 328.

Where the record shows that an instruction was asked and given with a statutory modification, but does not show what that statutory modification is or was, it will be presumed by the supreme court that the modification was correct, *Wilson v. Fuller*, 9 Kan. 176. To the same effect is *Clampitt v. Kerr*, 1 Utah 246. Where the record shows that the court refused to give, in the language and form requested, a true and pertinent proposition of law in its charge to the jury, it will be presumed, in the absence of anything appearing in the record to the contrary, that the same charge was

whether he must not go further, and show not only error, but that the error actually or probably operated to his prejudice.

According to one line of cases, error in giving or refusing instructions is presumed to be prejudicial and the judgment will be reversed unless it affirmatively appears from the record that the error in the particular case was harmless.¹⁸

substantially given, though in other language and form. *Bolen v. State*, 26 Ohio St. 371.

18—**Arkansas.** *Appling v. State*, 88 Ark. 393.

California. *People v. Smith*, 105 Cal. 676, 39 Pac. 38.

Connecticut. *Tompkins v. West*, 56 Conn. 487.

Florida. *Pensacola Electric Co. v. Bissett*, 59 Fla. 360.

Georgia. *Terry v. State*, 17 Ga. 204; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329n; *Pelham Mfg. Co. v. Powell*, 6 Ga. App. 308.

Illinois. *Cox v. People*, 109 Ill. 457; *People v. Peltz*, 143 Ill. App. 181; *Fick v. Mohr*, 92 Ill. App. 280.

Indiana. *Cleveland, C., C. & St. L. R. Co. v. Case*, 174 Ind. 369; *Sessengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 98; *Bissell v. Wert*, 35 Ind. 54; *Plummer v. Indianapolis Union R. Co.*, 56 Ind. App. 615; *City of Lafayette v. Ashby*, 8 Ind. App. 214.

Iowa. *State v. Empey*, 79 Iowa 460; *State v. Jacobs*, 75 Iowa 247; *Roby v. Appanoose County*, 63 Iowa 113; *Kendig v. Overhulser*, 58 Iowa 195; *Potter v. Chicago, R. I. & P. R. Co.*, 46 Iowa 399; *Carlin v. Chicago, R. I. & P. R. Co.*, 31 Iowa 370.

Kansas. *Gillett v. Corum*, 5 Kan. 608.

Kentucky. *Middleton v. Com-*

monwealth, 136 Ky. 354; *Barnett v. Com.*, 84 Ky. 449.

Maine. *Hastings v. Bangor House Proprietors*, 18 Me. 436.

Maryland. *Haney v. Marshall*, 9 Md. 194.

Massachusetts. *Tufts v. Seabury*, 11 Pick. 142.

Michigan. *Grand Rapids & I. R. Co. v. Monroe*, 47 Mich. 152.

Missouri. *State v. Taylor*, 118 Mo. 153; *Hovey & Brown v. Aaron*, 133 Mo. App. 573; *State v. Forrester*, 63 Mo. App. 530; *Bindbeutel v. Street Ry. Co.*, 43 Mo. App. 463.

Nevada. *State v. Ferguson*, 9 Nev. 106.

New York. *Greene v. White*, 37 N. Y. 405; *Nicholson v. Conner*, 9 Daly 275; *Benham v. Cary*, 11 Wend. 83.

Ohio. *Jones v. Bangs*, 40 Ohio St. 139, 48 Am. Rep. 664n; *Meek v. Pennsylvania Co.*, 38 Ohio St. 632; *Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 1; *Lowe v. Lehman*, 15 Ohio 179; *Baldwin v. Bank of Massillon*, 1 Ohio 141.

South Carolina. *Amaker v. New*, 33 S. C. 28; *Bonham v. Bishop*, 23 S. C. 103.

South Dakota. *Miller v. McConnell*, 23 S. D. 137.

Tennessee. *Witt v. State*, 6 Coldw. 5.

Texas. *Linney v. Wood*, 66 Tex.

Where the evidence is not in the record and an instruction is erroneous, the judgment must be reversed as the error will be presumed prejudicial.¹⁹

Where erroneous instructions have been given to the jury, the reviewing court cannot affirm the judgment on the ground that there were other correct legal propositions applicable to the case, which, if submitted to the jury, would have caused them to reach the same verdict, as if such additional instructions are not given and not asked for, the reviewing court cannot conjecture what effect they would have had upon the minds of the jury.²⁰

Inconsistent instructions are presumed prejudicial²¹ and a similar rule applies to misleading charges.²² This appears to be the sound and correct rule. Instructions are presumed to have been followed by the jury, and to have affected the verdict.²³ Therefore, where error is shown, prejudice is

22; *Gulf, C. & S. F. Ry. Co. v. Greenlee*, 62 Tex. 344; *Dwyer v. Continental Ins. Co.*, 57 Tex. 181; *Hudson v. Morris*, 55 Tex. 595; *Texas & P. Ry. Co. v. Jones*, — Tex. Civ. App., —, 123 S. W. 434; *Gulf, C. & S. F. Ry. Co. v. Darton* (Tex. Civ. App.), 23 S. W. 89; *Willis v. Kirbie*, 1 Posey, Unrep. Cas. 304; *Franklin v. Smith*, 1 Posey, Unrep. Cas. 229.

West Virginia. *State v. Douglass*, 28 W. Va. 298; *Nicholas v. Kershner*, 20 W. Va. 251; *Dinges v. Branson*, 14 W. Va. 100; *Strader v. Goff*, 6 W. Va. 258.

See also, *Burkham v. Daniel*, 56 Ala. 604.

There is no distinction in law between the giving of erroneous instructions and the withholding of proper instructions. Either, if it works injustice, constitutes error. *People v. Smith*, 105 Cal. 676, 39 Pac. 38; *Greenup v. Stoker*, 7 Ill. (2

Gilm.) 688; *City of Lafayette v. Ashby*, 8 Ind. App. 214.

19—*Sessengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 98; *Bissell v. Wert*, 35 Ind. 54; *Jones v. Bangs*, 40 Ohio St. 139, 48 Am. Rep. 664n; *Witt v. State*, 6 Coldw. (Tenn.) 5; *Gulf, C. & S. F. Ry. Co. v. Darton* (Tex. Civ. App.), 23 S. W. 89.

20—*Amaker v. New*, 33 S. C. 28, following *Bonham v. Bishop*, 23 S. C. 96.

21—*Grand Rapids & I. R. Co. v. Monroe*, 47 Mich. 152. But see *In re Darrow*, 175 Ind. 44.

22—*State v. Jacobs*, 75 Iowa 247; *Meek v. Pennsylvania Co.*, 38 Ohio St. 632; *Gulf, C. & S. F. Ry. Co. v. Greenlee*, 62 Tex. 344; *Hudson v. Morris*, 55 Tex. 595.

23—*Stanton v. French*, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174; *Needham v. People*, 98 Ill. 275; *Mitchell v. Illinois & St. L. Railroad & Coal Co.*, 85 Ill. 566; *Pettibone v. Maclem*, 45 Mich. 381; *Lowe v. Leh-*

also shown unless the record goes further and shows that, notwithstanding the error, the party was not prejudiced.²⁴

Other cases, however, take a contrary view, and hold that no presumption of prejudice is raised by the mere presence of error in the record. Under this view, error in the instructions is not ground for reversal unless the appellant shows affirmatively upon the record that the error produced actual, or at least possible or probable, injury.²⁵

man, 15 Ohio 179. Obviously, this presumption may work both ways. It may either operate to render certain errors harmless, or to render erroneous instructions reversible, by showing them to have been prejudicial.

24—Lowe v. Lehman, 15 Ohio 179.

25—See §§ 437, *et seq.*, *post*, "Harmless and prejudicial error." See also, the following cases:

Iowa. Wood v. Porter, 56 Iowa 161; Eyser v. Weissgerber, 2 Iowa 463.

Kansas. Central Branch Union Pac. R. Co. v. Andrews 41 Kan. 370, 21 Pac. 276; Johnson v. Leggett, 28 Kan. 590; Burton v. Boyd, 7 Kan. 17.

Louisiana. State v. Hill, 39 La. Ann. 927.

Tennessee. Noe v. Hodges, 5 Humph. 103.

Texas. Loper v. Robinson, 54 Tex. 510; Hollingsworth v. Hols-housen, 17 Tex. 41; Salinas v. Wright, 11 Tex. 572.

Virginia. Easley v. Valley Mut. Life Ass'n, 91 Va. 161.

"It is not every error in the rulings of a judge during the progress of the trial that will justify the setting aside of the verdict. To warrant such action on the part of the court, it must be so grave an error as to induce the belief that, but

for its commission, a verdict favorable to the occasion might have been returned." State v. Hill, 39 La. Ann. 927. Actual or possible prejudice must be shown, to authorize a reversal. Loper v. Robinson, 54 Tex. 510; Hollingsworth v. Hols-housen, 17 Tex. 41; Salinas v. Wright, 11 Tex. 572; Baltimore & O. R. Co. v. McKenzie, 81 Va. 71; Brighthope Ry. Co. v. Rogers, 76 Va. 443; Preston v. Harvey, 2 Hen. & M. (Va.) 55. Though a doubt as to whether or not injury was done is sufficient to authorize a reversal. Boren v. State, 32 Tex. Cr. App. 637.

Where the court instructs on contributory negligence, though that issue is not raised by the pleadings, a reviewing court will presume that the verdict was based on other grounds than contributory negligence, if there was no evidence of such negligence. Eckelund v. Talbot, 80 Iowa 571.

If an instruction states facts as established which are admitted or uncontradicted, no presumption of injury arises unless the record shows that such statement is untrue. Wood v. Porter, 56 Iowa 161. Where it is evident that improper instructions could have reasonably misled the jury to the prejudice of appellant, the judgment will be reversed, but

§ 434. **Invited error.**

It is well settled that a party cannot complain of instructions given at the instance of his adversary if substantially the same, or open to the same objection, as those given at his own request,²⁶ as, where instructions are not warranted

not where the prejudice is not manifest. *Eyser v. Weissgerber*, 2 Iowa 463.

If an erroneous charge be given as to the mode of computing damages, but no bill of exceptions be filed, showing that the actual damages allowed by the jury were enhanced by applying the erroneous principle of computation, the verdict will not be disturbed. The court will presume, in such case, that the jury did right, notwithstanding the erroneous charge. *Noe v. Hodges*, 5 *Humph. (Tenn.)* 103.

26—**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Lamb*, 95 Ark. 209; *Chicago, R. I. & P. R. Co. v. Smith*, 94 Ark. 524.

Illinois. *Harney v. Sanitary Dist. of Chicago*, 260 Ill. 54; *Hunter v. Sanitary Dist. of Chicago*, 179 Ill. App. 172; *Robishaw v. Schiller Piano Co.*, 179 Ill. App. 163; *Somers v. Petteys*, 175 Ill. App. 168; *Ankenbrandt v. Joachim*, 173 Ill. App. 158; *Howe v. Chicago City Ry. Co.*, 170 Ill. App. 636; *Devine v. Tazewell Coal Co.*, 161 Ill. App. 547; *Smith v. Hersh*, 161 Ill. App. 83; *City of Rockford v. Falver*, 27 Ill. App. 604; *Wear v. Duke*, 23 Ill. App. 323.

Indiana. *In re Darrow*, 175 Ind. 44.

Iowa. *In re Walker's Will*, 152 Iowa 154.

Kansas. *Shores v. United Surety Co.*, 84 Kan. 592, 114 Pac. 1062.

Kentucky. *Gaines v. Madisonville, H. & E. R. Co.*, 143 Ky. 250.

Maryland. *Baltimore & O. R. Co. v. Resley*, 14 Md. 424.

Michigan. *Needham v. King*, 95 Mich. 303.

Missouri. *Whitmore v. Supreme Lodge Knights & Ladies of Honor*, 100 Mo. 46; *Harrington v. City of Sedalia*, 98 Mo. 583; *M. Forster Vinegar Mfg. Co. v. Guggemos*, 98 Mo. 391; *Hazell v. Bank of Tipton*, 95 Mo. 60, 6 Am. St. Rep. 22; *Reilly v. Hannibal & St. J. R. Co.*, 94 Mo. 600; *Keen v. Schnedler*, 92 Mo. 516; *Fairbanks v. Long*, 91 Mo. 628; *State v. Stewart*, 90 Mo. 507; *Thorpe v. Missouri Pac. Ry. Co.*, 89 Mo. 650, 58 Am. Rep. 120; *Holmes v. Braidwood*, 82 Mo. 610; *McGonigle v. Daugherty*, 71 Mo. 259; *Davis v. Brown*, 67 Mo. 313; *Crutchfield v. St. Louis, K. C. & N. Ry. Co.*, 64 Mo. 255; *Welland v. Metropolitan St. R. Co.*, 144 Mo. App. 205; *Flint-Walling Mfg. Co. v. Ball*, 43 Mo. App. 504; *Missouri Pac. Ry. Co. v. Schoennen*, 37 Mo. App. 612; *Straat v. Hayward*, 37 Mo. App. 585; *Bybee v. Irons*, 33 Mo. App. 659; *Chicago, S. F. & C. Ry. Co. v. Vivian*, 33 Mo. App. 583; *Soldanels v. Missouri Pac. R. Co.*, 23 Mo. App. 516.

Nebraska. *Wood v. City of Omaha*, 87 Neb. 213.

Texas. *O'Neal v. Knippa (Tex.)* 19 S. W. 1020; *Mexican Cent. Ry. Co. v. Rodriguez*, — Tex. Civ. App. —, 133 S. W. 690.

by the evidence,²⁷ ignore issues,²⁸ are inconsistent,²⁹ or fail to define certain terms.³⁰ Thus an instruction permitting recovery if the defendant was negligent, as alleged, is unobjectionable when the defendant submits similar requests.³¹ The same rule applies to instructions given by the court of its own motion.³²

§ 435. Instructions given or refused on party's own motion.

Erroneous instructions given cannot be made available as error in the reviewing court by a party on whose motion they were given. He is bound by the theory of his case as presented by the instructions given at his instance, and, if they are erroneous, he cannot be heard to complain.³³ For the purposes of review they will be conclusively presumed

27—*Straat v. Hayward*, 37 Mo. App. 585.

28—*Demetz v. Benton*, 35 Mo. App. 559.

29—*Reardon v. Youngquist*, 189 Ill. App. 3.

30—*Herman v. Owen*, 42 Mo. App. 387.

31—*Needham v. King*, 95 Mich. 303.

32—*Hess v. Newcomer*, 7 Md. 325; *Silsby v. Michigan Car Co.*, 95 Mich. 204.

33—**California.** *Harrison v. Spring Valley Hydraulic Gold Co.*, 65 Cal. 376.

Illinois. *McInturff v. Insurance Co. of North America*, 155 Ill. App. 225, aff'd 248 Ill. 92, 140 Am. St. Rep. 153, 21 Ann. Cas. 176.

Indiana. *Worley v. Moore*, 97 Ind. 15; *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; *Cobb v. Krutz*, 40 Ind. 323; *Minot v. Mitchell*, 30 Ind. 228, 95 Am. Dec. 685.

Kansas. *Ft. Scott, W. & W. Ry. Co. v. Fortney*, 51 Kan. 287, 32 Pac.

904; *Chicago, K. & W. R. Co. v. Watkins*, 43 Kan. 50, 22 Pac. 985; *Greer v. Higgins*, 20 Kan. 420; *Kansas Pac. Ry. Co. v. Cutter*, 19 Kan. 83; *State v. Reddick*, 7 Kan. 144.

Maine. *Robinson v. White*, 42 Me. 209.

Maryland. *Keener v. Harrod*, 2 Md. 63, 56 Am. Dec. 706.

Missouri. *Jennings v. St. Louis, I. M. & S. Ry. Co.*, 99 Mo. 394; *Tetherow v. St. Joseph & D. M. R. Co.*, 98 Mo. 74, 14 Am. St. Rep. 617; *Musser v. Adler*, 86 Mo. 445; *Flowers v. Helm*, 29 Mo. 324; *Chamberlin v. Smith's Adm'r*, 1 Mo. 482.

Nebraska. *Hankins v. Reimers*, 86 Neb. 307.

North Carolina. *Moore v. Parker*, 91 N. C. 275; *McLennan v. Chisholm*, 66 N. C. 100; *Buie v. Buie*, 24 N. C. 87.

Pennsylvania. *Ritter v. Sieger*, 105 Pa. St. 400; *Benson v. Maxwell*, 105 Pa. St. 274; *Pritchett v. Cook*, 62 Pa. St. 193; *Huble v. Vanhorne*, 7 Serg. & R. 185.

South Carolina. *Oliver v. Sale*, 17

to be correct.³⁴ Thus where counsel for defendant in addressing the jury states that in a certain contingency they shall find for plaintiff, he cannot object to an instruction in accord with his own statement.³⁵ And a charge expressing the same idea conveyed by a plea, when taken most strongly against the pleader, cannot be assigned as error, although not correct if made entirely with reference to the evidence adduced.³⁶ Where a party asks an instruction which should not be given at all because there was not sufficient evidence on which to base it, but the same is modified and given, he has no ground of complaint.³⁷ The practice of giving voluminous instructions in important cases arises as much from the fault of counsel as from the volition of the court, and a party who has submitted more than twenty requests for instructions cannot be heard to complain that the jury have been misled and confused by the length of the instructions.³⁸

§ 436. Instructions given by consent.

If an instruction is given by consent, such consent makes the instruction the law of the case, and, upon appeal, its correctness cannot be questioned.³⁹ So, where the court said, in the presence of the parties, that, "if agreeable, he would instruct the jury orally," and there was no objection, the parties are deemed to have consented to the giving

S. C. 587; *Ellen v. Ellen*, 16 S. C. 139.

Texas. *Hardy v. De Leon*, 5 Tex. 211; *Collins v. State*, 5 Tex. App. 38.

Virginia. *Richmond & D. R. Co. v. Medley*, 75 Va. 499; *Murrell v. Johnson's Adm'r*, 1 Hen. & M. 450.

United States. *Castle v. Bullard*, 23 How. 172, 16 L. Ed. 424.

34—*Kansas Pac. Ry. Co. v. Custer*, 19 Kan. 83.

35—*Marquette, H. & O. R. Co. v. Marcott*, 41 Mich. 433.

36—*Fort v. Barnett*, 23 Tex. 460.

37—*Ryan v. Donnelly*, 71 Ill. 100.

38—*Henke v. Babcock*, 24 Wash. 556, 64 Pac. 755.

39—*Emory v. Addis*, 71 Ill. 273; *Stratton v. Staples*, 59 Me. 94; *Philadelphia, W. & B. R. Co. v. Harper*, 29 Md. 330; *Baughner v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279.

Where the judge instructed the jury that he had given them the law as understood and assented to by the counsel, and this statement was acquiesced in by both counsel, it must be regarded as a waiver of all objections to the instruction. *Stratton v. Staples*, 59 Me. 94.

of oral instructions, and cannot assign it as error.⁴⁰ When a party waives objections to any request of the opposite party, which the court thereupon gives to the jury, such party cannot afterwards reserve an exception thereto without first obtaining leave of court.

The same rule applies to instructions given by the court which are substantially the same as those requested, although the court may have expressed it in his own language, or made other slight modifications.⁴¹ So, the appellant cannot complain that an instruction was not given which was refused at his request.⁴² And where no exception is taken to the giving of an instruction at the time it is given, and it is recited in the record that it was given by agreement of parties, the appellant is precluded from assigning it as a cause of error, whether it states a correct

40—*Downey v. Abel*, 87 Ill. App. 530.

41—**Connecticut.** *Howey v. New England Nav. Co.*, 83 Conn. 278.

Illinois. *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163; *Solomon v. Friend*, 42 Ill. App. 407.

Iowa. *Campbell v. Ormsby*, 65 Iowa 518; *Weller v. Hawes*, 49 Iowa 45.

Kansas. *Ft. Scott, W. & W. Ry. Co. v. Fortney*, 51 Kan. 287, 32 Pac. 904.

Massachusetts. *Com. v. Locke*, 114 Mass. 288.

Michigan. *Needham v. King*, 95 Mich. 303.

Missouri. *Reardon v. Missouri Pac. Ry. Co.*, 114 Mo. 384; *Harper v. Morse*, 114 Mo. 317.

Nebraska. *Dawson v. Williams*, 37 Neb. 1.

North Carolina. *Simpson v. Pegram*, 112 N. C. 541.

Texas. *Martin v. Missouri Pac. Ry. Co.*, 3 Tex. Civ. App. 133; *Citi-*

zens' Ry. Co. v. Hargrove, — Tex. Civ. App. —, 135 S. W. 1063; *Galveston, H. & S. A. Ry. Co. v. Smith* (Tex. Civ. App.) 24 S. W. 668.

Where the court, in modifying an instruction asked, merely employed the language used in another instruction given at the request of the same party, such party will not be heard to complain that the instruction was erroneous. *Pierce v. Millay*, 62 Ill. 133. A charge cannot be assigned as error where it is the same in substance as one requested by the party complaining, but refused. *Galveston, H. & S. A. Ry. Co. v. Smith* (Tex. Civ. App.) 24 S. W. 668.

42—*State v. Jackson*, 99 Mo. 60; *State v. Elliott*, 90 Mo. 350.

“A party to a cause, after excepting to an instruction as erroneous, will not be heard to complain because it was afterwards revoked and withdrawn from the jury.” *Sittig v. Birkestack*, 38 Md. 158; *Oddie v. Mendenhall*, 84 Minn. 58.

principle of law or not.⁴³ But a party is not estopped from alleging error in an instruction as to the construction of a written agreement by the fact that, on the trial, his counsel made a verbal statement, when offering the agreement in evidence, that such was the proper construction.⁴⁴

§ 437. Harmless and prejudicial error.

It is a general well-recognized rule that a judgment will not be reversed, or a verdict set aside, because of error when it appears that no harm has resulted to the complaining party,⁴⁵ and in most states statutory provisions ex-

43—*Emory v. Addis*, 71 Ill. 273.

44—*Hoffman v. Bloomsbury & S. R. Co.*, 143 Pa. St. 503, 157 Pa. St. 174.

45—**Arkansas.** *Crawford County Bank v. Baker*, 95 Ark. 438; *Brooks v. Perry*, 23 Ark. 32; *Patterson v. Fowler*, 22 Ark. 396; *Swinney v. State*, 22 Ark. 215.

Colorado. *Geiger v. Kiser*, 47 Colo. 297, 107 Pac. 267; *Bassett v. Inman*, 7 Colo. 270, 3 Pac. 383.

Florida. *Pensacola Electric Co. v. Bissett*, 59 Fla. 360.

Georgia. *Johnson v. Cox*, 81 Ga. 25, 59 Am. Rep. 645; *Wilson v. State*, 69 Ga. 226; *Welch v. Butler*, 24 Ga. 445; *Carstarphen v. Central of Georgia R. Co.*, 8 Ga. App. 162.

Illinois. *Mayzels v. Chicago City Ry. Co.*, 177 Ill. App. 534; *Jones v. Vickers*, 173 Ill. App. 481; *Nichols v. City of Collinsville*, 165 Ill. App. 457; *Hendrix v. Goldman*, 163 Ill. App. 592; *Ringering v. Cleveland, C., C. & St. L. Ry. Co.*, 161 Ill. App. 43.

Indiana. *Haxton v. McClaren*, 132 Ind. 235; *Stewart v. State*, 111 Ind. 554; *Audis v. Personett*, 108 Ind. 202; *Atkinson v. Dailey*, 107 Ind. 117; *Davis v. Reamer*, 105 Ind. 318;

Barnett v. State, 100 Ind. 171; *Froun v. Davis*, 97 Ind. 401; *Louisville, N. A. & C. Ry. Co. v. Porter*, 97 Ind. 267; *Jones v. Angell*, 95 Ind. 376; *Simpkins v. Smith*, 94 Ind. 470; *Mooney v. Kinsey*, 90 Ind. 33; *Shryer v. Morgan*, 77 Ind. 479; *Hummel v. Tyner*, 70 Ind. 84; *Higbee v. Moore*, 66 Ind. 263; *Richardson v. State*, 55 Ind. 381; *Harris v. State*, 30 Ind. 131; *American Surety Co. of New York v. State*, 46 Ind. App. 126.

Iowa. *Harris v. Beebe*, 144 Iowa 735; *State v. Price*, 75 Iowa 243.

Louisiana. *State v. Cazeau*, 8 La. Ann. 114; *State v. Brette*, 6 La. Ann. 653.

Minnesota. *State v. Western U. Tel. Co.*, 111 Minn. 21.

Missouri. *State v. Tull*, 119 Mo. 421; *Crawford v. Armstrong*, 58 Mo. App. 214; *Gaty v. Sack*, 19 Mo. App. 470; *Nance v. Metcalf*, 19 Mo. App. 183.

Nebraska. *Smith v. Lorang*, 87 Neb. 537; *Beavers v. Missouri Pac. R. Co.*, 47 Neb. 761.

Nevada. *Bianchi v. Maggini*, 17 Nev. 322, 30 Pac. 1004; *Truckee Lodge, No. 14, I. O. O. F. v. Wood*, 14 Nev. 293; *Sharon v. Minnock*, 6

pressly declare that such is the rule.⁴⁶ In such cases the doctrine of error without injury applies and in the interests of substantial justice the judgment is affirmed. The burden is on the appellant to show error affirmatively on the record,⁴⁷ although there is some conflict in the cases as to whether or not prejudice will be presumed from an error.⁴⁸ If it can be shown affirmatively that the error did not affect the result adversely to the complaining party, the error is harmless.⁴⁹ And the doctrine of harmless error also

Nev. 377; *Brown v. Lillie*, 6 Nev. 244; *Robinson v. Imperial Silver Min. Co.*, 5 Nev. 44.

Oklahoma. *Woodward v. Bingham*, 25 Okla. 400, 106 Pac. 843.

Oregon. *Strong v. Kamm*, 13 Ore. 172, 9 Pac. 331; *Briscoe v. Jones*, 10 Ore. 63; *Salmon v. Olds*, 9 Ore. 488.

Texas. *Loper v. Robinson*, 54 Tex. 510; *Hollingsworth v. Holshousen*, 17 Tex. 41; *Robinson v. Varnell*, 16 Tex. 382; *Salinus v. Wright*, 11 Tex. 572; *Mercer v. Hall*, 2 Tex. 284; *Boren v. State*, 32 Tex. Cr. App. 637.

Virginia. *Easley v. Valley Mut. Life Ass'n*, 91 Va. 161; *Payne v. Grant*, 81 Va. 164.

Washington. *Brown v. Forest*, 1 Wash. T. 201.

46—**California.** Code Civ. Proc. § 475. *Preston v. Central California Water & Irrigation Co.*, 11 Cal. App. 190, 104 Pac. 462.

Colorado. *Geiger v. Kiser*, 47 Colo. 297, 107 Pac. 267.

Georgia. *Terry v. State*, 17 Ga. 204; *Shadwick v. McDonald*, 15 Ga. 392.

Illinois. Municipal Court Act, § 23, ¶ 8, J. & A. ¶ 3335 (8). *Bradley v. Chicago & N. W. Ry. Co.*, 147 Ill. App. 397.

Indiana. *Dodge v. Lake Shore & M. S. R. Co.*, 45 Ind. App. 281.

Kansas. *Spillman v. Union Port-*

land Cement Co., 81 Kan. 775, 106 Pac. 1087.

Kentucky. *Young's Adm'r v. Chesapeake & O. R. Co.*, 136 Ky. 784.

Missouri. Rev. St. 1909, § 2082. *Cowherd v. St. Louis & S. F. R. Co.*, 151 Mo. App. 1.

Nebraska. *Nielsen v. Central Nebraska Land & Investment Co.*, 87 Neb. 518.

Oklahoma. *Woodward v. Bingham*, 25 Okla. 400, 106 Pac. 843.

South Dakota. *Koester v. Northwestern Port Huron Co.*, 24 S. D. 546.

Texas. In criminal cases, error in the instructions has been held ground for reversal, regardless of the question of prejudice. *Cook v. State*, 22 Tex. App. 511; *Clanton v. State*, 20 Tex. App. 616; *Bravo v. State*, 20 Tex. App. 188. *Contra*, *Boren v. State*, 32 Tex. Cr. App. 637, holding that a judgment in a criminal case will be reversed for error in the instructions only when the error was harmful, or there is doubt as to whether or not injury was done.

Washington. *Hawkes v. Hoffman*, 56 Wash. 120, 24 L. R. A. (N. S.) 1038n, 105 Pac. 156.

47—See § 429, *ante*.

48—See § 433, *ante*, "Presumption of prejudice."

49—**Alabama.** *Hill v. State*, 43

applies if the error is such that it has no tendency to mislead a jury of ordinary capacity;⁵⁰ although it has been held that where the error might have misled the jury, and

Ala. 335; *Sims v. Boynton*, 32 Ala. 353, 70 Am. Dec. 540; *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150.

California. *People v. Smith*, 105 Cal. 676, 39 Pac. 38; *People v. Piner*, 11 Cal. App. 542, 105 Pac. 780.

Colorado. *Fearnley v. Fearnley*, 44 Colo. 417, 98 Pac. 819.

Georgia. *Hadden v. Larned*, 87 Ga. 634.

Illinois. *Gray v. Troutman*, 158 Ill. 171; *Keeler v. Herr*, 157 Ill. 57; *Hubner v. Feige*, 90 Ill. 208; *Rice v. Brown*, 77 Ill. 549; *Sterling Bridge Co. v. Baker*, 75 Ill. 139; *Sandberg v. Brinks Chicago City Exp. Co.*, 151 Ill. App. 623.

Kansas. *Mannen v. Bailey*, 51 Kan. 442, 32 Pac. 1085; *Redden v. Tefft*, 48 Kan. 302, 29 Pac. 157.

Mississippi. *Josephine v. State*, 10 George 613.

Missouri. *State v. Bowerman*, 140 Mo. App. 410; *Burbridge v. Kansas City Cable R. Co.*, 36 Mo. App. 669.

Nebraska. *Pjarrou v. State*, 47 Neb. 294.

Ohio. *Berry v. State*, 31 Ohio St. 219, 27 Am. Rep. 506; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Cricket v. State*, 18 Ohio 9.

Oklahoma. *Harding v. Gillett*, 25 Okla. 199, 107 Pac. 665.

Tennessee. *Myers v. Bank of Tennessee*, 3 Head 330; *Douglas v. Neil*, 7 Heisk. 438; *David v. Bell*, Peck. 135.

Virginia. *Muscoe v. Com.*, 87 Va. 460.

Washington. *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

West Virginia. *Clay v. Robinson*, 7 W. Va. 348.

50—**Alabama.** *McMahon v. State*, 168 Ala. 70; *Armstrong v. Tait*, 8 Ala. 635.

Arkansas. *Stone v. Kaufman*, 25 Ark. 187.

California. *People v. Fredoni*, 12 Cal. App. 685, 108 Pac. 663.

Connecticut. *Smith v. King*, 62 Conn. 515.

Georgia. *Snell v. State*, 7 Ga. App. 751.

Illinois. *Reh fuss v. Hill*, 243 Ill. 140; *Gray v. Troutman*, 158 Ill. 171; *Titley v. Enterprise Stone Co.*, 127 Ill. 457; *Robbins v. Roth*, 95 Ill. 464; *City of Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378; *Bowden v. Bowden*, 75 Ill. 143.

Indiana. *Louisville, N. A. & C. Ry. Co. v. Shanks*, 132 Ind. 395; *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *Wilson v. Trafalgar & Brown Co. Gravel Road Co.*, 93 Ind. 287; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433; *City of Indianapolis v. Scott*, 72 Ind. 197.

Iowa. *Searles v. Northwestern Mut. Life Ins. Co. of Milwaukee*, 148 Iowa 65, 29 L. R. A. (N. S.) 405n; *State v. Whitbeck*, 145 Iowa 29; *Taylor v. Chicago, St. P. & K. C. Ry. Co.*, 76 Iowa 753; *State v. Price*, 75 Iowa 243; *Lindsay v. City of Des Moines*, 74 Iowa 111; *State v. Hart*, 67 Iowa 142; *Ross v. City of Davenport*, 66 Iowa 548; *Blackburn v. Powers*, 40 Iowa 681; *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa 363; *Ocheltree v. Carl*, 23 Iowa 394; *How v. Reed*, 20 Iowa 591; *McKay v. Leonard*, 17 Iowa 569;

the court cannot see whether it did or not, the rule as to the presumption of prejudice is controlling.⁵¹

The rules as to harmless error have been applied in almost an innumerable number of cases, and the various expressions, applications and illustrations of such rules might be multiplied indefinitely. Only a few cases illustrative of the general rules will be presented here.

Error as to matters not contested is harmless and not ground for reversal,⁵² and a judgment will not be reversed for errors in instructions where the result is not affected,⁵³

Claggett v. Conlee, 16 Iowa 487;
Thompson v. Blanchard, 2 Iowa 44.

Michigan. *People v. Marks*, 90 Mich. 555; *Cross v. Lake Shore & M. S. R. Co.*, 69 Mich. 363, 13 Am. St. Rep. 399; *Continental Ins. Co. v. Horton*, 28 Mich. 173; *Sheehan v. Dalrymple*, 19 Mich. 239; *People v. Scott*, 6 Mich. 287.

Missouri. *State v. Steele*, 226 Mo. 583; *Suttie v. Aloe*, 39 Mo. App. 38.

Nebraska. *Converse v. Meyer*, 14 Neb. 190.

South Dakota. *Dilger v. Griffith*, 26 S. D. 411.

Texas. *Hollingsworth v. Hols-housen*, 17 Tex. 41; *Settle v. San Antonio Traction Co.*, — Tex. Civ. App. —, 126 S. W. 15; *Mass v. State*, 59 Tex. Cr. App. 390; *Rand v. Jones*, 4 Willson, Civ. Cas. Ct. App. § 204.

Virginia. *Watson v. Com.*, 87 Va. 608; *Muscoe v. Com.*, 87 Va. 460; *Wager v. Barbour*, 84 Va. 419; *Com. v. Lucas*, 84 Va. 303; *Richmond & D. R. Co. v. Norment*, 84 Va. 167, 10 Am. St. Rep. 827; *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71; *Bright-hope Ry. Co. v. Rogers*, 76 Va. 443; *Preston v. Harvey*, 2 Hen. & M. 55.

United States. *Knickerbocker Life Ins. Co. v. Trafz*, 104 U. S. 197, 26 L. Ed. 708.

51—*Terry v. Buffington*, 11 Ga. 337, 56 Am. Dec. 453; *Duffany v. Ferguson*, 66 N. Y. 482, rev'g 5 Hun 106.

52—*Consolidated Coal Co. v. Maehl*, 31 Ill. App. 252, aff'd 130 Ill. 551; *Gulf, C. & S. F. Ry. Co. v. Reagan* (Tex. Civ. App.) 34 S. W. 796; *La Bee v. Sultan Logging Co.*, 59 Wash. 341, 109 Pac. 1023; *Bokien v. State Ins. Co. of Oregon*, 14 Wash. 39, 44 Pac. 110; *Rawson v. Ellsworth*, 13 Wash. 667, 43 Pac. 934.

53—Immaterial and minor errors which manifestly had no influence upon the decision will not authorize a reversal.

California. *People v. Piner*, 11 Cal. App. 542, 105 Pac. 780.

Connecticut. *Smith v. King*, 62 Conn. 515.

Georgia. *Strong v. State*, 95 Ga. 499.

Illinois. *Massachusetts Mut. Life Ins. Co. v. Robinson*, 98 Ill. 324.

Indiana. *Kimble v. Seal*, 92 Ind. 276.

Oklahoma. *Harding v. Gillett*, 25 Okla. 199, 107 Pac. 665.

Texas. *Hollingsworth v. Hols-housen*, 17 Tex. 41.

Substantial correctness is all that is required. *Massachusetts Mut.*

as in the case of mere verbal inaccuracies,⁵⁴ misstatements,⁵⁵ or inconsistencies,⁵⁶ where there is an omission of essential

Life Ins. Co. v. Robinson, 98 Ill. 324; **Needham v. People**, 98 Ill. 275; **Montag v. Linn**, 23 Ill. 551; **Oliver v. State**, 39 Miss. 526.

54—Mere verbal criticisms and inaccuracies of expression are not ground for reversal unless it appears probable that the jury were misled.

California. **People v. Fredoni**, 12 Cal. App. 685, 108 Pac. 663.

Georgia. **Milledgeville Oil Mills v. Wilkinson**, 134 Ga. 840; **Chattanooga, R. & C. R. Co. v. Palmer**, 89 Ga. 161.

Idaho. **O'Connor v. Langdon**, 2 Idaho 803, 26 Pac. 659.

Illinois. **People v. Strauch**, 247 Ill. 220; **Pierce v. Hasbrouck**, 49 Ill. 23; **Lecklieder v. Chicago City Ry. Co.**, 172 Ill. App. 557; **Anderson v. Eastman**, 168 Ill. App. 172; **Cole-sar v. Star Coal Co.**, 160 Ill. App. 251, aff'd 255 Ill. 532; **Welch v. Miller**, 32 Ill. App. 110.

Indiana. **Wilson v. Trafalgar & Brown Co. Gravel Road Co.**, 93 Ind. 287; **Vanvalkenberg v. Vanvalkenberg**, 90 Ind. 433; **Chambers v. Kyle**, 87 Ind. 83; **Pittsburgh, C. & St. L. Ry. Co. v. Sponier**, 85 Ind. 165; **For-gey v. First Nat. Bank of Cambridge City**, 66 Ind. 123; **Morgantown Mfg. Co. v. Hicks**, 46 Ind. App. 623; **Pitts-burgh, C. C. & St. L. Ry. Co. v. Welch**, 12 Ind. App. 433; **Coppage v. Gregg**, 1 Ind. App. 112.

Iowa. **Brown v. West Riverside Coal Co.**, 143 Iowa 662, 28 L. R. A. (N. S.) 1260n; **Citizens' State Bank v. Council Bluffs Fuel Co.**, 89 Iowa 618.

Michigan. **Labar v. Crane**, 56 Mich. 586.

Missouri. **Suttie v. Aloe**, 39 Mo. App. 38.

Montana. **Burgess v. Territory (Mont.)** 19 Pac. 558.

New York. **Carpenter v. Eastern Transp. Co.**, 71 N. Y. 574.

South Dakota. **Dilger v. Griffith**, 26 S. D. 411.

Texas. **Harris v. Daugherty**, 74 Tex. 1, 15' Am. St. Rep. 812; **Galves-ton, H. & S. A. Ry. Co. v. Porfert**, 72 Tex. 344; **Settle v. San Antonio Traction Co.**, — Tex. Civ. App. —, 126 S. W. 15.

55—“A misstatement of the lan-guage of a witness by the court in its charge to the jury is no ground for reversal unless such misstate-ment is as to a material part of his testimony, and probably misleads the jury.” **Bellew v. Ahrburg**, 23 Kan. 287. See also, **Hull v. Detroit United Ry.**, 158 Mich. 682.

A misstatement of the evidence is harmless error, where the legal ef-fect of the evidence is the same, whatever view of it may be taken. **West Chicago St. R. Co. v. Martin**, 154 Ill. 523; **Knott v. Dubuque & S. C. Ry. Co.**, 84 Iowa 462; **Kaufman v. Schoeffel**, 46 Hun (N. Y.) 571.

56—Inconsistency between in-structions is not reversible error un-less actually or probably prejudicial. **Nuckolls v. Gaut**, 12 Colo. 361, 21 Pac. 41; **Overland Mail & Exp. Co. v. Carroll**, 7 Colo. 43, 1 Pac. 682; **Robbins v. Roth**, 95 Ill. 464; **Wenks v. Hazard**, 149 Iowa 16; **Bayles v. Savery Hotel Co.**, 148 Iowa 29; **Bige-low v. Wygal**, 52 Kan. 619, 35 Pac. 200.

Where two paragraphs of a charge are inconsistent, as applied to the

elements,⁵⁷ or where the decision is based on different grounds.⁵⁸ So, it is also held that a meaningless instruction does not warrant reversal,⁵⁹ and a like rule has been applied where particular facts were singled out;⁶⁰ where the instructions were repeated;⁶¹ abstract instructions;⁶² where

facts, and so the jury cannot follow the instructions as a whole, the jury may properly ignore the paragraph which, as applied to the facts of the case, is incorrect, and follow the correct instruction. *Hillébrant v. Green*, 93 Iowa 661.

57—*People v. Mines*, 164 Ill. App. 658.

58—Error in an instruction is harmless, where the case is decided upon a point or grounds wholly independent of that referred to in the erroneous instruction. *Comstock's Appeal*, 55 Conn. 214. See *City of Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

An instruction outside the evidence is not prejudicial to plaintiff, where the jury find for defendant on another ground. *Blatchford v. Boyden*, 122 Ill. 657.

59—"A judgment will not be reversed simply because an instruction given by the trial court is meaningless, but only when it is erroneous, and works injury to the substantial rights of the party complaining." *Staser v. Hogan*, 120 Ind. 207; *Kimble v. Seal*, 92 Ind. 276; *Hentig v. Kansas Loan & Trust Co.*, 28 Kan. 617.

60—*Schubert v. Schubert*, 168 Ill. App. 419; *Conover v. Carpenter*, 57 Wash. 146, 106 Pac. 620.

61—*Leeklieder v. Chicago City Ry. Co.*, 172 Ill. App. 557.

62—*Christensen v. Oscar Daniels Co.*, 170 Ill. App. 59; *Miller v. Kenwood Bridge Co.*, 169 Ill. App. 404.

Error in the statement of a rule of law in no way applicable to the facts of the case on trial is not ground for reversal unless the jury may have been misled, and the appellant injured.

Alabama. *Fleming v. Lunsford*, 163 Ala. 540; *Hudson v. Bauer Grocery Co.*, 105 Ala. 200; *Johnson v. Boyles*, 26 Ala. 578; *Salmons v. Roundtree*, 24 Ala. 458; *Magee v. Billingsley*, 3 Ala. 679; *Hughes v. Parker*, 1 Port. 139.

Arkansas. *Southern Anthracite Coal Co. v. Bowen*, 93 Ark. 140.

Georgia. *Boyd v. State*, 17 Ga. 194.

Illinois. *City of Farmington v. Wallace*, 134 Ill. App. 366.

Indiana. *Fitzgerald v. Goff*, 99 Ind. 28.

Iowa. *Doherty v. Des Moines City R. Co.*, 144 Iowa 26.

Louisiana. *State v. Turner*, 35 La. Ann. 1103.

Michigan. *People v. Marble*, 38 Mich. 117.

New York. *Clarke v. Dutcher*, 9 Cow. 674.

Pennsylvania. *Numan v. Kaap*, 5 Bin. 73.

South Carolina. *Jordan v. Lang*, 22 S. C. 164.

Tennessee. *Wilson v. State*, 3 Heisk. 278; *Steinwehr v. State*, 5 Sneed 586.

Texas. *Blake v. Hamburg Bremen Fire Ins. Co.*, 67 Tex. 160, 60 Am. Rep. 15; *Hardy v. De Leon*, 5 Tex. 211; *Jones v. Thurmond's Heirs*, 5

the pleadings were by the court referred to; ⁶³ or where the instructions are not supported by the evidence. ⁶⁴

Misleading instructions are usually considered prejudi-

Tex. 318; *McClearland v. State*, 24 Tex. App. 202; *Smith v. State*, 34 Tex. Cr. App. 265.

West Virginia. *Teel v. Coal & Coke R. Co.*, 66 W. Va. 315; *Shepard v. Peabody Ins. Co.*, 21 W. Va. 370.

63—*Vaughn v. O'Gara Coal Co.*, 173 Ill. App. 268; *Cooper v. Kankakee Elec. Light Co.*, 164 Ill. App. 581; *Courtney v. Illinois Cent. R. Co.*, 161 Ill. App. 577.

64—A correct statement of law, though not applicable to the evidence, and irrelevant to the case, is not ground for reversal unless it may have misled the jury to the prejudice of the appellant:

Alabama. *Birmingham Railway, Light & Power Co. v. Anderson*, 163 Ala. 72.

Arkansas. *McNeill v. Arnold*, 22 Ark. 477; *Hellems v. State*, 22 Ark. 207; *Pogue v. Joyner*, 7 Ark. 463.

Florida. *Louisville & N. R. Co. v. Willis*, 58 Fla. 307; *Milton v. Blackshear*, 8 Fla. 161; *Belden v. Gray*, 5 Fla. 504.

Georgia. *Pope v. Pope*, 95 Ga. 87; *Tumlin v. Parrott*, 82 Ga. 732; *Barker v. Blount*, 63 Ga. 423.

Illinois. *Chapman v. Stewart*, 63 Ill. 332; *Sandberg v. Brinks Chicago City Exp. Co.*, 151 Ill. App. 623.

Indiana. *Ohio & M. Ry. Co. v. Stein*, 140 Ind. 61; *Brant v. Gallup*, 111 Ind. 487; *Stockton v. Stockton*, 73 Ind. 510; *Hummel v. Tyner*, 70 Ind. 84; *Wiles v. Trustees of Philippine Church*, 63 Ind. 206; *Parmlee v. Sloan*, 37 Ind. 469; *McCall v. Seev-ers*, 5 Ind. 187; *Indianapolis Traction & Terminal Co. v. Ulrick*, 45

Ind. App. 149; *Evansville & I. R. Co. v. Darting*, 6 Ind. App. 375; *Foss-Schneider Brewing Co. v. McLaughlin*, 5 Ind. App. 415; *Boltz v. Smith*, 3 Ind. App. 43.

Iowa. *Fisher v. Bolton*, 148 Iowa 651; *Parkhurst v. Masteller*, 57 Iowa 474; *Sullivan v. Finn*, 4 Greene 544.

Kansas. *Barbour v. City of Rose-dale*, 82 Kan. 213, 107 Pac. 558; *State v. Keys*, 53 Kan. 674, 37 Pac. 167; *Ft. Scott, W. & W. R. Co. v. Karracker*, 46 Kan. 511, 26 Pac. 1027; *Kansas City, Ft. S. & G. R. Co. v. Hay*, 31 Kan. 177, 1 Pac. 766; *Dickson v. Randal*, 19 Kan. 214; *Douglas v. Wolf*, 6 Kan. 88.

Missouri. *State v. Donnelly*, 130 Mo. 642.

New Hampshire. *Nutting v. Herbert*, 37 N. H. 346; *Simonds v. Clapp*, 16 N. H. 222.

North Carolina. *Bryan v. Cowles*, 152 N. C. 767; *Evans v. Howell*, 84 N. C. 460.

Ohio. *Schneider v. Hosier*, 21 Ohio St. 98; *Satchell v. Doran*, 4 Ohio 542; *French v. Millard*, 2 Ohio 44; *Cincinnati, N. O. & T. P. Ry. v. Rawson*, 16 Cinc. L. Bul. 423.

Texas. *Mills v. Ashe*, 16 Tex. 295; *Allen v. Clearman*, — Tex. Civ. App. —, 128 S. W. 1140; *Miller v. State*, 36 Tex. Cr. App. 47; *McGuire v. State (Tex. Cr. App.)* 28 S. W. 345.

Washington. *Carstens v. Stetson & Post Mill Co.*, 14 Wash. 643, 45 Pac. 313.

United States. *Ames v. Quimby*, 106 U. S. (16 Otto) 342, 27 L. Ed. 100.

cial,⁶⁵ unless it appears that the proper result has been obtained.⁶⁶

If a case is close on the question of damages, the rulings

65—Instructions having a tendency to mislead, although correct, constitute reversible error.

Arkansas. *Blackburn v. Morton*, 18 Ark. 384.

Colorado. *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258.

Georgia. *Hilton v. Sylvania & G. R. Co.*, 8 Ga. App. 10.

Nebraska. *Chicago, B. & Q. R. Co. v. Anderson*, 38 Neb. 112.

Ohio. *White v. Thomas*, 12 Ohio 312.

Pennsylvania. *Pennsylvania Canal Co. v. Harris*, 101 Pa. St. 93; *Skinner v. McAllister*, 4 Cent. Rep. 750.

Texas. *Galveston Land & Improvement Co. v. Levy*, 10 Tex. Civ. App. 104.

West Virginia. *State v. Cain*, 20 W. Va. 679.

Contra, *Floyd v. State*, 82 Ala. 16. See also, *Louisville & N. R. Co. v. Young*, 168 Ala. 551; *Rullman v. Rullman*, 81 Kan. 521, 106 Pac. 52; *Homestead Fire Ins. Co. v. Ison*, 110 Va. 18.

Where an instruction states a proposition of law too broadly, but, as applied to the facts of the case, it is correct, the failure to state the limitations of the principle so laid down will not work a reversal, as any possible misleading tendency can be obviated by asking for an explanatory charge. *Anniston City Land Co. v. Edmondson* (Ala.) 30 So. 61.

“Where an instruction is erroneous, and calculated to mislead the jury, and the verdict would have been different had the instructions

not been given, a new trial will be awarded.” *Blackburn v. Morton*, 18 Ark. 384.

A verdict will not be set aside because the jurors, or some of them, assert that they misunderstood the charge. *Belknap v. Wendell*, 36 N. H. 250; *Folsom v. Brawn*, 25 N. H. 115, 124; *Tyler v. Stevens*, 4 N. H. 116, 17 Am. Dec. 404.

66—A judgment will not be reversed because of an erroneous instruction, if the proper result has been obtained, and the finding of the jury shows that the party complaining of the instruction has not been harmed.

Illinois. *Keegan v. Kinnare*, 123 Ill. 280; *Kulpinsky v. Sampsell*, 145 Ill. App. 242; *Williams v. John Davis Co.*, 54 Ill. App. 198; *Chicago City Ry. Co. v. Hastings*, 35 Ill. App. 434, aff'd 136 Ill. 251.

Indiana. *Indianapolis Traction & Terminal Co. v. Menze*, 173 Ind. 31; *Lemmon v. Moore*, 94 Ind. 40; *Pittsburgh, C. & St. L. Ry. Co. v. Welch*, 12 Ind. App. 433; *Coppage v. Gregg*, 1 Ind. App. 112.

Kansas. *Bigelow v. Wygal*, 52 Kan. 619, 35 Pac. 200; *Kansas City, Ft. S. & G. R. Co. v. Hay*, 31 Kan. 177, 1 Pac. 766.

Nebraska. *Liberty Ins. Co. v. Ehrlich*, 42 Neb. 553.

New Hampshire. *Hoitt v. Holcomb*, 32 N. H. 186; *Wendell v. Moulton*, 26 N. H. 41; *March v. Portsmouth & C. R. R.*, 19 N. H. 372.

North Carolina. *Revis v. City of Raleigh*, 150 N. C. 348.

New York. *Fogal v. Page*, 59 Hun 625.

on applicable instructions should be accurate,⁶⁷ but a judgment will not be reversed for erroneous instructions as to damages if the verdict shows that the error did not affect the result.⁶⁸

§ 438. Error harmless in view of evidence.

The evidence brought up in the record may be considered in determining the correctness of a charge, and in determining whether error was prejudicial.⁶⁹ Error in giving or refusing instructions is not ground for reversal, where, under the evidence, the result could not have been different had such error not been committed.⁷⁰ But where an erroneous charge may have influenced the verdict, the judgment must be reversed, although the evidence may be sufficient

Ohio. *Kuchenmeister v. O'Connor*, 11 Cinc. L. Bul. 120.

67—*Schleuter v. Sherman Bros. & Co.*, 169 Ill. App. 386.

68—Error as to measure of damages is harmless, where the amount of the verdict shows that the jury did not follow the erroneous direction. *Keeler v. Herr*, 157 Ill. 57.

Error in an instruction as to exemplary damages is harmless to the plaintiff, where the plaintiff was not entitled to even actual damages. *Meyers v. Wright*, 44 Iowa 38. See also, *Mareum v. Missouri, K. & T. R. Co.*, 139 Mo. App. 217.

An instruction as to the measure of damages cannot be regarded as prejudicial error, where it allows no less than the correct rule would warrant. *Hubbell v. Blandy*, 87 Mich. 209, 24 Am. St. Rep. 154.

69—*Bradshaw v. Mayfield*, 18 Tex. 21; *Texas & P. Ry. Co. v. Neill* (Tex. Civ. App.) 30 S. W. 369.

70—**Arkansas.** *Kansas City Southern R. Co. v. Carl*, 91 Ark. 97, 134 Am. St. Rep. 56; *Jachary v. Pace*, 9 Ark. 212, 47 Am. Dec. 744.

California. *Kirk v. Santa Barbara Ice Co.*, 157 Cal. 591, 108 Pac. 509; *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386; *People v. Riley*, 75 Cal. 98, 16 Pac. 544.

Georgia. *Sellers v. State*, 99 Ga. 212.

Illinois. *Scott v. Parlin & Orendorff Co.*, 245 Ill. 460; *Chicago & E. I. R. Co. v. Kneirim*, 152 Ill. 458, 43 Am. St. Rep. 259; *Cusick v. Campbell*, 68 Ill. 508; *Dodd v. Fruit Growers Refrigerating & Power Co.*, 147 Ill. App. 152; *Board of Sup'rs of Logan Co. v. People*, 17 Ill. App. 49; *O'Halloran v. Kingston*, 16 Ill. App. 659.

Indiana. *Dehority v. Paxson*, 97 Ind. 253; *Jones v. State*, 78 Ind. 217; *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1n; *Stipp v. Spring Mill & Williams Creek Gravel R. Co.*, 54 Ind. 16; *Morford v. Woodworth*, 7 Ind. 83; *Nichols v. Central Trust Co.*, 43 Ind. App. 64.

Iowa. *First Nat. Bank v. Breese*, 39 Iowa 640; *Farwell v. Salpaugh*, 32 Iowa 582.

Kansas. *Monroe v. City of Law-*

to support the verdict, or may even preponderate in its favor.⁷¹ So, where an instruction is predicated upon a case which the evidence tends to prove, and is correct, its refusal is ground for reversal, although a verdict for the other party may be sustained by the evidence.⁷²

Where the evidence would not support a verdict and

rence, 44 Kan. 607, 10 L. R. A. 520, 24 Pac. 1113.

Kentucky. Town of West Covington v. Schultz, 16 Ky. L. Rep. 831.

Maryland. Thurston v. Lloyd, 4 Md. 283.

Massachusetts. Com. v. Bishop, 165 Mass. 148.

Michigan. Cartier v. Douville, 98 Mich. 22; Schisler v. Null, 91 Mich. 321; Tubbs v. Dwelling House Ins. Co., 84 Mich. 646; Johnston v. Davis, 60 Mich. 56; Seymour v. Detroit Copper & Brass Rolling Mills, 56 Mich. 117; Sheehan v. Dalrymple, 19 Mich. 239; Sinclair v. Murphy, 14 Mich. 392; Cummings v. Stone, 13 Mich. 70; Clark v. Moore, 3 Mich. 55.

Missouri. Quinn v. Metropolitan St. R. Co., 218 Mo. 545; State v. Donnelly, 130 Mo. 642; State v. Cunningham, 130 Mo. 507.

Ohio. Earl's Lessee v. Shoulder, 6 Ohio 409; Reed v. McGrew, 5 Ohio 375; Courcier v. Graham, 1 Ohio 330; Chase v. Washburn, 1 Ohio 244; Murphy v. Hagerman, Wright (Ohio) 293.

Oklahoma. Shawnee Nat. Bank v. Wooten, 24 Okla. 425, 103 Pac. 714.

Pennsylvania. Trexler v. Greenwich Tp., 168 Pa. St. 214; Udderzook v. Harris, 140 Pa. St. 236; Boyle v. Hazleton, 8 Kulp 239.

South Carolina. McCord v. Blackwell, 31 S. C. 125.

South Dakota. Kime v. Bank of Edgemont, 22 S. D. 630.

Texas. Lang v. Dougherty, 74 Tex. 226; Bullock v. Smith, 72 Tex. 545; Hussey v. Moser, 70 Tex. 42; Carter v. Eames, 44 Tex. 544; Cox v. State, 41 Tex. 1; Montgomery v. Amsler, 57 Tex. Civ. App. 216; Harris v. State, 37 Tex. Cr. App. 441; West v. State (Tex. Cr. App.) 33 S. W. 227; Dawson v. Sparks, 1 Posey, Unrep. Cas. (Tex.) 735.

Virginia. Bernard v. Richmond, F. & P. R. Co., 85 Va. 792, 17 Am. St. Rep. 103; Snouffer's Adm'r v. Hansbrough, 79 Va. 166; Colvin v. Menefee, 11 Gratt. 87.

Washington. Aris v. Mutual Life Ins. Co., 54 Wash. 269, 103 Pac. 50.

West Virginia. Butcher v. Somerville, 67 W. Va. 261; Beaty v. Baltimore & O. R. Co., 6 W. Va. 388.

Wyoming. Miller v. State, 3 Wyo. 657, 29 Pac. 136.

71—State v. Empey, 79 Iowa 460; People v. Van Zile, 143 N. Y. 368; Dwyer v. Continental Ins. Co., 57 Tex. 181; Dunham v. Orange Lumber Co., — Tex. Civ. App. —, 125 S. W. 89; Willis v. Kirbie, 1 Posey, Unrep. Cas. (Tex.) 304; Franklin v. Smith, 1 Posey, Unrep. Cas. (Tex.) 229; What Cheer Coal Co. v. Johnson, 6 C. C. A. 148, 56 Fed. 810. But see Louisville, N. A. & C. Ry. Co. v. Nicholai, 4 Ind. App. 119; Seay v. Diller (Tex.) 16 S. W. 642.

72—Baltimore & O. R. Co. v. Skeels, 3 W. Va. 556.

judgment for the appellant, error in the instructions is immaterial as to him, and not ground for reversal.⁷³ Thus, a refusal to charge on the doctrine of reasonable doubt or error in the charge is not ground for reversal, where the state of the evidence is such as to leave no reasonable

73—Alabama. Cowen v. Earth-erly Hardware Co., 95 Ala. 324.

Arkansas. Taylor v. Robinson, 94 Ark. 560.

Florida. Frank v. Williams, 36 Fla. 136.

Illinois. Herrin & S. R. Co. v. Nolte, 243 Ill. 594; Johnson v. Illinois Cent. R. Co., 61 Ill. App. 522; Dwelling House Ins. Co. v. Dowdall, 55 Ill. App. 622; Carey-Lombard Lumber Co. v. Hunt, 54 Ill. App. 314.

Indiana. Evansville & T. H. R. Co. v. Berndt, 172 Ind. 697; Swaim v. Swaim, 134 Ind. 596; State v. Caldwell, 115 Ind. 6; Winchester Wagon Works & Mfg. Co. v. Carman, 109 Ind. 31, 58 Am. Rep. 282n; Wolfe v. Pugh, 101 Ind. 293; Standard Oil Co. v. Bretz, 98 Ind. 231; Newcomer v. Hutchings, 96 Ind. 119; Musselman v. Wise, 84 Ind. 248; Simmon v. Larkin, 82 Ind. 385.

Iowa. Clark v. Johnson County Tel. Co., 146 Iowa 428; Churchill v. Gronewig, 81 Iowa 449.

Michigan. Hatt v. Evening News Ass'n, 94 Mich. 114; Wintermute v. Torrent, 83 Mich. 555; Williams v. City of Grand Rapids, 59 Mich. 51; Parker v. Fields, 48 Mich. 251; Worth v. McConnell, 42 Mich. 473; Loudon v. East Saginaw, 41 Mich. 18; McDonough v. Sutton, 35 Mich. 1; Houghton Co. Sup'rs v. Rees, 34 Mich. 481.

Mississippi. Clymer v. Cameron, 55 Miss. 593.

Missouri. State v. Cunningham,

130 Mo. 507; Greer v. Lafayette Co. Bank, 128 Mo. 559; Sessinghaus v. Knoche, 137 Mo. App. 323.

Ohio. Mehurin v. Stone, 37 Ohio St. 49.

Pennsylvania. Eister v. Paul, 54 Pa. St. 196; Girard Fire & Marine Ins. Co. v. Stephenson, 37 Pa. St. 293, 78 Am. Dec. 423; Houser v. Lightner, 42 Leg. Int. 289; Malson v. Fry, 1 Watts 433; Strawbridge v. Cartledge, 7 Watts & S. 394.

Rhode Island. Collier v. Jenks, 19 R. I. 493.

Tennessee. Jones v. Cherokee Iron Co., 14 Lea 157; Harrison v. Morton, 2 Swan 461; Neddy v. State's Lessee, 8 Yerg. 249.

Texas. Gulf, C. & S. F. Ry. Co. v. Ward, — Tex. Civ. App. —, 124 S. W. 130; Blackman v. Houssels (Tex. Civ. App.) 35 S. W. 511; Turner v. Ft. Worth & D. C. Ry. Co. (Tex. Civ. App.) 30 S. W. 253.

Washington. La Bee v. Sultan Logging Co., 59 Wash. 341, 109 Pac. 1023.

West Virginia. Butcher v. Somerville, 67 W. Va. 261; Mercer Academy v. Rusk, 8 W. Va. 373.

Wisconsin. Chase v. Woodruff, 138 Wis. 641; Rose v. Bradley, 91 Wis. 619; Fairfield v. Barrette, 73 Wis. 463.

United States. Texas & P. Ry. Co. v. Nolan, 11 C. C. A. 202, 62 Fed. 552.

See also, § 196, *ante*.

doubt.⁷⁴ The assumption of facts conclusively proven or admitted, or a failure to require the jury to find such facts, is not reversible error.⁷⁵ And where the judgment is for the plaintiff, error in the charge as to the defense, or any particular branch of it, is harmless, and not ground for reversal, if it clearly appears that such defense or branch of it is not sustained by the evidence.⁷⁶

74—*McGuire v. State*, 37 Miss. 369; *Edelhoff v. State*, 5 Wyo. 19, 36 Pac. 627.

75—*St. Louis, I. M. & S. R. Co. v. Hudson*, 95 Ark. 506; *Hefling v. Van Zandt*, 162 Ill. 162; *St. Louis, A. & T. H. R. Co. v. Holman*, 155 Ill. 21; *Tomlinson v. Briles*, 101 Ind. 538; *Drum v. Stevens*, 94 Ind. 181; *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143; *Corcoran v. City of Detroit*, 95 Mich. 84; *Missouri, K. & T. Ry. Co. of Texas v. Farris*, — Tex. Civ. App. —, 120 S. W. 535.

76—*Alabama*. *Poull & Co. v. Foy-Hays Const. Co.*, 159 Ala. 453.

Illinois. *Joliet Steel Co. v. Shields*, 146 Ill. 603.

Indiana. *Louisville, N. A. & C. Ry. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432.

Iowa. *Greenlee v. Ealy*, 145 Iowa 394; *Brentner v. Chicago, M. & St. P. Ry. Co.*, 68 Iowa 530.

Kansas. *Atchison, T. & S. F. R. Co. v. Love*, 57 Kan. 36, 45 Pac. 59; *City of Clay Centre v. Jevons*, 2 Kan. App. 568, 44 Pac. 745.

Missouri. *Grant v. Tomlinson*, 138 Mo. App. 222; *Lindsay v. Kansas City, Ft. S. & M. R. Co.*, 53 Mo. App. 11; *Goodwin v. Kansas City, Ft. S. & M. R. Co.*, 53 Mo. App. 9.

Montana. *John v. Northern Pac. R. Co.*, 42 Mont. 18, 32 L. R. A. (N. S.) 85, 111 Pac. 632.

Texas. *Pullman Palace Car Co.*

v. Smith, 79 Tex. 468, 13 L. R. A. 215, 23 Am. St. Rep. 356; *Hilliard v. Johnson* (Tex. Civ. App.) 32 S. W. 914; *Gulf, C. & S. F. Ry. Co. v. Higby* (Tex. Civ. App.) 26 S. W. 737. See also, cases cited *post* this note.

Washington. *La Bee v. Sultan Logging Co.*, 59 Wash. 341, 109 Pac. 1023.

An improper instruction as to the degree of care to be exercised by a person to avoid injury is harmless error, where the evidence shows no contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Higby* (Tex. Civ. App.) 26 S. W. 737.

An error in the charge upon contributory negligence by the plaintiff is not material when there was no testimony to show contributory negligence, and no injury resulted. *Louisville, N. A. & C. Ry. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432; *Atchison, T. & S. F. R. Co. v. Love*, 57 Kan. 36, 45 Pac. 59; *City of Clay Centre v. Jevons*, 2 Kan. App. 568, 44 Pac. 745; *Weiden v. Brush Electric Light Co.*, 73 Mich. 268; *Pullman Palace Car Co. v. Smith*, 79 Tex. 468, 13 L. R. A. 215.

Error in defining "fellow servants" is immaterial, where the employee in question was not a fellow-servant. *Joliet Steel Co. v. Shields*, 146 Ill. 603. See also, *Austin Rapid Transit Co. v. Grothe*, 88 Tex. 262.

§ 439. Error in appellant's favor.

Errors in instructions which favor the party objecting are not ground for reversal. This rule is elementary and is supported by an almost innumerable number of decisions, only a few of which are cited.⁷⁷ Accordingly, a refusal of

77—Alabama. Green & Sons v. Lineville Drug Co., 167 Ala. 372; Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412; Salmons v. Roundtree, 24 Ala. 458.

Arkansas. Jones v. Dyer, 92 Ark. 460.

California. People v. Sternberg, 111 Cal. 3, 43 Pac. 198; McNamara v. MacDonough, 102 Cal. 575, 36 Pac. 941; McKeever v. Market St. R. Co., 59 Cal. 294; Roberts v. Sierra R. Co. of California, 14 Cal. App. 180, 111 Pac. 519, 527; Skrocki v. Stahl, 14 Cal. App. 1, 110 Pac. 957.

Colorado. Grimes v. Greenblatt, 47 Colo. 495, 19 Ann. Cas. 608, 107 Pac. 1111; Denver City Tramway Co. v. Wright, 47 Colo. 366, 107 Pac. 1074; De St. Aubin v. Marshall Field & Co., 27 Colo. 414, 62 Pac. 199; Leitensdorfer v. King, 7 Colo. 436, 4 Pac. 37; Smith v. Ramer, 6 Colo. App. 177, 40 Pac. 151.

Connecticut. Daggett v. Whiting, 35 Conn. 372.

Florida. Louisville & N. R. Co. v. Willis, 58 Fla. 307; Marshall v. State, 32 Fla. 462.

Georgia. McTyier v. State, 91 Ga. 254; Partee v. Georgia R. Co., 72 Ga. 349; Atkins v. Paul, 67 Ga. 97; McCoy v. State, 15 Ga. 205; Southern R. Co. v. Robertson, 7 Ga. App. 154.

Illinois. Zeman v. North American Union, 263 Ill. 304; People v. Hotz, 261 Ill. 239; Morton v. Gateley, 1 Scam. 211; Grier v. Barkley, 182 Ill. App. 541; Wabash, St. L. &

P. Ry. Co. v. Shacklett, 10 Ill. App. 404.

Indiana. In re Darrow, 175 Ind. 44; Cline v. Lindsey, 110 Ind. 337; Bronnenberg v. Coburn, 110 Ind. 169; Barnett v. State, 100 Ind. 171; Ferguson v. Hosier, 58 Ind. 438; Bissot v. State, 53 Ind. 408; Baltimore & O. R. Co. v. Countryman, 16 Ind. App. 139; Eddingfield v. State, 12 Ind. App. 312.

Iowa. Tuffree v. Saint, 147 Iowa 361.

Kansas. State v. United States Fidelity & Guaranty Co., 81 Kan. 660, 26 L. R. A. (N. S.) 865n, 106 Pac. 1040; Kansas City, Ft. S. & G. Ry. Co. v. Lane, 33 Kan. 702, 7 Pac. 587; State v. Potter, 15 Kan. 302; State v. Dickson, 6 Kan. 309.

Kentucky. Tibbs v. Commonwealth, 138 Ky. 558, 28 L. R. A. (N. S.) 665n.

Maine. Lime Rock Bank v. Hewett, 52 Me. 531; Philbrook v. Burgess, 52 Me. 271.

Maryland. Benson v. Atwood, 13 Md. 20, 71 Am. Dec. 611.

Massachusetts. Com. v. Houle, 147 Mass. 380.

Michigan. Langworthy v. Green Tp., 95 Mich. 93; Towle v. Ionia, Eaton & Barry Farmers' Mut. Fire Ins. Co., 91 Mich. 219; Bull v. Brockway, 48 Mich. 523; Comstock v. Smith, 20 Mich. 338; Brigham v. Gurney, 1 Mich. 349.

Mississippi. Darcy v. Spivey, 57 Miss. 527.

Missouri. Lindsey v. Stephens,

a requested instruction which operates to the benefit of the appellant is not ground for reversal,⁷⁸ and it cannot avail

229 Mo. 600; *State v. Rumpf*, 228 Mo. 443; *State v. Berkley*, 109 Mo. 665; *State v. Buchler*, 103 Mo. 203; *Harrington v. City of Sedalia*, 98 Mo. 583; *State v. Stewart*, 90 Mo. 507; *State v. O'Gorman*, 68 Mo. 179; *Houx v. Batteen*, 68 Mo. 84; *Knittel v. United Rys. Co. of St. Louis*, 147 Mo. App. 677; *Ball v. City of Independence*, 41 Mo. App. 469; *Vail v. Kansas City, C. & S. Ry. Co.*, 28 Mo. App. 372; *Mangold v. St. Louis, I. M. & S. R. Co.*, 24 Mo. App. 52.

Montana. *Poor v. Madison River Power Co.*, 41 Mont. 236, 108 Pac. 645.

Nebraska. *McCary v. Stull*, 44 Neb. 175; *City of Lincoln v. Gillilan*, 18 Neb. 114.

Nevada. *State v. Little*, 6 Nev. 281.

New Hampshire. *Fowler v. Tuttle*, 24 N. H. 9.

North Carolina. *Stern v. Benlow*, 151 N. C. 460; *State v. Alston*, 113 N. C. 666; *Cowles v. Hall*, 90 N. C. 330; *Lutz v. Yount*, 61 N. C. 367; *Ray v. Lipscomb*, 48 N. C. 185; *Reynolds v. Magness' Ex'rs*, 24 N. C. 26.

Ohio. *McClintock v. Chamberlin*, *Wright*, 547.

Oklahoma. *Chicago, R. I. & P. R. Co. v. Johnson*, 25 Okla. 760, 27 L. R. A. (N. S.) 879, 107 Pac. 662; *Hunter v. State*, 3 Okla. Cr. 533, 107 Pac. 444.

Oregon. *Moorhouse v. Donaca*, 14 Ore. 430.

Pennsylvania. *Brown v. Caldwell*, 10 Serg. & R. 114, 13 Am. Dec. 660; *Collins v. Rush*, 7 Serg. & R. 147; *McIlvaine v. McIlvaine*, 6 Serg. & R. 559.

South Carolina. *Bowen v. Johnston*, 87 S. C. 250, 264; *Oliver v. Sale*, 17 S. C. 587.

Tennessee. *Nashville & C. R. Co. v. Smith*, 6 Heisk. 174; *McNairy v. Thompson*, 1 Sneed 141.

Texas. *Producers Oil Co. v. Barnes*, 103 Tex. 515; *Wright v. State*, 41 Tex. 246; *Cocker v. State*, 31 Tex. 498; *Barbee v. Hall*, 31 Tex. 161; *Warren v. Smith*, 24 Tex. 484, 76 Am. Dec. 115; *Mercer v. Hall*, 2 Tex. 284; *Templeton v. State*, 5 Tex. App. 398; *Powell v. State*, 5 Tex. App. 234; *Davis v. State*, 6 Tex. App. 133; *Gulf, C. & S. F. Ry. Co. v. Duvall*, 12 Tex. Civ. App. 348; *St. Louis Southwestern Ry. Co. of Texas v. Taylor*, — Tex. Civ. App. —, 123 S. W. 714; *International Building & Loan Ass'n v. Fortassain* (Tex. Civ. App.) 23 S. W. 496; *Schuh v. State*, 58 Tex. Cr. App. 165; *Joy v. State*, 57 Tex. Cr. App. 93; *Loggins v. State*, 32 Tex. Cr. App. 364.

Virginia. *Proctor v. Spratley*, 78 Va. 254.

Wisconsin. *Kortendick v. Town of Waterford*, 142 Wis. 413.

78—**Colorado.** *Grimes v. Greenblatt*, 47 Colo. 495, 19 Ann. Cas. 608, 107 Pac. 1111.

Iowa. *Harris v. Beebe*, 144 Iowa 735.

Missouri. *State v. Mitchell*, 98 Mo. 657.

Pennsylvania. *Deal v. Bogue*, 20 Pa. St. 228, 57 Am. Dec. 702; *Werkheiser v. Werkheiser*, 6 Watts & S. 184.

Tennessee. *State v. Parker*, 13 Lea 221.

Texas. *Fort Worth & D. C. Ry.*

a defendant in a criminal case that the court erred in allowing the prosecuting attorney to withdraw a charge after the court has determined to give it, and has so indorsed on the request, if the instruction is as favorable to the prosecution as the law admits of its being, and is correct in every respect.⁷⁹ The modification of a requested instruction is also harmless error, where, as modified, it requires the other party, in order to sustain his case, to prove more than the instruction, as offered, required.⁸⁰

In giving instructions it has been held that an appellant can not complain where the court improperly submits a question of law to the jury, which should have been decided against the party complaining;⁸¹ requires the adverse party to prove more than he ought to be required to prove in order to make out his case;⁸² or to establish his de-

Co. v. Mackney, 83 Tex. 410; Missouri, K. & T. Ry. Co. v. Cook, 12 Tex. Civ. App. 203; Dickinson Creamery Co. v. Lyle, — Tex. Civ. App. —, 130 S. W. 904.

Wisconsin. Stennett v. Bradley, 70 Wis. 278.

As, for instance, where an instruction given by the court is more favorable to the party complaining than the one refused. State v. Mitchell, 98 Mo. 657; Fort Worth & D. C. Ry. Co. v. Mackney, 83 Tex. 410. Thus, a refusal to instruct that plaintiff must establish his case by a preponderance of the evidence is harmless to defendant, where the court instructs that plaintiff must establish his case by a "fair" preponderance of the evidence. De St. Aubin v. Marshall Field & Co., 27 Colo. 414, 62 Pac. 199.

Where a plaintiff proposes correct instructions as to certain defenses, asserted by the defendant, but the court says they are not in the case, and refuses to give them, plaintiff

is benefited, rather than harmed. Stennett v. Bradley, 70 Wis. 278.

79—Bonner v. State, 107 Ala. 97.

80—State v. O'Gorman, 68 Mo. 179.

81—Taylor v. Kelly, 31 Ala. 59, 68 Am. Dec. 150; Millard's Adm'r's v. Hall, 24 Ala. 209; Stanley v. Bank of Mobile, 23 Ala. 652; Courtland v. Tarlton, 8 Ala. 532; Towle v. Iouia, Eaton & Barry Farmers' Mut. Fire Ins. Co., 91 Mich. 219; Smith v. Southern Ry., 87 S. C. 136.

"If the court, after deciding a question of law, against the plaintiff, refuses to instruct the jury, on his request, that they have nothing to do with the decision of that question, thereby impliedly admitting their right to revise its decision, the refusal of the charge gives the plaintiff an additional chance for a verdict, and is therefore no cause of reversal." Wyatt's Adm'r v. Steele, 26 Ala. 640.

82—Baltimore & O. R. Co. v. Countryman, 16 Ind. App. 139; Houx

fense;⁸³ instructs outside of the issues, but in favor of the party complaining;⁸⁴ omits certain elements of the case;⁸⁵ or assumes a fact to exist that is in favor of the party complaining.⁸⁶ And an appellant cannot complain that the jury were not fully instructed where all the instructions asked by him were given.⁸⁷ So, in criminal cases it has been held that no objection can be made where the court permits a conviction of a lesser offense than the evidence warrants,⁸⁸ or eliminates from the case a paragraph of the complaint, defendant appealing,⁸⁹ or expresses the opinion that the accused is not guilty of the crime charged.⁹⁰ But error in giving confusing and misleading instructions is not cured

v. Batteen, 68 Mo. 84; Collier v. Langan & Taylor Storage & Moving Co., — Mo. App. —, 127 S. W. 435; McClary v. Stull, 44 Neb. 175; Warren v. Smith, 24 Tex. 484, 76 Am. Dec. 115; Gulf, C. & S. F. Ry. Co. v. Duvall, 12 Tex. Civ. App. 348.

Where the defense of contributory negligence is not presented by the pleadings, no injury can result to defendant by submitting to the jury the question whether plaintiff was guilty of negligence, as he gets the benefit of a defense which has not been set up. Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412.

83—Daggett v. Whiting, 35 Conn. 372; Harrington v. City of Sedalia, 98 Mo. 583.

84—Terrapin v. Barker, 26 Okla. 93, 109 Pac. 931; Moorhouse v. Donaca, 14 Ore. 430, 13 Pac. 112.

85—Rogers v. Rollins, 185 Ill. App. 153.

86—Ferguson v. Hosier, 58 Ind. 438; Greenway v. Turner, 4 Md. 296.

“The party appealing cannot, in this court, object to a prayer that it assumes a fact which was admitted at the trial, and which admission

was made for his benefit.” Inloes v. American Exch. Bank, 11 Md. 173, 69 Am. Dec. 190.

87—Grier v. Barkley, 182 Ill. App. 541.

88—McTyier v. State, 91 Ga. 254; State v. Alston, 113 N. C. 666; Templeton v. State, 5 Tex. App. 398; Powell v. State, 5 Tex. App. 234. See State v. Berkley, 109 Mo. 665 and Joy v. State, 57 Tex. Cr. App. 93.

If the instructions complained of relate to a degree of crime inferior to the offense charged in the indictment or information, and inferior to that of which the defendant is guilty, they will be deemed not to have prejudiced the defendant, whether erroneous or not. State v. Potter, 15 Kan. 302; State v. Dickson, 6 Kan. 209; State v. Buchler, 103 Mo. 203.

A charge on the lesser offense of fornication is no ground for reversing a conviction of seduction. McTyier v. State, 91 Ga. 254.

89—Bronnenburg v. Coburn, 110 Ind. 169.

90—State v. Little, 6 Nev. 281.

by the fact that their general tenor is unduly favorable to the appellant.⁹¹

⁹¹—Chicago, B. & Q. R. Co. v. Anderson, 38 Neb. 112.

INSTRUCTIONS TO JURIES

FORMS

CHAPTER XXXV.

ABDUCTION.

- § 440. In general.
- § 441. — Georgia.
- § 442. — Kentucky.
- § 443. — North Carolina.
- § 444. Person having control of female—Uncle.
- § 445. Taking or enticement—Necessity.
- § 446. — In general.
- § 447. — Georgia.
- § 448. — Tennessee.
- § 449. Same—What constitutes.
- § 450. Same—When not against will of parents.
- § 451. Intent in, or purpose of taking—In general.
- § 452. — Illinois.
- § 453. — Iowa.
- § 454. — Massachusetts.
- § 455. — Missouri.
- § 456. — New York.
- § 457. Same—Necessity of accomplishment.
- § 458. Defenses—Belief of defendant that female over statutory age.
- § 459. Same—Want of chastity in female.
- § 460. Evidence—Presumptions and burden of proof—Chastity of female.

Cross-References.

Kidnapping, see KIDNAPPING; matters pertaining to law of crime in general, see CRIMINAL LAW; seduction, see SEDUCTION; statutory rape, see RAPE.

§ 440. In general.

§ 441. — Georgia.

The court instructs the jury that if you believe the accused was a married man, and induced the girl to go away with him, without the consent of her parents, under a false and fraudulent prom-

(1009)

ise of marriage and for the purpose of having illicit sexual intercourse with her, he would be guilty.¹

§ 442. — Kentucky.

The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, _____, in _____ County, _____, before _____ [date], did unlawfully, wilfully and feloniously take and detain _____, a female, and not the wife of him the said _____, against her will, with intent to have carnal knowledge with her, they should find the defendant guilty and fix his punishment at confinement in the state penitentiary for a period of time not less than _____ nor more than _____ years, in their discretion.²

§ 443. — North Carolina.

The court instructs the jury that they must be satisfied beyond a reasonable doubt that the girl was under _____ years, that she was residing with her father, and that the defendant took and carried her away, not only against his will and without his consent, but that the taking and carrying of the child was by the defendant's force, fraud, persuation, or other inducement, exercising a controlling influence upon her conduct; that, if he merely permitted her to go with him and his family and gave her his active assistance, that of itself would not make him guilty; that abduction is the taking and carrying of a child, ward, etc., either by fraud, persuasion, or open violence; that the consent of the child is no defense, but, if there was no inducement nor force, and the child departed from her father entirely voluntarily on her part, the defendant was not guilty of abduction; that, should the jury find that the girl was taken away by the defendant against her father's will and without his consent, the defendant cannot be convicted, unless the jury should go further and find beyond a reasonable doubt that the girl was carried away by the

¹—Carter v. State, 14 Ga. App. 51.

²—Smith v. Com. (Ky.) 127 S. W. 790.

force or fraud, or induced to go by the persuasion, of the defendant.³

§ 444. Person having control of female—Uncle.

The jury are instructed that if the female was living in the family of her uncle as a member of his family and had no parent or guardian in the state and was wholly under the protection and care of said uncle, then she was under the control of said uncle within the statute provided she was under — years of age and there by the consent of her parents, which consent may be proved by the relationship of the family and the length of time she had been there in the absence of other testimony.⁴

§ 445. Taking or enticement—Necessity.

§ 446. — In general.

The court instructs the jury that to constitute abduction the female must have been taken or enticed away by defendant and if she went of her own free will without enticement or persuasion by him he is not guilty, but neither force nor fraud need have been used. If the female was induced to go by solicitation and enticement it is sufficient.⁵

§ 447. — Georgia.

The court instructs the jury that if the girl went away willingly and knowingly, for the purpose of having illicit relations with the accused, even without her father's consent, the accused would not be guilty.⁶

§ 448. — Tennessee.

The court instructs the jury that, if she went to the store of her own accord, without being induced or persuaded by defendant, and there agreed to intercourse, he would not be guilty.⁷

§ 449. Same—What constitutes.

The jury are instructed that if defendant induced the woman to leave her home and go with him by presents and solicitation

3—State v. Burnett, 142 N. C. 577.

4—State v. Ruhl, 8 Iowa 447. See State v. Round, 82 Mo. 679.

5—Slocum v. People, 90 Ill. 274; State v. Jamison, 38 Minn. 21; People

v. Plath, 100 N. Y. 590, 53 Am. Rep. 236; Sencker v. People, 88 N. Y. 192.

6—Carter v. State, 14 Ga. App. 51.

7—South v. State, 97 Tenn. 496.

and being moved by such inducements she did go he is guilty of "taking" her away.⁸

§ 450. Same—When not against will of parents.

If the jury believe from the evidence that the parents of the female alleged to have been abducted encouraged her by their conduct in a lax course of life, permitted her to be out alone at night and to attend places of questionable repute, the enticement of the girl away from them for the purpose named in the statute cannot be said to be against their will though they never actually knew of or consented to it, and defendant must be acquitted.⁹

§ 451. Intent in, or purpose of taking—In general.

§ 452. — Illinois.

The jury are instructed that the taking, if any, must have been for the purpose of concubinage and a taking for the purpose of a single act of sexual intercourse is not sufficient. But no particular continuance of illicit intercourse is necessary to constitute concubinage. That relation is formed when a woman consents to unlawfully cohabit with a man generally as though the marriage relation existed between them.¹⁰

§ 453. — Iowa.

The court instructs the jury that if the defendant only intended to obtain the body of the said A, for his own personal carnal enjoyment, and no more, then the act did not amount to her prostitution, in the sense of the law.¹¹

§ 454. — Massachusetts.

The jury are instructed that prostitution means common indiscriminate sexual intercourse with men, and if defendant took the female from her home for the sole purpose of having sexual intercourse with her himself, he is not guilty.¹²

8—State v. Johnson, 115 Mo. 480.

9—Regina v. Primalt, 1 F. & F. 50.

See also, State v. Stone, 106 Mo. 1.

This instruction is probably applicable only where the statute states that the taking must be "against the will" of the parent or guardian.

10—Henderson v. People, 124 Ill. 607, 7 Am. St. Rep. 391.

11—State v. Ruhl, 8 Iowa 447.

12—Com. v. Cook, 53 Mass. 93. See State v. Osborn, 52 Ind. 526; State v. Stoyell, 54 Me. 24, 89 Am Dec. 716.

§ 455. — Missouri.

The court instructs the jury that by the word "concubinage," as used in the information and in these instructions, is meant the act or practice of a man cohabiting in sexual intercourse with a woman—a female with whom he is not married. If the jury believe and find from the evidence that the defendant, _____, did take the prosecuting witness, _____, from her father and that she was at the time a female under the age of _____ years, for the purpose of cohabiting with her in sexual intercourse for any length of time for more than one single act of sexual intercourse, then the defendant is guilty of the crime charged in the information. If you find that the defendant did not so take the said _____ from her father, or did not take her for the purpose or with the intent to practice sexual intercourse with her, as explained in these instructions, or if you find that said _____ was at the time _____ years of age or over, then the defendant is not guilty of the crime charged, and you will so find.¹³

§ 456. — New York.

The court instructs the jury that the question is: What did they go up there for? Was the intent of this defendant honorable? Is there any evidence in this case from beginning to end that it was honorable? Has there been any evidence offered in this case to explain the reason why he was up there at that hour?¹⁴

§ 457. Same—Necessity of accomplishment.

The court instructs that if the jury believe from the evidence that the defendant took or enticed the female from the control of her parents [or from the person having lawful charge of her] for the purpose of prostitution [or whatever the statutory purpose may be] the offense was thereby completed and it was not needful that illicit sexual intercourse be had with her.¹⁵

13—State v. Baldwin, 214 Mo. 290.

14—People v. Smith, 114 App. Div. (N. Y.) 513, 20 N. Y. Cr. 307.

15—Henderson v. People, 124 Ill. 607, 7 Am. St. Rep. 391; Berger v. People, 86 N. Y. 369.

§ 458. Defenses—Belief of defendant that female over statutory age.

The jury are instructed that under the statute the female abducted must at the time have been less than — years of age, but if the jury find that she was in fact under such age, the fact that defendant had good reason to believe and did believe that she was over such age is no defense.¹⁶

§ 459. Same—Want of chastity in female.

The court instructs the jury that even if they should find that the prosecuting witness, ———, was of unchaste character, and had previously had sexual intercourse with the defendant, yet that state of facts did not constitute any defense to this action or prosecution.¹⁷

The court instructs the jury that if you find beyond a reasonable doubt that the girl was living with her parents a chaste and virtuous life towards all others except defendant, and defendant wilfully took her from her father without his consent, for the purpose of and intending to prostitute her, then he would be guilty as charged, although it might appear that, prior thereto, defendant had had sexual intercourse with her.¹⁸

§ 460. Evidence—Presumptions and burden of proof—Chastity of female.

The jury are instructed that though it is essential to the offense that the female be of previous chaste character, her chastity is presumed, and need not be proved by the state, but the burden is on defendant to impeach it.¹⁹

16—State v. Johnson, 115 Mo. 480. That "one who entices away a female for the purpose of debauching her is not relieved by the fact that he did not know her to be within the age named in the statute" but that "it is the fact that she was [within such age] that controls and fixes the offense." See Riley v.

State (Miss.) 18 So. 117. To the same effect see State v. Ruhl, 8 Iowa 447.

17—State v. Baldwin, 214 Mo. 290.

18—South v. State, 97 Tenn. 496.

19—Bradshaw v. People, 153 Ill. 156.

CHAPTER XXXVI.

ABORTION.

- § 461. Intent.
- § 462. — Illinois.
- § 463. — Massachusetts.
- § 464. Aiders and abettors.
- § 465. Defenses—Abortion due to natural causes.
- § 466. Same—Consent of female.
- § 467. Same—Danger to life of female—Threat of suicide.
- § 468. Same—Advice of physician.
- § 469. Indictment—Proof—Means or instrument used.
- § 470. Same—Same—Time of acts.
- § 471. Evidence—Extent.
- § 472. Questions for jury.

Cross-References.

Criminal liability for death of female, see HOMICIDE; matters pertaining to law of crime in general, see CRIMINAL LAW.

§ 461. Intent.

§ 462. — Illinois.

The jury are instructed that an intent to produce a miscarriage is essential, and therefore, if the jury believe from the evidence that defendant unlawfully assaulted and beat a pregnant woman and thereby caused a miscarriage he is not guilty if he did not intend to produce that result.¹

§ 463. — Massachusetts.

The court instructs the jury that in order to authorize a conviction the jury must be satisfied that there was an operation performed upon ————— by the defendant, by thrusting an instrument up into her body and into her womb, with intent unlawfully thereby to procure her miscarriage, she being pregnant.²

1—Slattery v. People, 76 Ill. 217.

2—Com. v. Snow, 116 Mass. 47.

The court instructs the jury that it was not necessary for the government to prove that the act complained of was performed with the intention by the defendant to kill and murder the child; it was sufficient if it was done in the manner alleged, with intent to procure a miscarriage unlawfully.³

§ 464. Aiders and abettors.

The jury are instructed that though they believe that an abortion was actually performed on ———— and that defendant knowing of her intention to have the same performed accompanied her to the office of ———— who performed the same, remaining in an adjoining room, such acts do not constitute a participation in the offense, and if defendant did not in any other manner aid, abet or encourage the operation he is not guilty.⁴

§ 465. Defenses—Abortion due to natural causes.

The court instructs the jury that if you believe that A aborted from natural causes, or from any one of the several causes testified to by the medical witnesses in the case, then you should find the respondent not guilty.⁵

The court instructs the jury that if you believe that A aborted by reason of the ordinary sickness and vomiting, augmented by the sickness and vomiting of a sea voyage, together with the nervous, mental excitement, fatigue, lack of nourishment, and the change of climate, then you should find the respondent not guilty.⁶

§ 466. Same—Consent of female.

The court instructs the jury that if the defendant unlawfully used said instrument as alleged, for the purpose of procuring her miscarriage, it is sufficient to authorize his conviction under this indictment, though the jury are satisfied that the operation was

3—Com. v. Snow, 116 Mass. 47.

6—People v. Seaman, 107 Mich.

4—People v. McGonegal, 136 N. Y. 62.

348, 61 Am. St. Rep. 326.

5—People v. Seaman, 107 Mich. 348, 61 Am. St. Rep. 326.

performed by her procurement and with her consent, and that the evidence showed it was with her consent.⁷

§ 467. Same—Danger to life of female—Threat of suicide.

The jury are instructed that the danger to the life of the mother which will justify the production of a miscarriage must be a danger arising from natural causes, and the fact that she has threatened to commit suicide unless the miscarriage is produced is no defense though defendant believed in good faith that she would carry out such threat.⁸

§ 468. Same—Advice of physician.

The jury are instructed that if they believe from the evidence that a physician advised that the production of a miscarriage was necessary to save the life of the woman, and that defendant acted in good faith on such advice he must be acquitted though the physician was in fact mistaken as to the necessity.⁹

§ 469. Indictment—Proof—Means or instrument used.

The court instructs the jury that if it is proven beyond a reasonable doubt that both drugs and instruments were used by the defendant to commit abortion, then the allegations of the indictment are proven so far as concerns the means and instrumentalities alleged; and it is not necessary to prove beyond a reasonable doubt which was used, whether drugs or instruments, just so you are convinced beyond a reasonable doubt that one or both were used.¹⁰

§ 470. Same—Same—Time of acts.

The court instructs the jury that it is not necessary that it should be proved that the acts complained of were on the day alleged; that the exact day is not material; and if the jury are satisfied that the defendant performed the operation on any day in the month of ———, it is sufficient as far as the day is material; that if the jury are satisfied that the witnesses for the govern-

7—Com. v. Snow, 116 Mass. 47.

8—Hatchard v. State, 79 Wis. 357.

9—State v. Fitzporter, 93 Mo. 390.

In some states the concurring opinion of two physicians is re-

quired by statute. See Hatchard v. State, 79 Wis. 357.

10—Thomas v. State, 156 Ala. 166.

ment were in error as to the date stated by them, this is a proper matter to be considered upon the question of the degree of credit they are entitled to as to other matters; and if this, either alone or in connection with other evidence, causes the jury so far to doubt as to their truth and the reliability of their testimony in other matters, that they are not satisfied beyond doubt that the defendant did perform the operation as alleged, then they should acquit the defendant.¹¹

§ 471. Evidence—Intent.

The court instructs the jury that the intent with which an act is committed may be proved by direct and positive testimony, or such intent may be inferred from all the facts and circumstances surrounding and attending the act, as shown by the evidence in the case, and the intent with which the defendant used an instrument or instruments upon the private parts of the womb of said A, if you find that he did use it, or them, must be determined by you from the evidence given in this case.¹²

§ 472. Questions for jury.

The court instructs the jury that as by the defendant's testimony it is confessed that he inserted into the bodies of each of the women named an instrument, which does not appear to have been known to the grand jury who found the indictment, on ——— and on ——— last, at ———, the only practical questions to be considered by the jury in relation to the ——— and ——— counts are, first, whether, at the time when this instrument was inserted into their bodies by defendant, the women were pregnant with child; and second, whether this instrument was thus inserted into the bodies of these women unlawfully, that is to say, without justification in law. As to these two questions, the jury are instructed that the allegations of the indictment, that an instrument was forced and thrust into the bodies of these women, are substantially and sufficiently proved by evidence that such instrument was inserted into their

11—Com. v. Snow, 116 Mass. 47.

12—State v. De Groat, 259 Mo.

bodies by any degree of mechanical force. As to the first question, the jury are instructed that the proof on the part of the prosecution must be, that, at the time of the defendant's acts upon the bodies of said A and said B, they were pregnant with children which had vitality, so that in the course of nature they could mature into living children. The statute is intended to prevent and punish the destroying of embryo human life, the germs of human life before birth in the course of nature, and would not apply to acts to procure the miscarriage of a woman having a dead foetus in her womb. As to the second question affecting, the lawfulness of the defendant's acts, the jury are instructed that a physician may lawfully procure the miscarriage of a woman pregnant with child, by any means appropriate and reasonable for that purpose, directly or indirectly applied, if in so doing he acts in good faith for the preservation of the life or health of such pregnant woman. The justification of a physician thus acting must depend upon his exercising his best skill and judgment, and in the honest belief that his acts directly applied to produce a miscarriage, or applied to the treatment of a disease so as to involve a miscarriage, as a not unusual incident of such treatment, are necessary to save such pregnant woman from great peril to her life or health. Acts for the purpose of procuring the miscarriage of a woman pregnant with child, to be unlawful, need not be done in a spirit of wanton cruelty or wicked revenge; but would be unlawful if done from any wicked, base or sordid motive, offensive to good morals or injurious to society. Such acts would be none the less unjustifiable because done by the consent or upon the solicitation of the pregnant woman whose miscarriage was attempted to be procured, or because done to screen such a woman from exposure or disgrace, or for gain or reward. The possession by a physician of surgical instruments adapted to use in procuring the miscarriage of pregnant women would be explained consistently with that physician's innocence of any intention to use them for unlawfully procuring miscarriages, if they were instruments also adapted equally to other and legitimate uses in surgery or midwifery, unless their extraor-

dinary number and variety was in more than ordinary proportion to the whole number and variety of surgical instruments possessed by him, or the exigencies of his practice furnished him occasions for using; but the significance as evidence, of the possession of any number or variety of surgical instruments adapted especially to procuring miscarriage of pregnant women, would more or less depend upon circumstances, usual or unusual, ordinary or extraordinary, attending the mode of their possession and keeping, and the exigencies of such physician's practice. Inasmuch as A and B, by their solicitation of or consent to the acts of defendant, alleged to be unlawful, were severally implicated in these acts, and their unlawful and criminal character, that fact may justly be considered by the jury as affecting their credibility as witnesses and the force and weight of their testimony.¹³

13—Com. v. Brown, 121 Mass. 69.

CHAPTER XXXVII.

ACCORD AND SATISFACTION.

- § 473. Definition.
- § 474. Agreement of parties—Necessity in general.
- § 475. Same—Condition required to be attached to offer.
- § 476. Acceptance of sum less than amount claimed.
- § 477. — Indiana.
- § 478. — Nebraska.
- § 479. Acceptance of check or notes.
- § 480. Illinois.
- § 481. — New York.
- § 482. Payment of interest admitted, and surrender of notes and mortgages.
- § 483. Compliance with condition attached.

Cross-References.

See COMPROMISE AND SETTLEMENT; PAYMENT; RELEASE.

§ 473. Definition.

The court instructs the jury that the only issue before them is the question of settlement between the plaintiffs and the defendant, or, accord and satisfaction as set forth by the defendant in his answer, and that accord and satisfaction is an agreement between a creditor and his debtor, by which the creditor agrees to take and receive something from his debtor in lieu and satisfaction of his claim. If the property or thing to be given by the debtor to the creditor is received and accepted by the latter in settlement of his claim, it has the effect of payment, and extinguishes his claim. Anything valuable may be given by the debtor to the creditor, whether specific property or goods, or a transfer of claims or rights belonging to the debtor, (and if the jury believe from the evidence that in the month of —— or at any time since the maturity of the notes sued on in this case, the defendant and the plaintiff agreed upon a settlement, by which

the defendant was to assign and transfer to the plaintiff a certain claim of inheritance belonging to the wife of the defendant, and if the jury further believe from the evidence that this basis of settlement was carried out by the parties, that is to say, that the defendant and his wife executed an assignment and transfer of said claim of inheritance to plaintiff, and that the said claim of inheritance was delivered to and accepted by the plaintiff in full satisfaction of the claim of plaintiff against the defendant, then the jury will find for the defendant).¹

§ 474. Agreement of parties—Necessity in general.

The court instructs the jury that the transaction that took place in regard to this stock, if it took place, as the defendant claims and has testified in regard to, if you are satisfied of that by a preponderance of the evidence, that would be a defense. But the mere fact that the defendant A did work in connection with buying up this stock, bringing it in so it could be divided, I say that mere fact alone would not and could not be considered by you as wiping out this indebtedness between him and B, the plaintiff; the mere fact that he did work that was valuable and that enabled the plaintiff to obtain this stock; that mere fact alone of his getting something valuable could not be considered as an offset or cancellation of this indebtedness without this agreement that the defendant claims B made in regard to it. And the mere fact that B received — dollars' worth of stock, or any amount of stock, by this agreement of C, could not be considered as an offset to this claim, unless, as I have said, he agreed to receive it in the way that A has stated. In other words, this money as it appears by this agreement was to be furnished by C and C was distributing this stock. If it was a present from C, it was a present from C to each of these men who were running the business and trying to put it upon its feet. He could have kept all this, I suppose; he could have bought up these notes and could have kept it all, but he made the agreement to divide up with the other two in the company, so that that was a gratuity,

¹—*American v. Rimpert*, 75 Ill.

so to speak, on the part of C. But if, in connection with that, A, by reason of B's not going out and helping him, got him to say that he would release him from the indebtedness if he brought that about and took that stock, then I say, if that is made out by a preponderance of the evidence, that would be a defense, but the mere fact alone that he got something valuable for nothing from C would not of itself cancel the indebtedness.²

§ 475. Same—Condition required to be attached to offer.

The court instructs the jury that to constitute an accord and satisfaction of a claim unliquidated and in dispute it is necessary that the money should be offered in satisfaction of the claim and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted it is to be in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it, he takes it subject to such condition.³

§ 476. Acceptance of sum less than amount claimed.

§ 477. — Indiana.

The court instructs the jury that a person cannot pay and satisfy a debt by the payment of a sum less than the debt; but if you believe from the evidence that the plaintiff, in order to avoid a suit, of the result of which he was doubtful, agreed to receive any sum in full satisfaction of the amount he claimed to be due on said account, and upon such agreement the defendant paid the sum agreed upon, then such agreement and payment would completely discharge the defendant from all liability.⁴

§ 478. — Nebraska.

The court instructs the jury that if you find from the evidence that there was a dispute in good faith between the board of county commissioners of defendant county and the plaintiffs as

2—Weaver v. Murray, 163 Mich. 660. In disposing of this charge the court says it sees nothing therein justifying a reversal.

3—Kingsville Preserving Co. v.

Frank, 87 Ill. App. 586; Lang, Evans & Co. v. J. H. Lane & Co., 83 Ill. App. 543.

4—Ogborn v. Hoffman, 52 Ind. 439.

to the amount justly due them under said contract, and that said dispute was settled by such county board agreeing to allow and pay, and the said plaintiffs to accept and receive — in full settlement and satisfaction of said claim, and that in pursuance of said claim, and that in pursuance of such settlement and agreement, such sum of money was allowed by such board, and paid to, and received by said plaintiffs, then said plaintiffs cannot recover in this action, and your verdict should be for defendant. And you are further instructed that if you find from the evidence that there was a disagreement in good faith between the plaintiffs and said board of county commissioners with respect of the amount due and owing said plaintiffs under said contract, and that said board proposed to allow and pay to them the sum of — in full satisfaction and settlement of said claim, that then it was optional with said plaintiffs to accept said sum or to refuse the same. But, if you further find that said plaintiffs exercised such option by accepting such allowance and receiving such sum, then they would be bound by the condition that such allowance and payment was in full satisfaction and settlement of said claim, to the same extent that they would have been bound had they expressly agreed to such condition; and this would be true even as against any secret or expressed intentions to the contrary, or any protests then or subsequently made.⁵

§ 479. Acceptance of check or notes.

§ 480. — Illinois.

The court instructs the jury that if they believe, from the evidence, that prior to the bringing of this suit by the plaintiffs against the defendants there was an honest dispute between the plaintiffs and the defendants as to the amount due from the defendants to the plaintiffs and whether the same was due, and on or about the — day of —, 19—, in order to adjust and settle the controversy and the account, the defendants delivered to the plaintiffs a check for — and three notes, one for —, payable — months after date, one for —, payable —

⁵—Green v. Lancaster County, 61
Neb. 473.

months after date, and one for —, payable — months after date, said check and notes aggregating the sum of —, and that said check and notes were delivered to the plaintiffs with the statement and understanding that they were given and should be received in full settlement and payment of said claim of the plaintiffs against the defendants, and the plaintiffs received said check and collected and kept the amount thereof, but refused to accept the notes and returned the same to the defendants, and that the defendants demanded back said — [amount of check] unless the plaintiffs should receive the check and notes in full settlement of the account, and the defendants now have said notes in their possession and have tendered the same to the plaintiffs on the trial of this case, then the court instructs you, as a matter of law, that the plaintiffs cannot recover in this action.⁶

The court instructs the jury that if the check for — and three notes introduced in evidence were sent to the plaintiffs by the defendants at the same time and as a part of one transaction, as a full settlement of an honestly disputed claim between the plaintiffs and the defendants, then the plaintiffs, as a matter of law, were not entitled to receive and appropriate the check and collect the amount thereof and return the notes; that a tender of such a kind must be accepted as a whole, or not at all; and if the return of the notes was not acquiesced in by the defendants, but they have been tendered back by the defendants to the plaintiffs and are now ready to be delivered by the defendants to the plaintiffs, then the plaintiffs cannot recover in this action.⁷

§ 481. — New York.

The court instructs the jury that the acceptance of a check for less than the sum claimed may amount to an accord and satisfaction, and that if you believe from the evidence (here state facts surrounding acceptance of check, as where check was sent and the creditors collected the check but wrote that they had agreed to accept it on account, to which defendant replied that if they

6—Lapp v. Smith, 183 Ill. 179,
rev'g 83 Ill. App. 203.

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7—Lapp v. Smith, 183 Ill. 179,
rev'g 83 Ill. App. 203.

retained the amount accepted they would be expected to do so in full payment), then your verdict will be for defendant.⁸

The court instructs the jury that if you find from the evidence that the debtor gave his note indorsed by a third person as further security for a part of the debt and if you further find that the note was accepted by the creditor in full satisfaction of all demands, your verdict will be for the defendant.⁹

§ 482. Payment of interest admitted, and surrender of notes and mortgages.

The court instructs the jury that where there is a bona fide dispute between the maker and payee of notes as to the date from which interest is payable under the terms of the notes which are ambiguous; and the maker pays the amount he admits to be due on the express condition that the notes and mortgages securing the same shall be canceled and surrendered, and the payee accordingly receives the money and cancels and surrenders the mortgages, there is an accord and satisfaction.¹⁰

§ 483. Compliance with condition attached.

The court instructs the jury that a payment under an agreement to accept less than the whole debt if paid by a certain day, is not a discharge unless the condition is strictly complied with.¹¹

8—Bernard v. Henry Werner Co.,
19 Misc. (N. Y.) 173.

9—Boyd v. Hitchcock, 20 Johns.
(N. Y.) 76, 11 Am. Dec. 247.

10—Storch v. Dewey, 57 Kan. 370,
46 Pac. 698.

11—Inman v. Griswold, 1 Cow.
(N. Y.) 199.

CHAPTER XXXVIII.

ACCOUNT, ACTION ON.

§ 484. Open accounts in general—Recovery on items admitted.

§ 485. Book accounts—What constitutes open book account.

§ 486. Same—Burden of proof.

Cross-Reference.

Application of payments in case of running account, see PAYMENT.

§ 484. Open accounts in general—Recovery on items admitted.

The court instructs the jury that the plaintiff is entitled to recover the full amount charged in the bill of particulars for all items which have been admitted by defendant to be correct.¹

§ 485. Book accounts—What constitutes open book account.

The court instructs the jury that if you shall find that the various deliveries of coal to the steamer ———, as charged upon the books of A, were entered upon the books as parts and items of running and continuous dealings between A and the defendant, and that the account was kept unclosed prior to the date of the last entry on ———, 19—, with the anticipation of further transactions on the part of A and the defendant, then I instruct you that the book account which contains these charges is an open book account.²

The court instructs the jury that the mere entry of items in books does not constitute an open book account, but there must be either an express agreement between the parties to maintain an open book account or some acts from which such an agreement may be reasonably inferred.³

1—*Mitchell v. Joyce*, 69 Iowa 121.

3—*Mercantile Trust Co. of San*

2—*Mercantile Trust Co. of San Francisco v. Doe*, — Cal. App. —, 146 Pac. 692.

§ 486. Same—Burden of proof.

The court instructs the jury, at the request of the defendant that the burden of proof devolves upon the plaintiff to make out its case on the account sued on by a preponderance on evidence, and as to those items, if any, upon which there has been a failure, if any, to make proof, you will disallow them to plaintiff, and as to such items, if any, you will find in favor of defendant.⁴

4—Keating Implement & Machine
Co. v. Erie City Iron Works (Tex.
Civ. App.) 63 S. W. 546.

CHAPTER XXXIX.

ACCOUNT STATED.

- § 487. Nature and requisites—Form of words.
- § 488. Same—Agreement of parties.
- § 489. Same—Failure to object to account rendered.
- § 490. In general.
- § 491. — Alabama.
- § 492. — California.
- § 493. — Illinois.
- § 494. — Iowa.
- § 495. — West Virginia.
- § 496. Conclusiveness.
- § 497. — Alabama.
- § 498. — Illinois.
- § 499. Issues and proof—Agency, or ratification of act of third party.
- § 500. Evidence—Burden of proof.
- § 501. — Alabama.
- § 502. — Illinois.
- § 503. — West Virginia.

§ 487. Nature and requisites—Form of words.

The court instructs the jury that no particular form of words is necessary to constitute a settlement, nor is it necessary to prove a promise to pay the balance found to be due, provided a balance be found in the party's favor.¹

§ 488. Same—Agreement of parties.

The court instructs the jury that it is essential to an account stated that there be an examination of the claims by each party, and an agreement, express or implied, as to the correctness of the allowance of the amount of their respective claims and of the balance struck on the adjustment of the account.²

The court instructs the jury that to make an account stated

1—Brewer v. Wright, 25 Neb. 805. Wkly. Dig. (N. Y.) 124; Allen v.
2—Stenton v. Jerome, 54 N. Y. Woonsocket Co., 11 R. I. 288; Bus-
sey v. Gant, 29 Tenn. (10 Humph.)
480; Smith v. Harris, 26 Wkly. Dig. (N. Y.) 323; Murphy v. Ross, 26 238.

there must be a mutual agreement between the parties as to the allowance or disallowance of their respective claims, and to establish such an account so as to preclude a party from impeaching save from fraud or mistake, there must be proof of assent to the account as rendered, either express or implied from failure to object within a reasonable time after presentation.³

§ 489. Same—Failure to object to account rendered.

§ 490. — In general.

The court instructs the jury that where an account rendered is not objected to within a reasonable time, the failure to object will be regarded as an admission of its correctness by the party to be charged, and what is a retention for a reasonable time is to be determined by all the circumstances of the case.⁴

§ 491. — Alabama.

The court instructs the jury that plaintiff's failure to object to any charges made against him by the ——— Company can only be considered as a circumstance against him, and not as conclusive proof that he admitted them to be correct, or that they were correct.⁵

§ 492. — California.

The court instructs the jury that if they should find from the evidence that a statement of account was rendered to defendant on ———, 19—, and that the items thereof were explained to her, and that more than — months elapsed after said date without any objection being made by the defendant, the account became an account stated, the items of which were no longer open to inquiry, in the absence of allegation and proof of fraud or mistake.⁶

§ 493. — Illinois.

The court instructs the jury that if you believe, from the evidence in the case, that the plaintiffs, on or about the — or

3—Stenton v. Jerome, 54 N. Y. 480.

5—Hodges v. Kyle, 9 Ala. App. 449.

4—White v. Hampton, 10 Iowa 238; Darby v. Lastrapes, 28 Lans. (N. Y.) 605.

6—Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985.

— day of —, 19—, sent to the defendants an account, showing the purchase of the high wines by the plaintiffs for the defendants; the amount paid for the same; the interest on the amount so paid; the credits to the defendants for the — paid by them; the sum for which the high wines were sold, and the interest on these amounts, showing a balance in favor of the plaintiffs of —; and the defendants held said account, and retained possession of the same from the date of such delivery up to the time when this suit was commenced, without making objections to the correctness of such account, this is a circumstance to be taken into account by the jury in determining whether or not the defendants have admitted the correctness of said account.⁷

The court instructs the jury that if you believe from the evidence that some time about the — day of —, 19—, a statement of account was made by the plaintiff or its agent, and submitted to the defendant or its agent, and the latter acquiesced in its correctness, the jury are instructed that the law regards this as a stated account, by which both parties will be bound unless it can be shown that some error or mistake has been made or fraud practiced, and the burden of proving mistake or fraud is on the party alleging it.⁸

§ 494. — Iowa.

The court instructs the jury that what will amount to a stated account from the presumed acquiescence of the plaintiff, arising from lapse of time and his failure to object to the same within a reasonable time, depends upon the circumstances and nature of the transaction and habits of business, and it is for you to determine, from all the circumstances of the case, whether plaintiff acquiesced in the statement rendered by the defendant by lapse of time.⁹

7—*Miller v. Bruns*, 41 Ill. 293.

9—*Millard v. Bennett*, 161 Iowa

8—*Concord Apartment House Co.* 242.

v. Alaska Refrigerator Co., 78 Ill. App. 682.

§ 495. — West Virginia.

The jury are further instructed that he who has been silent as to his alleged rights when he ought to have spoken is not permitted to speak when he ought to be silent; and if you believe from the evidence in this case that the plaintiff received, from time to time, from the defendant statements of his account with the defendant and was thereby afforded the opportunity to see the items in his bill of particulars mentioned charged against him, and remained silent and did not object to the charge of such items against him within a reasonable time after each of such items was so rendered, then the defendant had the right to infer acquiescence of the plaintiff in the correctness of such charges and the plaintiff is now estopped to deny the correctness of all such items to which he did not object in proper time; and, as to all such items of the plaintiff's account, you must find for the defendant.¹⁰

§ 496. Conclusiveness.**§ 497. — Alabama.**

The court instructs the jury that if you believe there was a stated account between the plaintiff and defendant in this case, that this fact would not preclude the defendant from showing that the said account was either incorrect or void for want of consideration.¹¹

§ 498. — Illinois.

The court instructs the jury that a settlement between two parties is a mutual accounting between them, done with the full assent and knowledge of both parties, by which the parties shall arrive at some definite result as to the amount due from one to the other, and in which result both parties agree as to such amount due. And if the jury believe, from the evidence, that the pretended settlement, claimed by the plaintiff to have taken place in ———, 19—, was not an accounting in which both parties agreed, or if there was committed any error in such settlement,

10—Shrewsbury v. Tufts, 41 W.
Va. 212.

11—Ivy Coal & Coke Co. v. Long,
139 Ala. 535.

accidental or otherwise, on the part of the plaintiff, then such accounting and pretended settlement is not binding upon the defendant.¹²

The court instructs the jury that if they find, from the evidence in the case, that the defendant admitted the account sued on in this case to be correct and unpaid, and promised to pay the same, that such admissions are sufficient evidence to entitle the plaintiffs to recover the amount of said account, unless they further find from the evidence that defendant when he made the admission, was as a fact mistaken in the facts in regard to said account.¹³

The court instructs the jury, as a matter of law, that if you believe from a consideration of all the evidence that the defendant arrived at a settlement with the plaintiff, as to the balance due him, then he is bound by that settlement and is liable to him for the balance, if any, so found, unless it shall appear that the settlement was made through fraud of the plaintiff, or the mistake of both parties.¹⁴

The court instructs the jury that if they believe from the evidence that from time to time the officers or agents of the plaintiff and defendant in this suit met and looked over their accounts together, and settled all matters between them and struck a balance, and agreed upon that as the amount due from one to the other, then, in the absence of mistake or fraud, neither party will be allowed to go behind that settlement for the purpose of increasing or diminishing the amount so agreed upon.¹⁵

§ 499. Issues and proof—Agency, or ratification of act of third party.

The court instructs the jury that a recovery cannot be had on the basis of an account stated made with defendant's agent, without proof that he was an authorized agent of the defendant at the time, or there was a subsequent ratification of his act.¹⁶

12—Eddie v. Eddie, 61 Ill. 134.

13—Warren v. Dickson, 27 Ill. 115.

14—Neagle v. Herbert, 73 Ill. App. 17.

15—Gottfried Brewing Co. v. Szarkowski, 79 Ill. App. 583.

16—Mink v. Morrison, 42 Mich. 567; Harvey v. West Side El. R. Co., 13 Hun (N. Y.) 392.

§ 500. Evidence—Burden of proof.**§ 501. — Alabama.**

The court instructs the jury that the burden of proof is on the defendant to reasonably satisfy you from the evidence of the correctness of any item charged to the plaintiff by the ——— Company, which was not authorized by the mortgage in evidence.¹⁷

§ 502. — Illinois.

The court instructs the jury that a strong presumption arises that a settlement of account between parties embraces all the items each has against the other which are due, and to overcome this presumption it devolves on the party asserting the contrary to prove that the item was not due or that it was by consent of the parties omitted from the settlement or omitted by accident or unintentionally by the party claiming.¹⁸

§ 503. — West Virginia.

The jury are instructed that the burden of proof is on the plaintiff to make out his case by a preponderance of the evidence. In this case the plaintiff's claim, according to his bill of particulars, is for commissions alleged to have been retained improperly, and not paid to him, as shown by statements of account rendered and filed with said bill of particulars; and the jury are instructed that the burden is on the plaintiff to show by a preponderance of the evidence that the items referred to in such statement of accounts, and charged in his bill of particulars, are not lawful charges against the plaintiff; otherwise he is not entitled to recover in this action and you must find for the defendant.¹⁹

17—Hodges v. Kyle, 9 Ala. App. 449.

19—Shrewsbury v. Tufts, 41 W. Va. 212.

18—Straubher v. Mohler, 80 Ill. 21.

CHAPTER XL.

ACKNOWLEDGMENT.

§ 504. Operation and effect—Validation of signature to instrument.

§ 504. Operation and effect—Validation of signature to instrument.

The court instructs the jury that if they find from the evidence that the certificate is true, then they will find for the plaintiff, and it can make no difference whether J. M. and R. M. actually did or did not sign their names to the mortgage with their own hands.¹

The court instructs the jury that under the laws of ——— it is not necessary in order for husband and wife to make a valid mortgage, that they or either of them should actually sign their names with their own hands, but if they appear before a proper officer and acknowledge the execution as the law provides and the officer attaches his certificate as the law provides, then this is sufficient, so far as the signing of the names to a mortgage is concerned.²

1—McClendon v. Equitable Mortg. Co., 122 Ala. 384.

2—McClendon v. Equitable Mortg. Co., 122 Ala. 384.

CHAPTER XLI.

ACT OF GOD.

§ 505. What constitutes act of God in general.

Cross-Reference.

See CARRIERS.

§ 505. What constitutes act of God in general.

The court instructs the jury that by the expression "act of God" is meant some destructive occurrence which could not have been occasioned by the intervention of man, but which proceeds from natural causes alone, such as the violence of the elements or natural accident. It must be such that it was impossible to be guarded against.¹

1—Forward v. Pitard, 1 T. R. 27.

CHAPTER XLII.

ADJOINING LANDOWNERS.

- § 506. Excavations—Notice.
- § 507. Same—Proximate cause of damage.
- § 508. Same—Actions for damages—Issues and proof.
- § 509. Same—Same—Measure of damages.
- § 510. Eavesdrip—In general.
- § 511. Same—Sufficiency of gutter and down spout.
- § 512. Same—Actions for damages—Elements of damages.
- § 513. Falling walls—Actions for damages—Defenses.
- § 514. Same—Same—Presumptions and burden of proof.

Cross-References.

See BOUNDARIES; FENCES; USE AND OCCUPATION; WATERS AND WATER COURSES.

§ 506. Excavations—Notice.

The court instructs the jury that if they shall find that the work done upon the defendant's premises by which the house known as ——— is alleged to have been injured, was done by ——— contractor under the written contract offered in evidence and shall further find that a reasonable time before any excavation below the foundation of said house was made, the plaintiff was notified or had actual knowledge that such excavation was about to be made, then, under the pleadings and the evidence in the cause, their verdict must be for the defendant.¹

The court instructs the jury that if they find from the evidence that a reasonable time before the contractor commenced to dig under the foundation wall of the defendant's house next to the premises at ———, on the east, but separated from it by an alley about — ft. wide, the defendant notified the plaintiff of his intention to do so; and shall further find that afterwards the said

¹—Bonaparte v. Wiseman, 89 Md.
12, 44 L. R. A. 482.

contractor did dig under said foundation wall upon the defendant's ground, and in so doing exercised reasonable care to prevent the ground under the bed of the said alley from caving in, then the plaintiff is not entitled to recover, though the jury may believe that the east and south walls of the plaintiff's house or either of them settled and cracked by reason of the excavation made by the said contractor.²

§ 507. Same—Proximate cause of damage.

The court instructs the jury that if they believe from the evidence that the east and south walls of the house at _____ were in a bad condition before the commencement of the digging by the contractor under the foundation wall of the defendant's house, and that the settling and cracking thereof were caused by their own inherent defects and not by the digging by the defendant of his cellar in the year —, then the plaintiff is not entitled to recover for any injury to her property caused by such settling and cracking.³

§ 508. Same—Actions for damages—Issues and proof.

The court instructs the jury that if they shall believe that the house at _____ was in a ruinous and dilapidated condition before the contractor commenced work upon premises of the defendant adjoining it on the east, and shall not find that by reason of such work it became more ruinous and dilapidated to an extent which impaired its rental value, then under the pleadings and all the proof in the cause, the plaintiff cannot recover, and their verdict must be for the defendant.⁴

§ 509. Same—Same—Measure of damages.

The court instructs the jury that there is incident to land in its natural condition, a right to support from the adjoining land; and if land not subject to artificial pressure, sinks or falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. The

2—Bonaparte v. Wiseman, 89 Md. 12, 44 L. R. A. 482.

3—Bonaparte v. Wiseman, 89 Md. 12, 44 L. R. A. 482.

4—Bonaparte v. Wiseman, 89 Md. 12, 44 L. R. A. 482.

measurement of damages in such case is not the cost of restoring the land to its former condition or situation, or of building a wall to support it, but it is the diminution in value of the plaintiff's land by reason of the acts of the party removing the support.⁵

§ 510. Eavesdrip—In general.

The court instructs the jury that the plaintiff complains in his declaration that the defendant is the owner of a livery barn adjoining the premises occupied by plaintiffs, having a large roof surface, from which water falling on said roof was negligently permitted to flow off and upon the premises of the plaintiffs in great quantities; and further alleges that on ———, 19—, the water thus negligently permitted by defendant to flow from the roof of his barn on the premises occupied by plaintiffs, caused the damage complained of. If you believe from the preponderance of the evidence that the plaintiff has proven these allegations of the declaration and that plaintiff was thereby injured, your verdict should be for the plaintiff.⁶

§ 511. Same—Sufficiency of gutter and down spout.

The court instructs the jury that before the plaintiffs can recover, they must show that the damage caused to their property, as claimed in the declaration, was caused by reason of the negligence and failure of the defendant to provide his barn with such gutter and down spout as would ordinarily and usually carry away all water that might fall upon the roof thereof by all ordinary and expectant rains; and that if the jury believe from the evidence that the defendant did furnish such gutter and down spout, and used reasonable care to keep the same in reasonably good condition, and that the damage to plaintiffs was by reason of extraordinarily heavy floods, and not by reason of any negligence on the part of the defendant, then and in that case, they should find him not guilty.⁷

5—Moellering v. Evans, 121 Ind. 195.

6—Miller Harness Co. v. Wilson, 104 Ill. App. 556.

7—Miller Harness Co. v. Wilson, 104 Ill. App. 556.

The court instructs the jury for defendant that the law does not require the owner of a building to keep and maintain a gutter that will always, under all circumstances, carry off the water. If the jury believe from the evidence that the gutter on ——'s building was sufficient to carry off the water that would fall on the roof of ——'s building in the usual and ordinary rain-storms, that would be a compliance with the law.⁸

§ 512. Same—Actions for damages—Elements of damages.

The court instructs the jury that expenditures incurred by the plaintiff in attempting to remedy the alleged cause of the injury may be recovered, and that if the jury believe from the evidence (here state the facts) that the defendant negligently allowed water to flow from a pipe upon the plaintiff's premises, and that the plaintiff built a wall to prevent such flow of water after the refusal of the defendant to remedy the cause of the injury, plaintiff may recover for the building of such wall.⁹

§ 513. Falling walls—Actions for damages—Defenses.

The court instructs the jury that the fact, if shown by the evidence, that A was erecting a building on his property in violation of a city ordinance, is no defense to this action, and, if true, will not prevent the owner from recovering for his injuries if otherwise entitled thereto.¹⁰

8—*Meister v. Lang*, 28 Ill. App. 624. "By ordinary rains are meant all usual and always to be expected rains, in certain seasons in each and every year; and by extraordinary rains, such as do not occur, nor are reasonably to be expected, annually. * * * This instruction is criticised as being misleading because it did not define what an ordinary rain was; and counsel say that heavy rains were those spoken of by the witnesses as causing the damage. All rains, whether heavy or light, that may reasonably be expected to fall at certain seasons, would clearly

come within the language and meaning of the instruction. If plaintiff in error desired the jury to have a legal definition of ordinary and extraordinary rains, it was his privilege to ask for it; and because he did not, we see no reason why the court should not use the word ordinary, in the instruction complained of, without stopping to define its meaning."

9—*Comstock v. New York Cent. & H. River R. Co.*, 48 Hun (N. Y.) 225.

10—*Hall v. Gage*, — Ark. —, 172 S. W. 833.

§ 514. Same—Same—Presumptions and burden of proof.

The court instructs the jury that it is the duty of an owner of a building to take reasonable care that it shall not fall and injure others; and therefore the mere fact of the fall of a building whereby a person lawfully on adjoining premises is injured, raises a presumption that the owner of the building has been negligent.¹¹

The court instructs the jury that the collapse of a building or falling of a wall is prima facie evidence of negligence, and imposes a burden upon the owner to show that the accident happened without his negligence.¹²

¹¹—Hall v. Gage, — Ark. —, 172 S. W. 833.

¹²—Hall v. Gage, — Ark. —, 172 S. W. 833.

CHAPTER XLIII.

ADULTERY.

- § 515. Nature and elements—In general.
- § 516. Same—Consent of female to intercourse.
- § 517. Same—Occasional occupancy of same room.
- § 518. Complaint by spouse—Subpoena by, and testimony before grand jury.
- § 519. Issues and proof—Time of commission of crime.
- § 520. — Oregon.
- § 521. — Texas.
- § 522. — Utah.
- § 523. Evidence—Presumptions and burden of proof—Existence of marriage relation between complainant and defendant.
- § 524. Same—Same—Finding of indictment on complaint of wife.
- § 525. Same—Same—Sexual intercourse.
- § 526. Same—Weight and sufficiency—Adulterous and amorous disposition of parties.
- § 527. Same—Same—Opportunity to commit crime.
- § 528. Same—Same—Occupancy of sleeping apartment by defendants alone.
- § 529. Same—Same—Degree of proof required.

Cross-References.

See BIGAMY; FORNICATION; INCEST; LEWDNESS; PROSTITUTION; alienation of affections, see HUSBAND AND WIFE; criminal conversation, see HUSBAND AND WIFE; false accusation, see LIBEL AND SLANDER; ground for divorce, see DIVORCE; matters pertaining to law of crime in general, see CRIMINAL LAW; provocation for homicide, see HOMICIDE, §§ 3845-3848.

§ 515. Nature and elements—In general.

The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant A was on or about ———, 19—, a married man, whose wife's name was B, which married relation is admitted by defendant, and did then and there and in said ——— county, ———, have habitual carnal intercourse with the said C, then you will find the defendant guilty, and assess his punishment at not less than ——— nor more than ———.¹

1—Russell v. State, 53 Tex. Cr. App. 500.

§ 516. Same—Consent of female to intercourse.

The court instructs the jury that to constitute the crime of adultery as against the man, the consent of the woman to the carnal intercourse is not indispensable, but the offense may, as against him, exist, though the connection was effected by force and against her will.²

§ 517. Same—Occasional occupancy of same room.

The court instructs the jury that if they shall find from the evidence that the defendants were not living together in a state of open and notorious adultery but were simply at the time charged in the information stopping together in the same room occasionally, and were only guilty of occasional acts of illicit intercourse, then the court should find the defendants not guilty.³

§ 518. Complaint by spouse—Subpoena by, and testimony before grand jury.

The court instructs the jury that if the wife of the defendant appeared before the grand jury in response to a subpoena and testified before them in the case, but not intending to prefer the charge of adultery against the defendant, but gave her testimony supposing she was required to do so, this would not be a complaint by her against her husband, within the meaning of the law.⁴

§ 519. Issues and proof—Time of commission of crime.**§ 520. — Oregon.**

The court instructs the jury that though the crime was alleged to have been committed ———, 19—, it was not necessary that they should find that it was the exact date; but if they were satisfied that it was perpetrated within a month or more from the date stated, and before the information was filed, it would justify them in bringing in a verdict of guilty, if they were satisfied, beyond a reasonable doubt, that at the time the crime was committed the defendant was a married man and the husband of A.⁵

2—State v. Donovan, 61 Iowa 278.

3—State v. Crouner, 56 Mo. 147.

4—State v. Donovan, 61 Iowa 278.

See State v. Loftus, 128 Iowa 529.

5—State v. Eggleston, 45 Ore. 346,
77 Pac. 738.

§ 521. — Texas.

The court instructs the jury that they can not convict the defendant for living in adultery for any period of time after the filing of said complaint.⁶

§ 522. — Utah.

The court instructs the jury that the exact time alleged in the information as to the commission of the crime charged need not be proved, for it is sufficiently established under the law, if you believe beyond a reasonable doubt that the unlawful act charged was committed within — years next prior to the filing of the information, which information was so filed on ———, 19—. ⁷

§ 523. Evidence—Presumptions and burden of proof—Existence of marriage relation between complainant and defendant.

The court instructs the jury that the marriage may be proved in different ways. Evidence of eyewitnesses who saw the marriage performed is sufficient (that is, it is sufficient if you believe the evidence to be true); and if you are satisfied from the evidence in this case that at the time this act is alleged to have been committed the defendant, A, was married to B [the complainant], that would be sufficient evidence upon that part of the case. I will further say that if you are satisfied that the marriage was performed, that the defendant and B [the complainant] were married at some time prior to the time this offense is alleged to have been committed, it would not be necessary for the state to go on and show that they continued to be husband and wife, but it would be presumed they have continued to be husband and wife, in the absence of any evidence to the contrary.⁸

§ 524. Same—Same—Finding of indictment on complaint of wife.

The court instructs the jury that the burden is on the state to show that the indictment was found on the complaint of the wife, and failing to do so the jury should acquit.⁹

6—Proctor v. State, 37 Tex. Cr. App. 366.

7—State v. Greene, 38 Utah 389, 115 Pac. 181.

8—State v. Eggleston, 45 Ore. 346, 77 Pac. 738.

9—State v. Donovan, 61 Iowa 278.

§ 525. Same—Same—Sexual intercourse.

The court instructs the jury that sexual intercourse must be proven.¹⁰

§ 526. Same—Weight and sufficiency—Adulterous and amorous disposition of parties.

The court instructs the jury that you can take into consideration, however, evidence tending to show an adulterous or amorous disposition on the part of the accused, and also on the part of the person with whom it is alleged that he committed this crime—any adulterous or amorous disposition, or evidence tending to show an inclination on the part of these parties to commit adultery. You can take into consideration any evidence tending to show such a disposition or inclination, either before or after the time when this crime is alleged to have been committed; and you may take into consideration any evidence tending to show that this act was committed at other times and places, although, it may show distinct and separate crimes, because such evidence would tend to show an adulterous disposition or inclination on the part of the parties.¹¹

§ 527. Same—Same—Opportunity to commit crime.

The court instructs the jury that you may also take into consideration any evidence tending to show an opportunity upon the part of these parties to commit this crime. Evidence of an adulterous disposition or inclination, together with evidence of an opportunity to commit the crime, would be sufficient to justify you in bringing in a verdict of guilty against this defendant, if this evidence satisfies you beyond a reasonable doubt that the crime was committed.¹²

§ 528. Same—Same—Occupancy of sleeping apartment by defendants alone.

The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendants, within

10—People v. Payment, 109 Mich. 553.

12—State v. Eggleston, 45 Ore. 346, 77 Pac. 738.

11—State v. Eggleston, 45 Ore. 346, 77 Pac. 738.

— years next previous to the date of the returning of the indictment into court [giving the proper date of such return], occupied the sleeping apartment alone as a sleeping room, that circumstance may be considered by you in arriving at your verdict.¹³

§ 529. Same—Same—Degree of proof required.

The court instructs the jury that they are to determine from all the circumstances, as brought out by the evidence, whether or not the defendants lived together in a state of adultery, and in order to find the defendants guilty they must find from the evidence that the defendants were living together in an open and notorious state of adultery and that they were cohabiting together; and if the evidence does not establish the living together and cohabitation together of the defendants in the minds of the jurors beyond a reasonable doubt, then they must find the defendants not guilty.¹⁴

13—United States v. Griego, 12 N. M. 84, 75 Pac. 30.

14—Tomlinson v. People, 102 Ill. App. 542.

CHAPTER XLIV.

ADVERSE POSSESSION.

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Cross-References.

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I. NATURE AND REQUISITES.

A. ACQUISITION OF RIGHTS BY PRESCRIPTION IN GENERAL.

§ 530. Definition of adverse possession.**§ 531. — Texas.**

The court instructs the jury that adverse possession is an actual, continuous, notorious, visible, and hostile appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.¹

¹—Texas & N. O. R. Co. v. Broom,
53 Tex. Civ. App. 78.

§ 532. — Virginia.

The court instructs the jury that adverse possession is the actual occupied possession under color and claim of title, and it is wholly immaterial whether this claim of title be under a good or bad, a legal or an equitable title.²

§ 533. Persons against whom prescription will run.

The court instructs the jury that if you believe from the evidence, that the defendant, and those through whom he obtained possession of the property sued for, had had a continuous possession thereof for twenty years next before the commencement of this suit, claiming the same as their own,—then they should find for the defendant as against each of the plaintiffs, who has not proved herself or himself either under twenty-one years of age, or a married woman, at the commencement of such possession; and the burden of proof is upon each of the plaintiffs claiming to have been under such age, or a married woman at the commencement of such possession, to prove it affirmatively; and until it be proved to the satisfaction of the jury, the contrary thereof should be presumed by the jury.³

§ 534. Elements of adverse possession in general.**§ 535. — Alabama.**

The court instructs the jury that if they find from the evidence that A has held exclusive, open and adverse possession of the lands in controversy, claiming them as her own, since 19—, then she acquired a complete title, and the plaintiff can not recover in this cause.⁴

§ 536. — Connecticut.

The court instructs the jury that the question in this part of the case is whether the defendants, and those under whom they claim, have for a period of ——— had actual, open and exclusive adverse occupancy and possession of the land claimed

2—Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574.

4—Stiff v. Cobb, 126 Ala. 381, 85 Am. St. Rep. 38.

3—Dessaunier v. Murphy, 33 Mo. 184.

to be owned by the plaintiff, such adverse possession being known and acquiesced in by the real owner, or so far notorious as to be presumptively within his knowledge.⁵

§ 537. — Indiana.

The court instructs the jury that if they find that a public highway was located on and across the lands of either of the parties, and had been so located and used for more than — years, and that if the plaintiff and his predecessors in interest had occupied and used the lands immediately south of and up to the south line of such highway for the full period of — years prior to the alleged trespass, and that if such occupancy had been open, notorious, visible, adverse, and under claim of right for such length of time, then the plaintiff's title to the lands would extend to the center of the highway.⁶

§ 538. — Iowa.

The court instructs the jury that to constitute a bar to plaintiff's right to recover in this action defendants herein must show an actual occupancy of the premises in suit, clear, definite, notorious and hostile, and such occupancy must be continuous, adverse and exclusive during the whole period prescribed by the statute.⁷

§ 539. — Kentucky.

The court instructs the jury that if they believe from the evidence that N conveyed the entire boundary of land described in plaintiff's petition to W on the — of —, —, and that said W on the — of —, —, sold and conveyed the same property to the plaintiff H, and further believe from the testimony that in pursuance of such conveyance and under color thereof, they, the said W and the plaintiffs entered into the actual possession of the lands so conveyed, claiming title thereto to the full extent of the boundary and title so conveyed, and that such possession of said land continued for (the period prescribed by statute) previous to the defendant's entry sued for, and during such

5—Merwin v. Morris, 71 Conn. 555.

7—Davenport v. Sebring, 52 Iowa 364.

6—Fatie v. Myer, 163 Ind. 401.

period, their possession was actual, visible and notorious, then such possession is adverse and the jury should find for the plaintiffs and determine their damages as indicated in previous instructions.⁸

The court instructs the jury that unless they should believe from the evidence that the plaintiff, ———, had the actual, adverse possession of the tract of land in controversy, continuously and uninterruptedly for — years and notoriously as her own, adversely to all others, the jury should find for defendant.⁹

The court instructs the jury that if they believe from the evidence that the plaintiff, A, made an absolute and unconditional verbal gift of his entire title to the land described in the petition to his son B, and in pursuance of such gift, he, the said B, entered into the possession thereof, claiming title thereto according to such gift, and that such possession of said land continued for a period of — years previous to B's death, and during such period his said possession was actual, visible, and notorious, then such possession is adverse, and the jury should find for the defendant.¹⁰

§ 540. — Michigan.

The court instructs the jury that when a party claims to have acquired title to the lands of another by having held possession a length of time sufficient to bar the owner from retaking possession, he must, to succeed, show that his possession is of that exclusive, permanent, open, hostile, and adverse character as to put the owner in the position of failing to assert his rights, knowing, or having reason to know, they were encroached upon, for the full period of ———.¹¹

§ 541. — Missouri.

The court instructs the jury that if they believe from the evidence that S cleared and cultivated the land east of the old levee, beginning at an old stone in the southeast corner of the

8—Maysville & B. S. R. Co. v. 435. See Owsley v. Owsley, 117 Ky. Holton, 100 Ky. 665. 47.

9—Louisville & N. R. Co. v. Rayl, 11—Hockmoth v. Des Grand 32 Ky. L. Rep. 870. Champs, 71 Mich. 520.

10—Thomson v. Thomson, 93 Ky.

lot No. 7, of the D tract, and running eastwardly at right angles to said old levee toward the Mississippi river, and that he and those under whom he claims title have been in the open, notorious and adverse possession thereof, claiming title thereto for more than (time prescribed by statute) prior to the institution of this suit, plaintiff is not entitled to recover any part of the land so occupied, nor any part of the accretion thereto.¹²

The court instructs the jury that, in order to divest the title to the land described in plaintiff's declaration out of the plaintiff and vest it in the defendant, by reason of his adverse possession, that possession must be actual, visible, notorious and hostile, continuous and uninterrupted, under a claim of title, for a period of (time prescribed by statute) next preceding the commencement of this suit.¹³

The court instructs the jury that if the title to the land in controversy emanated from the government more than — years, and that the defendant and those under whom he claims have been in the lawful possession for one year before the institution of this suit and that the plaintiff and those under whom he claims have not paid any taxes on the said land for — years prior to —, 19—, then the plaintiff cannot recover.¹⁴

§ 542. — New York.

The court instructs the jury that the occupant who claims adverse possession must claim during the (time prescribed by statute) adverse to the true owner. This possession must be a possession undisturbed and open and under the open claim of ownership and must be adverse to the owner of record. This is a question of fact for you to decide on all the evidence in this case—whether the defendant and the parties who owned before him and occupied the premises have peaceably, openly and under claim of ownership to the exclusion of the plaintiff, occupied the premises in question.¹⁵

12—Benne v. Miller, 149 Mo. 228.

13—Dalby v. Snuffer, 57 Mo. 294.

14—Campbell v. Greer, 209 Mo. 199.

15—McAvoy v. Cassidy, 60 N. Y.

St. 827. The use of the word "peaceably" was objected to, but held proper as limited and understood by the use of the word "undisturbed."

§ 543. — South Carolina.

The court instructs the jury that if the said defendant took possession of the land in dispute here sued for under claim of title and held and claimed it as his own adversely and continued to so hold it adversely against all the world, until the expiration of ——— from the time of his first taking possession, then this action is barred by the statute of limitations.¹⁶

§ 544. — Texas.

The court instructs the jury that in-connection with defendant's plea of limitation, you are charged that if you believe from the evidence that, at any time anterior to bringing this suit, A was in peaceable and adverse possession of the land in controversy, cultivating, using or enjoying the same, for a period of ——— consecutive years, then you are instructed that he would have title by limitation to the same, and, if you so find you will let your verdict be for the defendant A. "Peaceable possession" as above used, means continuous possession not interrupted by adverse suit to recover the land. The term "adverse possession," as used above, means the actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.¹⁷

§ 545. — Wisconsin.

The court instructs the jury that if you find from the evidence that the defendant entered into the occupation and possession of the premises in question claiming title thereto exclusive of and hostile to any other right, and that such claim of title was made in good faith, the defendant believing that he had a good title to such land as the owner thereof, and further find that such occupation and possession was actual and continued, uninterrupted and notorious and hostile to any other right or title to said land, for a period of (the period prescribed by statute) prior to the commencement of this action, and that during all that time

16—Sutton v. Clark, 59 S. C. 440, 82 Am. St. Rep. 848. The court held in this case that adverse possession for the statutory period confers a positive affirmative title.

17—Hermann v. Schroeder, — Tex. Civ. App. —, 175 S. W. 788.

the defendant so claimed title to said land, that would constitute adverse possession, and would bar plaintiff's right to recover in this action and your verdict in such case would be for the defendant.¹⁸

§ 546. — United States.

The court instructs the jury if they find from the evidence that D, the ancestor of the defendants, bought at a tax sale held by the ———, the property in controversy in this case and paid the price bid by him at such sale and received from the ——— a deed to said property, which was by him duly filed for record and recorded in the ——— more than (time prescribed by statute) prior to the commencement of this suit; that thereupon the said property was assessed to the said D on the tax books of the city of W and the taxes thereon from that time until the beginning of this suit were paid by the said D or his successors in title, the defendants in this case; that at a period of time more than ——— years before the commencement of this suit the said property was rented on behalf of the defendants to a person who took the same and held possession thereof as tenant of the defendants for the purposes of a stone yard, paying rent therefor from the date of making such arrangement with the defendants, and that, although the said property was not inclosed by a fence, yet the person so renting the same, either upon the whole or a part thereof, during his occupancy deposited stone used by him in the business, and that such use and possession of the said property was continued by the occupant thereof actually, exclusively, continuously, openly, notoriously, adversely and uninterruptedly for a period of (time prescribed by statute) next before the commencement of this suit, then the jury is instructed that the defendants are entitled to recover.¹⁹

§ 547. Color of title—Distinguished from claim of title.

The court instructs the jury that color of title and claim of title are not in their strict sense synonymous terms. To consti-

18—Bartlett v. Secor, 56 Wis. 520.

19—Holtzman v. Douglas, 168 U. S. 278, 42 L. Ed. 466.

tute color of title a paper title,—that is, a deed or other instrument purporting to convey title,—is necessary, but a claim of title may exist wholly in parol, and may be manifested by acts as well as by words, and if you find from the evidence that the defendant S built a house or houses and barn and other outbuildings, dug a well or wells, planted an orchard and otherwise improved and cultivated the premises in controversy, this is competent evidence tending to show claim of title on part of the defendant upon which an adverse possession may be predicated and which if continued for (the period prescribed by statute) or more would bar the plaintiffs from maintaining this action.²⁰

§ 548. Same—Necessity.

§ 549. — Alabama.

The court instructs the jury that if they find from the evidence that A bought the lands in the fall of 19— from B and went into actual adverse possession of the land by himself, and by tenant, claiming them as his own from his said purchaser, then his adverse possession would run from that time, although he did not receive his deed from B till 19—.²¹

§ 550. — Michigan.

The court instructs the jury that plaintiff's adverse possession would become perfect with the lapse of (time prescribed by statute) even if plaintiff originally had no shadow of title, provided such adverse possession was so open that any other person could bring suit to eject the plaintiff.²²

§ 551. Same—Antedated deed.

The court instructs the jury that if A and B made the B deed in 19— and dated it back in 19—, it was a gross fraud, if A intended to use such deed as a color of title since 19— against the defendant.²³

20—Bartlett v. Secor, 56 Wis. 520.

23—Edmondson v. Anniston City

21—Barron v. Barron, 122 Ala. Land Co., 128 Ala. 589.

194.

22—Beecher v. Ferris, 112 Mich.
584.



§ 552. Same—Void deed.**§ 553. — Alabama.**

The court instructs the jury that if at the time the deed from A to B was executed, the defendant or those under whom it claimed, was in adverse possession of said land, then said deed from A was void as evidence of title.²⁴

§ 554. — Connecticut.

I am asked by the defendant's counsel to charge you, in conformity with this statute, that, if you find that the defendants had entered upon and held possession of the premises in question at the time A made his conveyance to the plaintiff, then the deed must be held to be void, and the plaintiff cannot by reason of it establish a title. That is so, gentlemen, with the qualification that by the language of the statute, as you will recollect, the dispossession must be by an ouster; and I say to you that to void the deed from A, the record title owner, the ouster must be of the same character as that required to establish adverse possession. I stated that an ouster must be of the same character. It must be an open, visible, exclusive possession that is to make an adverse possession. It need not continue for — years, but the character of the ouster must be of the same character as in the case of adverse possession of — years, claiming to convey title, or amount to that.²⁵

§ 555. — South Carolina.

Suppose that the sheriff's sale and the deed made in pursuance of that sheriff's sale was a nullity, yet the deed purports to designate by metes and bounds a tract of land and purports to convey that land to A. That becomes a description of the land, showing the extent of A's claim under the deed, so it becomes what we call color of title, and by way of writing that shows the extent of the party's claim under the deed, and if A took possession of that — acres of land under that deed or supposed deed, and held it continuously, either himself or by somebody that

24—Edmondson v. Anniston City
Land Co., 128 Ala. 589.

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25—Merwin v. Morris, 71 Conn.
555.

was holding it under him and in pursuance of some arrangement with him, if he held it continuously for — years from the date of that sheriff's deed, ———, that would be sufficient to establish in A a title by adverse possession, as I told you a while ago. As the law now is, — years' adverse possession gives title, but in 19— when this sale was alleged to have been made, it required — years.

If it appears that A took possession of the land contained in that deed of B, acting as sheriff, and held it continuously for — years, that would give title in him to all the land embraced in that deed now, by virtue of the sale, and by virtue of the bar of the statute of limitations; so if he had held the land for — years adversely and continuously, that forbids any other person to claim the land as against him. If he had title by conveyance from the sheriff and by the — years' adverse possession and died, and that title descended to his heirs, then the conveyance by those heirs to C in 19— would confer upon C a good title to the land, and if that should be your conclusion, then the plaintiff must recover, unless there is something else to show that she has been ousted of her right to recover.

You will observe then that the — years' possession from the date of the sheriff's deed in 19—, if it was adverse, whether A held it himself by hostile possession or permitted somebody else to hold it by some arrangement under him, would give him title. Only adverse holding would give him title by adverse possession. Under the statute, peaceable possession whether he held it himself or by those living on the land who recognized his right superior to theirs, peaceable possession of the land would presume he held it because of a grant from the state, either to himself or to somebody else and the grant came to him, so if he held the land — years either peaceably or adversely, continuously, openly, and notoriously, and exclusively of everybody else's rights, even though he may have allowed other people to live there, if they lived there in recognition and in subordination of his rights, then that establishes in A the title which this plaintiff relies on, and that title passing to the plaintiff and her children by inheritance

would inure to them now as a valid title, upon which they would be entitled to recover the land.²⁶

B. ACTUAL POSSESSION.

§ 556. In general.

The court instructs the jury that to constitute an actual possession of land it is only necessary to put it to such use or exercise such dominion over it as in its present state it is reasonably adapted to.²⁷

§ 557. Entry—Necessity—Intent.

The court instructs the jury that if they believe from the evidence that the grantors of defendant had no title or possession to the premises described in their deed to him of lot No. —, dated —, and recorded —, it could not control and ride over the recorded deed of E to plaintiff, or affect the possession of the plaintiff of the premises in dispute, if his possession was such, under the instructions aforesaid, as would constitute a disseizin of the true owner; that the delivery and registry of the deed to the defendant of lot No. —, would not purge the disseizin of the plaintiff, (if the latter had acquired such a possession as constitutes a disseizin according to the foregoing instructions, or, if the disseizin was constituted by the delivery and recording of the deed of E to him,) without an entry into some part of the disputed premises. But, if the defendant had the title to the premises in dispute, under the deed to him from — and wife, or the right of entry therein, the disseizin might be purged by an entry. And, in regard to an entry, the intent with which it is made, generally determines its character, and consequently, the effect of the act. The mere act of going upon the land and cutting trees upon it, will not always constitute a legal entry sufficient to vest the seizin in him who has the legal right. In order to constitute a legal entry, the party must go upon the premises with that intent.²⁸

26—Kennedy v. Kennedy, 86 S. C. 483.

28—Gardner v. Gooch, 48 Me. 487.

27—Alabama State Land Co. v. Matthews, 168 Ala. 200.

§ 558. Visible and notorious character of possession in general.**§ 559. — Alabama.**

The court instructs the jury that openness and notoriety and exclusiveness of possession are shown by such acts in respect of the land in its condition at the time as comport with ownership—such acts as would ordinarily be performed by the true owners in appropriating the land or its avails to his own use, and in preventing others from the use of it as far as reasonably practicable.²⁹

The court instructs the jury that the idea of adverse possession is inconsistent with and repugnant to the idea of a secret or furtive possession.³⁰

The court instructs the jury that the possession of land which the law protects is open and notorious possession, and not a secret or furtive possession.³¹

§ 560. — Michigan.

The court instructs the jury that, to constitute possession it is not necessary that the land should be enclosed with a fence, or that the same should be cultivated, resided upon or that buildings should be erected thereon. It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use, such as are consistent with the character of the premises in question. If you find in the spring of ———, or the summer of that year, ——— after getting his deed, began the exercise of such acts of ownership and control as are usual by owners of timber lots when used to supply a farm in the neighborhood with timber, and his acts were of such an adverse, open, notorious and hostile nature as to clearly indicate that he asserted exclusive control over it, and that he continued to do so up to the time of his selling to defendant, and that afterwards, defendant continued with like acts, you would be justified in finding that defendant had been in such possession as to bar

29—Alabama State Land Co. v. Matthews, 168 Ala. 200.

30—Edmondson v. Anniston City Land Co., 128 Ala. 589.

31—Edmondson v. Anniston City Land Co., 128 Ala. 589.

any claim of title upon the part of the plaintiff, and your verdict should be for the defendant.³²

§ 561. — North Carolina.

The court instructs the jury that, if A's acts in cutting the timber were committed without the knowledge or acquiescence of the defendants, they would not affect their claim or impair their rights, but it would be otherwise if he was recognized by the defendants as acting for and in behalf of the plaintiffs.³³

§ 562. — Texas.

The court instructs the jury that peaceable and adverse possession is one that was actual, continuous, visible, notorious, distinct, hostile—that is, adverse—fair, and open and of such a character as to indicate clearly a claim of ownership in the occupant.³⁴

§ 563. Inclosure, improvements and cultivation.

§ 564. — Alabama.

The court instructs the jury that the burden of proving adverse possession is upon the defendant; and, if the evidence fails to reasonably satisfy the jury that a sufficient portion of the lands in suit was within defendant's inclosure, that would attract the attention of a reasonably prudent owner that the inclosure included a portion of the land in suit, then such inclosure would not be sufficiently notorious to extend the possession to the lands outside the inclosure.³⁵

The court instructs the jury that, in order to sustain the defense of adverse possession, the possession must have been actual, open, notorious, and continuous for a period of — years before suit brought; and, if the possession was of such a small portion of the land sued for that a reasonable prudent owner would not have notice from it that his lands were included in such inclosure, then the possession would be insufficient to sustain the defense

32—Murray v. Hudson, 65 Mich. 670.

35—Lawrence v. Alabama State Land Co., 144 Ala. 524.

33—Hill v. Bean, 150 N. C. 436.

34—Hunter v. Malone, 49 Tex. Civ. App. 116.

of adverse possession of any of the lands sued for outside of the inclosure.³⁶

§ 565. — Connecticut.

The court instructs the jury that neither physical occupation, cultivation, nor residence is necessary to constitute actual adverse possession, when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the property has been evidenced by open, visible, continuous acts of ownership, known to and acquiesced in by the real owner, or so far notorious as to be presumed to be within his knowledge.³⁷

§ 566. — Georgia.

The court instructs the jury that there is a use and occupation of land within the law where the land is used for turpentine purposes, and such use is so notorious as to attract the attention of every adverse claimant and so exclusive as to prevent actual occupation by another. If you believe from the evidence that the trees on the land were cultivated for turpentine purposes and the timber was boxed and that for a considerable portion of the time during the year the trees were chipped and hacked and the hands were continually dipping turpentine from the trees and were hauling the turpentine away and the trees were racked around to protect them from fire, I charge you that this would be actual possession if you find it to be true.³⁸

§ 567. — Kentucky.

The court instructs the jury that if they should believe from the evidence that the plaintiff, —————, had the actual adverse possession of the tract of land sued for, continuously and uninterruptedly, for ——— years or more before ———, 19—, claiming the same openly and notoriously as her own, adversely to all others, then and in that event the jury should find for the

36—Lawrence v. Alabama State Land Co., 144 Ala. 524.

37—Merwin v. Morris, 71 Conn. 555.

38—Flannery v. Hightower, 97

Ga. 592. This instruction was held not to be open to objection of expressing opinion on weight of evidence.

plaintiff the lot of ground sued for. And the court instructs the jury that if they should believe from the evidence that the plaintiff had said lot under enclosure, and claimed said land as her own then she was in the actual adverse possession of said lot in the meaning of the instructions.³⁹

§ 568. — Maine.

The court instructs the jury that if the plaintiff's possession of the premises in dispute was open, notorious, exclusive and adverse, comporting with the usual management of a farm by its owner, though a portion was woodland and uncultivated, and though not wholly surrounded by fences, or rendered inaccessible by other obstructions, it would constitute a disseizin of the true owner, unaffected by other facts.⁴⁰

§ 569. — Michigan.

The court instructs the jury that you cannot presume that the owner of the ———, in going along the highway where the fence is shown to be nearly on the line, and seeing a fence extending north, has thereby notice that the fence incloses any portion of his land. On the contrary, he is justified in assuming that his neighbor is only enclosing what he is entitled to.⁴¹

§ 570. — Missouri.

If T and his representative took the actual possession of the G tract, by fencing up the whole of it, and held such possession, claiming the tract in fee, for more than (time prescribed by statute) prior to the entry of defendants, and those under whom they claim, such possession vested the fee in said T's representatives.⁴²

The court instructs the jury that, if you believe from the evidence in the case that the land in controversy or any considerable part thereof was susceptible to definite occupation or possession,—that is, that said land or any part thereof was fit for

39—Louisville & N. R. Co. v. Rayl, 32 Ky. L. Rep. 870.

40—Gardner v. Gooch, 48 Me. 487.

41—Hockmoth v. Des Grand Champs, 71 Mich. 520.

42—Farrar v. Heinrich, 86 Mo. 521.

pasture or cultivation without clearing or cutting away the timber thereon—then in order to constitute the possession of plaintiff or that of those under whom he claims adverse as required in the foregoing instruction, you must believe from the evidence in the cause that the plaintiff or his grantor M., either in person or by their tenants, built permanent structures on said land or actually enclosed or cultivated said land or some part thereof for the period of (the period prescribed by statute) prior to the institution of this suit, and that it is not sufficient in such a case that plaintiff and his grantor M paid the taxes on said land, kept off trespassers, cut timber, erected temporary structures and pastured hogs thereon under a claim of ownership.⁴³

The court instructs the jury that if you believe from the evidence in the case that the land in controversy or any considerable part thereof, was susceptible of a definite occupation or possession, that is, that said land or any part thereof was fit for pasture or cultivation without clearing or cutting away the timber therein—then in order to constitute the possession of plaintiff or that of those under whom he claims, adversely, you must believe from the evidence in the case that the plaintiff or his grantor, either in person or by their tenants built permanent structures on said land or actually inclosed or cultivated said land or some part thereof for the period of (period prescribed by statute) prior to the institution of this suit, and that it is not sufficient in such a case that plaintiff and his grantor paid the taxes on said land, kept off trespassers, cut timber, erected temporary structures, and pastured hogs thereon under a claim of ownership.⁴⁴

§ 571. — Nebraska.

The court instructs the jury that if you believe from the evidence that the defendant, not less than (time prescribed by statute) prior to the commencement of this suit, entered into possession of the lands in controversy and cultivated said lands or fenced the same, or erected improvements of any kind thereon or did any other acts of such a character as to clearly show that he was occupying said lands and claiming the same as his own,

43—Cook v. Farrah, 105 Mo. 492.

44—Cook v. Farrah, 105 Mo. 492.

and during all of said time continued to so occupy said lands, claiming during all of said time to be the owner of the same, and never during any of said period of ——— abandoned said land, but during all of said time continued openly, notoriously, adversely and exclusively to occupy and claim the same as his land, then you are instructed that said acts on the part of defendant would constitute adverse possession within the meaning of the law and would entitle the defendant to a verdict at your hands. But if the defendant has failed to establish any of said acts by a preponderance of the evidence your verdict should be for the plaintiff.⁴⁵

§ 572. — Texas.

The court instructs the jury that if you believe from a preponderance of the evidence that the defendants, and those under whom they claim, have had peaceable and adverse possession (as those terms have been defined) of the land described in the defendants' answer, claiming, cultivating, using, or enjoying the same, by defined metes and bounds, continuously for — years before the filing of this suit on the — day of —, 19—, you will find for defendants.⁴⁶

§ 573. — Wisconsin.

The court instructs the jury that for the purpose of constituting adverse possession by a person claiming title not founded upon some written instrument or some judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only: (1) When it has been protected by a substantial inclosure; (2) When it has been usually cultivated and improved.⁴⁷

§ 574. — United States.

The court instructs the jury that if the tenants, under their respective leases from ———, occupied and cultivated to the T line, in such a manner as the owners of such land would

⁴⁵—Hoffine v. Ewings, 60 Neb. 729.

⁴⁷—Bartlett v. Secor, 56 Wis. 520.

⁴⁶—Texas & N. O. R. Co. v. Broom, 53 Tex. Civ. App. 78.

ordinarily occupy and cultivate, and such occupation had continued for the period of (time prescribed by statute) it would constitute such an adverse possession as would bar the defendant's right to recover.⁴⁸

§ 575. Cutting grass or fire wood.

§ 576. — Connecticut.

The court instructs the jury that an occasional use of the land, such as the occasional cutting of grass or fire wood, will not be sufficient to establish adverse possession.⁴⁹

§ 577. — Maine.

The court instructs the jury that if plaintiff cut the grass upon a natural fresh meadow, and carried the hay away and converted it to his own use, annually for any period of time, however long, without any other possession of the land on which it grew, or any claim of title to the land, such acts alone would not constitute an adverse possession against the true owner of the soil.⁵⁰

§ 578. Piling wood or lumber on land.

The court instructs the jury that the mere piling of wood or lumber or rails or offal upon a tract of land or lot, unaccompanied by any other act denoting ownership, is not such possession of the land or lot as would constitute notice to a bona fide purchaser of such tract of land or lot, unless such piling of wood or lumber should constitute, in the estimation of the jury, an open, visible and exclusive possession of the lot in the person piling such wood or lumber.⁵¹

§ 579. Wild land.

The court instructs the jury that if you are reasonably satisfied from the evidence that the plaintiff and those under whom he claims had such an adverse possession of the land as, from its wild nature, it was susceptible of, for — years prior to the

48—Reed v. Proprietors of Locks & Canals on Merrimac River, 8 How. (U. S.) 274, 12 L. Ed. 1077.

49—Merwin v. Morris, 71 Conn. 555.

50—Gardner v. Gooch, 48 Me. 487.

51—Truesdale v. Ford, 37 Ill. 210.

time that A [defendant] entered into possession, then your verdict must be for the plaintiff.⁵²

C. CONTINUITY OF POSSESSION.

§ 580. Necessity.

The court instructs the jury that it is not sufficient to constitute the possession referred to in the preceding instruction, that the said K should have occasionally used such property for the purposes of a printing office during a period of time equal to (time prescribed by statute) or more, but such possession, in order to bind the true owner, must have been continuous and unequivocal.⁵³

§ 581. Occasional absence of occupant or tenant.

The court instructs the jury that where the adverse occupant of land leaves it temporarily, with the intention of returning, his possession continues during such occasional absence, and so if the tenant quits the premises the landlord is to be regarded as still in possession if by taking possession himself, or putting in another tenant as soon as one can be procured, within a reasonable time, he gives evidence that he does not intend to abandon the land. An interval of two or three months, or from the harvesting of cultivated crops in the fall to the resumption of cultivation in the spring, does not of itself amount to abandonment or a break in the continuity of possession.⁵⁴

§ 582. Interruption by claim of tenant or tenant's wife.

The court instructs the jury that if they find from the evidence that A went into possession of said lands in 19— under a lease or as tenant of his son, B, and that C entered on said lands as his wife, then any claim of the said C during said tenancy of her husband to the lands, while she lived on them with her said husband, he having entered on them under a lease from B, would not have made a gap or chasm in said B's possession while her husband occupied as the tenant of B.⁵⁵

52—Owen v. Moxom, 167 Ala. 615.

55—Barron v. Barron, 122 Ala.

53—Mertens v. Kielmann, 79 Mo. 194.

412.

54—Mahoney v. Southern Ry.,
Carolina Div., 82 S. C. 215.

The court instructs the jury that if they find from the evidence that A's going on the lands with her husband [B], and that her husband went on them under contract with C and C promptly expelled B from the lands when he found out the lands were claimed against him, such going on the lands by A would not interrupt the statute of limitations, if it had begun to run.⁵⁶

The court instructs the jury that if they find from the evidence that A went on the lands sued for in 19— under a lease or as tenant of B, and after going on said lands, he set up a claim to the lands in his own right or in the right of his wife, C, whilst his tenancy lasted, and that said B, on ascertaining that said A was setting [up] such claim to said lands and property, instituted a suit of unlawful detainer against him and vigorously prosecuted the same, and in such suit recovered possession of said lands, then such possession and claim to the lands by the said A would not make such a gap or chasm in the possession of B as would break its continuity, if said B was in the adverse possession of said lands.⁵⁷

§ 583. Tacking possessions—In general.

§ 584. — Missouri.

The court instructs the jury that if defendants, and those under whom they claim, have had adverse possession of so much of the premises described in the petition as is covered by the building of defendants, and said possession was open, notorious and hostile, under claim of title, and continuous for more than (time prescribed by statute) prior to the institution of this suit, on the — day of —, 19—, then the plaintiffs cannot recover the portion of said premises so covered by said building.⁵⁸

§ 585. — South Carolina.

The court instructs the jury that the defendants could tack the time during which they had held possession with the time

⁵⁶—Barron v. Barron, 122 Ala. 194.

⁵⁷—Barron v. Barron, 122 Ala. 194.

⁵⁸—Dalton v. Bank of St. Louis, 54 Mo. 105.

during which those under whom they claim held possession, so as to complete the statutory terms of adverse possession.⁵⁹

§ 586. — United States.

The court instructs the jury that to defeat the claim of the plaintiffs in this action upon the defense of adverse possession, the jury must find from the evidence that the defendants, in person or by their tenants, have for more than (time prescribed by statute) prior to the — day of —, 19—, held actual, exclusive, continuous, open, notorious, and adverse possession of the said premises, and they cannot extend their possession by tacking it to the prior possession of any person who, during such prior possession, did not claim any title or right to the premises.⁶⁰

The court instructs the jury that if the possession of —, in 19—, under K, included the demanded premises, and the same possession had been continued by the subsequent lessees, as the evidence tended to show it had been, down to the entry of the heirs of M and wife, in 19—, it constituted in law such a continuity of possession as would bar the demandant's right to recover.⁶¹

§ 587. Same—Vendor and purchaser.

§ 588. — Alabama.

The court instructs the jury that if they find from the evidence that A was in the actual adverse possession of the lands, claiming them as his own, for more than — consecutive years prior to the — day of —, 19—, or if they find from the evidence that B [the widow of C] was in the actual adverse possession of the lands, claiming them as her own, and she sold them to A and turned her possession over to him, and the actual adverse possession of the two when added together covered a period of more than — consecutive years just prior to the — day of —, 19—, then this was sufficient to take the title out of the heirs of C's first wife; and the court further charges the jury that the moving in of third parties on the land would not constitute a

59—Sutton v. Clark, 59 S. C. 440,
82 Am. St. Rep. 848.

60—Holtzman v. Douglas, 168 U.
S. 278, 42 L. Ed. 466.

61—Reed v. Proprietors of Locks
& Canals on Merrimac River, 8

How. (U. S.) 274, 12 L. Ed. 1077.

break in the adverse holder's possession, if said adverse holder took prompt action in the court to remove them, and did remove them.⁶²

The court instructs the jury that it makes no difference when the adverse possession of A [vendor] and that of B [purchaser], respectively, commenced, if the jury find from the evidence that both together held the land adversely for more than — consecutive years before the — day of —, 19—. ⁶³

The court instructs the jury that if they believe from the evidence that A [vendor] and B [purchaser] had actual adverse possession of the lands sued for, claiming them as their own, and cultivating them, openly and notoriously for more than — years before suit was brought for their recovery in —, 19—, then their verdict must be for the plaintiffs. ⁶⁴

The court instructs the jury that if they find from the testimony that the possession of the property sued for has been open, notorious, adverse and exclusive in A, and those to whom she sold, for — years next before the commencement of the present suit, they must find for defendants. ⁶⁵

The court instructs the jury that if they find from the evidence in this case that A and these defendants together have held the lands in controversy openly, notoriously and adversely and exclusively under a claim of title from the year 19—, then the defendants have a good title, and the plaintiff can not recover. ⁶⁶

§ 589. — Illinois.

The court instructs the jury that, if you believe, from the preponderance of the evidence, that the grantors of the plaintiff held the open, notorious, adverse, hostile, peaceable, uninterrupted and continuous possession of the land in question for some time, under claim of ownership thereto, and that they conveyed one from another down to the plaintiff herein, and that under said con-

62—Barron v. Barron, 122 Ala. 194.

63—Barron v. Barron, 122 Ala. 194.

64—Barron v. Barron, 122 Ala. 194.

65—Stiff v. Cobb, 126 Ala. 381, 85 Am. St. Rep. 38.

66—Stiff v. Cobb, 126 Ala. 381, 85 Am. St. Rep. 38.

veyance the plaintiff took possession of the land in question and held the open, notorious, adverse, hostile, peaceable, uninterrupted and continuous possession thereof, under claim of ownership, from the time of such conveyance to the time it is alleged in the declaration that the defendant took possession thereof, and that such possession of the said grantors of the plaintiff and the possession of the plaintiff together amount to a period of (time prescribed by statute) or more prior to the time it is alleged in the declaration that the defendant took possession thereof, then the plaintiff would be the absolute owner of the said land, if you further believe, from the preponderance of the evidence, that the defendant took and unlawfully withheld from the plaintiff the possession thereof as alleged in the declaration, then you should find a verdict for the plaintiff.⁶⁷

§ 590. Same—Landlord and tenant.

§ 591. — Alabama.

The court instructs the jury that if A was in possession of the land sued for, for more than — years prior to 19—, claiming to own the same as his own, or as a partner in the firm of B & Co., and remained in possession until the time that C bought from him, and that after C's purchase he, the said C, remained in possession until the delivery of the possession to D [plaintiff], by him under his deed, and the said D, acting through his tenants, remained in possession of the same until E [defendant] ousted him in the fall of 19—, then your verdict must be for the plaintiff.⁶⁸

The court instructs the jury that if the jury find from the evidence that A, by himself and tenants, was in the actual adverse possession of the lands sued for, claiming them as his own, for more than — consecutive years prior to the — day of —, 19—, then this was sufficient to divest the title out of the heirs of the first wife of B, if they ever had title, and invest the title in A.⁶⁹

67—Lourance v. Goodwin, 170 Ill. 390.

69—Barron v. Barron, 122 Ala. 194.

68—Owen v. Moxom, 167 Ala. 615.

§ 592. — Georgia.

The court instructs the jury that the possession of the tenant is in the right of the person under whom he holds, and though such enters under only an oral lease, his possession inures to the benefit of the person under whom he holds, and if such possession of a tenant should continue for — years, and should have the necessary qualities which the law gives it, the person who put the tenant in possession would, if he had good color of title, acquire title by prescription.⁷⁰

§ 593. — United States.

The court instructs the jury that the possession of the premises by said lessees, under the lease, was the possession of K, the lessor, and his heirs, he claiming to have a deed which included them, and having turned M out of possession, if it was of such a character as amounted to a disseizin, it would in law inure to the benefit of K, and his heirs, and would be the disseizin and adverse possession of the lessor.⁷¹

D. HOSTILE CHARACTER OF POSSESSION.**§ 594. Claim of title—In general.****§ 595. — Alabama.**

The court instructs the jury that, if you believe from all the evidence in the case that at the time defendant claims to have gone into possession of the lands described in the complaint he did so in subordination of the mortgagee's rights in the case by agreeing to pay part of the mortgage debt, then you would find against the defendant on the question of adverse possession.⁷²

The court instructs the jury that to constitute adverse possession there must be an actual claim of present ownership, accompanied with possession and a possession with a mere intention to claim in the future is not adverse possession.⁷³

70—Smith v. Donalson, 137 Ga. 465.

72—Ballard v. Bank of Roanoke, 187 Ala. 335.

71—Reed v. Proprietors of Locks & Canals on Merrimac River, 8 How. (U. S.) 274, 12 L. Ed. 1077.

73—Edmondson v. Anniston City Land Co., 128 Ala. 589.

The court instructs the jury that if they find from the evidence that A is the widow of the deceased, B, and occupied the property as such widow, and that she claimed the property, her claim is presumed to be in accordance with her right as such widow, and if her claim was as such widow there is no question of adverse possession by defendant.⁷⁴

The court instructs the jury that if the jury believe from the evidence that A took possession of the land sued for as the widow of B, then the plaintiff is entitled to recover, unless the evidence has reasonably satisfied their minds that the plaintiff or those under whom he claims knew that she was holding the lands adversely.⁷⁵

The court instructs the jury that the actual claim of the lands sued for, without any reference to whether or not the claimants thought the title was good, is all the law requires as an element of claim of adverse possession.⁷⁶

§ 596. — Iowa.

The court instructs the jury that if you believe, from the evidence introduced on the trial of this case, that defendants purchased the land in controversy from ———, by an assignment of a contract of purchase from one J, and thereby derived the first claim they ever made to the land in suit, and afterwards sued and obtained the purchase money paid for said land by their assignor, J, or themselves, by reason of an alleged want of title in said railroad company, then such action on the part of defendants amounts to an abandonment of all rights claimed or acquired by the defendants in and to the title to the land in question, up to the time of receiving such repayments of the purchase money, and their claim of title now made must commence from

74—Hays v. Lemoine, 156 Ala. 465.

75—Hays v. Lemoine, 156 Ala. 465.

76—Barron v. Barron, 122 Ala. 194.

For an instruction to the effect

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that the holding of land beyond the true boundary line is not adverse when the intention has been to claim only to the true line wherever it may be, see Cooper v. Slaughter, 175 Ala. 211.

the date of the receipt of such purchase money, if you find such claim has been made by defendants.⁷⁷

The court instructs the jury that if defendants, during the time they have held this land in dispute, only claimed to own the improvements made on said land, then no length of possession will give them title to the land in dispute; and in considering this case you will take into consideration the acts and declarations of the defendants and their statements of the claim made by them, and if the evidence offered upon the trial of this cause satisfies you that the claim of defendants was a claim for improvements only, then you must find for the plaintiffs.⁷⁸

The court instructs the jury that such possession must be under a claim of title or right to the land occupied; or, in other words, the fact of possession, and the intention with which it was commenced and held, are the only tests. If, therefore, the intention of claiming the title to the land against the true owner is wanting, the possession will not be adverse, and, however long continued, will not bar the owner's right to recover.⁷⁹

The court instructs the jury that on the other hand, if when the defendants took possession of the strip of land in controversy he only intended to occupy and claim the government subdivision of the land described in his deed, but by mistake extended his possession too far north and included the disputed strip, and has since occupied and cultivated it with no intention of claiming it as his own, unless it was in fact included within the true boundaries of the land described in his deed, then his possession, however long continued, was not adverse; and if you so find, your verdict will be for the plaintiff.⁸⁰

The court instructs the jury that if at the date this suit was commenced the defendant had been in peaceful and exclusive possession of the land up to the north line of the disputed strip and cultivated and claimed it as his own, and such claim of ownership has been open, notorious and adverse to all the world for

77—Davenport v. Sebring, 52 Iowa 364.

79—Davenport v. Sebring, 52 Iowa 364.

78—Davenport v. Sebring, 52 Iowa 364.

80—Heinz v. Cramer, 84 Iowa 497.

more than (time prescribed by statute), then his possession and claim has ripened into a good title, and if you so find, your verdict will be for the defendant. To be adverse, however, the holding or possession of the defendant must have been with the intention of insisting upon his right to the land in controversy as against all others and not by mere mistake as to the location of the line as fixed by the government survey.⁸¹

§ 597. — Nebraska.

The court instructs the jury that adverse possession sufficient to defeat a legal title must be hostile in its inception and continue uninterruptedly for (time prescribed by statute). It must also be open, notorious, adverse and exclusive and must be held during all of such time under a claim of ownership by the occupant and all of these facts must be proved by a preponderance of the evidence.⁸²

§ 598. — West Virginia.

The court instructs the jury further that the defendants to make out a title by adverse possession must show that such possession was adverse in its inception, and where the entry is under the title of the legal owner, the holder cannot controvert that title without an express disclaimer, or its equivalent, and the assertion of an adverse title with notice to the owner.⁸³

§ 599. Same—Notice to, or knowledge of owner.

§ 600. — Alabama.

The court instructs the jury that if they believe from the evidence that A went into possession of the lands sued for as the widow of B, then the statute of limitations will not begin to run in her favor until knowledge of such adverse claim is brought home to the plaintiff or those under whom he claims.⁸⁴

81—Heinz v. Cramer, 84 Iowa 497. Provides for contingencies that statute of limitations might have been set in motion by agreement respecting line.

82—Hoffine v. Ewings, 60 Neb. 729, though court suggests the use

of another word than "hostile," as that word savors of ill will.

83—Maxwell v. Cunningham, 50 W. Va. 298.

84—Hays v. Lemoine, 156 Ala. 465.

§ 601. — Michigan.

The court instructs the jury that the owner need not move to retake possession till he learns or ought to know that his lands are taken possession of.⁸⁵

§ 602. — North Carolina.

The court instructs the jury that the ignorance of the plaintiff as to the correct location of the line, and as to the adverse possession by the defendant of what he alleges is a part of his tract, would not affect the right of the parties.⁸⁶

§ 603. — Virginia.

The court instructs the jury that there can be no adverse possession of lands where the possession is consistent with the title of the true owner, as where the occupant has leased or acknowledged the title of the claimant, and a tenancy once shown to exist is presumed to continue until the contrary be proven, and no adverse possession can be set up by the tenant or anyone entering upon the land under the tenant until full notice of the denial of landlord's title is brought home to the landlord, and the statute of limitations only begins to run from the time the landlord had such notice.⁸⁷

E. PAYMENT OF TAXES.**§ 604. In general.****§ 605. — Illinois.**

The court instructs the jury that so far as the claim of plaintiffs, founded upon color of title and payment of taxes for (time prescribed by statute) consecutive years while the land was vacant and unoccupied and possession thereafter taken, is concerned, to establish title on that basis it must appear, from a preponderance of the evidence, that throughout the entire period, from the first to the last of such payment of taxes, the land was vacant and unoccupied.⁸⁸

85—Hockmoth v. Des Grand Champs, 71 Mich. 520.

86—Pittman v. Weeks, 132 N. C. 81.

87—Reusens v. Lawson, 91 Va. 226.

88—Scott v. Bassett, 186 Ill. 98.

§ 606. — Minnesota.

The court instructs the jury that payment of taxes and assessments for local improvements tends to prove claim of ownership and title to land. Likewise, total failure to pay any taxes or assessments for local improvements tends strongly to prove lack of claim of title and ownership of land by the person in possession.⁸⁹

II. OPERATION AND EFFECT.**A. EXTENT OF POSSESSION.****§ 607. Constructive possession—Definition.**

The court instructs the jury that “constructive possession” of lands is where a person having paper title to a tract of land is in actual possession of a part thereof. In such a case the law construes that possession to extend to the boundaries of the tract.⁹⁰

§ 608. Same—Sufficiency.**§ 609. — Alabama.**

The court instructs the jury that if adverse possession is held without color of title such possession is limited to the portion actually occupied, and if the deed from A was not actually made until 19—, then B’s possession prior to that time is limited to the part actually occupied by him.⁹¹

The court instructs the jury that if they find from the evidence that defendant has from the latter part of —, 19—, up to the — day of —, 19—, had adverse possession of any portion of the land sued for, that then he had adverse possession of the whole of it, that was not actually occupied and held adversely to him, and that plaintiff would not be entitled to recover any portion of it, unless the jury find from the evidence that plaintiff has acquired title by adverse possession.⁹²

89—Peters v. Tackaberry, 117 Minn. 373.

90—Smith v. Donalson, 137 Ga. 465.

91—Edmondson v. Anniston City Land Co., 128 Ala. 589.

92—Anniston City Land Co. v. Edmondson, 127 Ala. 445.

§ 610. — Maine.

The court instructs the jury that if the plaintiff's possession of the premises in dispute was open, notorious, exclusive and adverse, comporting with the usual management of a farm by its owner, though a portion was woodland and uncultivated and though not wholly surrounded by fence or rendered inaccessible by other obstructions, it would constitute a disseizin of the true owner unaffected by other facts.⁹³

The court instructs the jury that if they believe from the evidence that plaintiff, upon receiving and recording the deed from E. to him, dated ———, entered upon the land therein described, and continued to have a visible possession, occupancy, and improvement of only a portion thereof, such occupation and improvement, uncontrolled by other facts, were a disseizin of the true owner as to the whole of the land described in the deed, though E. might not have had title thereto.⁹⁴

§ 611. — Texas.

The court instructs the jury that the fencing and possession of the — acres in connection with defendant's adjoining tract would not support defendant's claim of title by limitation to land beyond the defendant's original inclosure, unless such fencing and possession of said — acres of land in connection with all the other acts and conduct of the defendant, if any, in reference to said land, were sufficient for — years next before the — day of ———, 19—, to put a reasonably prudent person on notice that the defendant was claiming title to all the land.⁹⁵

§ 612. — West Virginia.

The court instructs the jury that if the adverse possession should be held as in the above instruction for (time prescribed by statute) before the commencement of the action under claim of title, the person claiming adversely will be limited in the adverse holding to his actual inclosure, if under color of title

93—Gardner v. Gooch, 48 Me. 487.

95—Hedrick v. Kilgore, 57 Tex.

94—Gardner v. Gooch, 48 Me. 487. Civ. App. 47.

then the adverse holding will extend to the boundaries contained in the deed or writing that constitutes his color of title.⁹⁶

B. TITLE ACQUIRED.

§ 613. Effect of survey after acquisition of title.

The court instructs the jury that if the plaintiff had acquired a good title to the land in controversy by adverse possession under a claim of title for more than — years, a subsequent survey, made for the purpose of finding the true south line of the land, upon the consent and agreement of the plaintiff that the survey should be made, would not affect his title to the said land.⁹⁷

III. PLEADING, EVIDENCE AND TRIAL.

§ 614. Pleading—Issues and proof.

The court instructs the jury that the party who relies on adverse possession of land under color or claim of title, to defeat the legal right of the owner of the land must show: 1. His color or claim of title and that it covers the land, or a part of the land in controversy. 2. That he entered under said claim or color of title upon said land in controversy or some part thereof. 3. That his entry was hostile and adverse to the party having the legal title and was actual, visible, and exclusive, and 4, Must have so continued hostile, actual, visible, unbroken, under said color or claim of title for (time prescribed by statute) before the commencement of the action to dispossess.⁹⁸

§ 615. Evidence—Presumptions and burden of proof—Ownership of land.

The court instructs the jury that if A was in possession of the land, claiming to own it, such possession would carry with it the presumption that so long as she continued in possession she owned the land. But if she abandoned her possession, moved off the land, with no intention of returning, and defendant entered under

96—Maxwell v. Cunningham, 50 W. Va. 298.

97—Fatic v. Myer, 163 Ind. 401.

98—Maxwell v. Cunningham, 50 W. Va. 298.

claim of right of title, then the presumption that A owned the land ceased, and the presumption would be that defendant owned the land from the time of his entry and claim of ownership.⁹⁹

§ 616. Same—Same—Existence of adverse possession.

The court instructs the jury that the adverse possession of land is a fact continuous in its nature, and that if it be shown to have existed at any time it will be presumed to have continued thereafter until evidence is adduced showing that it is not.¹

§ 617. Same—Same—Continuance of adverse possession.

The court instructs the jury that adverse possession is not to be made out by inference, but by clear and positive proof.²

§ 618. Same—Weight and sufficiency.

The court instructs the jury that if they believe from the evidence that the defendant A made an agreement with the plaintiff to have the line dividing the northern portion of section —, and the southern portion of section —, township —, range — west, ascertained by a survey, the jury may look to such an agreement, in connection with all the other evidence, in determining whether the possession of the defendants has been adverse or not.³

The court instructs the jury that if you believe from the evidence that plaintiff had possession of the land and occupied the land in question, cultivating, using, and enjoying the same by himself and tenants for — consecutive years prior to the filing of this suit, but you should further believe that thereafter the plaintiff acknowledged himself to be the tenant of the defendant, either in writing or verbally, you will only consider such acknowledgment of tenancy, if any, as bearing upon the nature of plaintiff's prior possession; that is, whether the same was adverse to defendant or not.⁴

99—Vidmer v. Lloyd, 184 Ala. 153.

1—Alabama State Land Co. v. Matthews, 168 Ala. 200.

2—Merwin v. Morris, 71 Conn. 555.

3—Cooper v. Slaughter, 175 Ala. 211.

4—Wickizer v. Williams, — Tex. Civ. App. —, 173 S. W. 288.

The court instructs the jury that they may look to the fact in evidence that A has in the past made conveyances of parts of block — for the purpose of explaining in connection with the other evidence the nature of her claim to the property sued for.⁵

The court instructs the jury that if they are satisfied from the whole evidence that this property was originally paid for with the money of A, or that the property for which the property in controversy was exchanged was so paid for, this may be looked to by the jury in connection with all the other evidence determining the nature of the possession alleged to be held by said A.⁶

The court instructs the jury that if they find that the plaintiff entered into possession of the land in dispute, under the paper introduced in evidence as exhibit A, purporting to be signed by R under a claim of ownership, and if they find that he has personally or by his tenants continued in possession thereof for more than (time prescribed by statute), then the jury must find that he is presumed to have obtained a grant from the state.⁷

§ 619. Questions for jury.

The court instructs the jury that defendant S, alleges that he went into possession of the tract of land described in the petition of ——— that he is now living on said tract of land, and that ever since going into possession of ——— he has been in open and notorious possession of said land, claiming the same all of the time as his own, and defendant charges that the statute of limitations is a complete bar to the plaintiff's claim; and the court instructs the jury that if they believe from the evidence that the deed from W to the defendant S, conveying certain lands and under which deed the defendant S claims to enter into possession of the lands described in the complaint, conveyed the same lands which are described in the complaint, then it is for the jury

5—*Stiff v. Cobb*, 126 Ala. 381, 85 Am. St. Rep. 38.

6—*Stiff v. Cobb*, 126 Ala. 381, 85 Am. St. Rep. 38.

7—*Kolb v. Jones*, 62 S. C. 193.

Held not open to objection that it ignored necessity of adverse holding, as holding under claim of ownership is adverse.

to say whether the defendant S, entered into the possession of the said lands under the said deed, and whether the subsequent possession was adverse, to the exclusion of plaintiff's claim.⁸

8—Sudduth v. Sumeral, 61 S. C. 276, 85 Am. St. Rep. 883. The court held in this case that whether the land described in a particular deed

is the same land described in the complaint or some other papers is a question of fact for the jury.

CHAPTER XLV.

AFFIDAVITS.

§ 620. Effect as evidence.

§ 620. Effect as evidence.

The court instructs the jury that the statement signed and sworn to by A on the — day of ———, 19—, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of A as evidence of the facts stated under oath, against the plaintiff, with like effect as the deposition of A, and may also be considered as effecting the credibility of said A as a witness.¹

1—Connecticut Mut. Life Ins. Co. 446, rev'g 46 C. C. A. 668, 107 Fed. v. Hillmon, 188 U. S. 208, 47 L. Ed. 834.

CHAPTER XLVI.

AGENCY.

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- § 622. — Illinois.
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- § 659. Knowledge of facts.
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- § 669. — Georgia.
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D. NOTICE TO AGENT.

- § 672. In general.

E. ACTIONS.

- § 673. Evidence—Presumptions and burden of proof—Existence of relation.
- § 674. — Illinois.
- § 675. — New York.
- § 676. Same—Weight and sufficiency.
- § 677. Questions for jury.

Cross-References.

Agency of one spouse for other, see HUSBAND AND WIFE; agents of corporations, see CORPORATIONS; embezzlement by agent, see EMBEZZLEMENT, §§ 2841-2843.

I. THE RELATION.

A. CREATION AND EXISTENCE.

§ 621. Estoppel to deny agency.**§ 622. — Illinois.**

The court instructs the jury that if a person knowingly and voluntarily permits another to hold himself out to the world as his agent he will be held to adopt his acts and be bound as principal to the person who gives credit to the one acting as such agent.¹

The court instructs the jury that if you believe from the evidence that in the winter of 19— - 19— the defendants knew that A was acting as their agent, and was buying stocks of goods in their name and operating the ——— Mine in their name and to their benefit, and that they voluntarily permitted him to do so; and if you further believe from the evidence that A was so acting and made the contract alleged in plaintiff's declaration, then the defendants would be bound thereby, whether the said A was in fact their agent at the time or not.²

§ 623. — Missouri.

The court instructs the jury that direct proof of agency may be dispensed with where the person alleged to be the principal has by his actions or words influenced the conduct of others so that a wrong would be done to those influenced, if the alleged principal should be permitted to show a state of facts inconsistent with his actions and words. And the court instructs the jury that if they believe from the evidence that (plaintiff had bought flour regularly from ——— as the agent of the defendant for several years, and that the contracts made with ——— had always been promptly complied with by the defendant), and if the jury believe from the evidence that (——— acted as agent of defendant for several years in making sales of the class of articles which plaintiff bought, and that his contracts were always carried out by the defendant), then the jury may find that

1—Swannell v. Byers, 123 Ill. App. 545.

2—Swannell v. Byers, 123 Ill. App. 545.

——— was the agent of the defendant and authorized to sell the goods described in the declaration to the plaintiff, although they may further find that ——— was also a broker selling on commissions.³

§ 624. — Texas.

The court instructs the jury that the matter of ——— being the agent of defendants is a question of fact for them to determine from the testimony and in aid of their investigation they are instructed that an agent may be created by long acquiescence on the part of the principal, with knowledge of his acts as agent for said principal, as well as by express appointment; and that if by express agreement, it is so arranged between the parties that one shall be advertised as the agent, but that another shall actually do the business, and this third person* does transact the business, and becomes known as the agent of the principal by transacting their said business, then the said third person is their agent and the principal is estopped from denying it as to those who have acquired rights against said principal because of the acts of said agent.⁴

B. TERMINATION.

§ 625. Revocation by principal—Right to revoke.

The court instructs the jury that an agent cannot act in the business of his agency for himself and his principal at the same time and in the same transaction, and that if you believe from the evidence (that the plaintiff was employed by the defendant railroad company to purchase wood and ties for the use of the corporation and that the plaintiff accepted a commission from A, who desired to sell wood to the defendant, and that plaintiff advised the directors to make the purchase of A, without disclosing his interest and that under such advice defendant made the purchase at a higher price than it would otherwise have to

3—Haubelt v. Rea & Page Mill Co., 77 Mo. App. 672.

4—Planters' Mut. Ins. Co. v. Lyons, Lindenthal & Co., 38 Tex. 253.

do, then you are instructed that defendant was justified in discharging the plaintiff).⁵

§ 626. Same—Notice.

§ 627. — Michigan.

The court instructs the jury that the plaintiffs were employed by J to work for the defendant mining corporation at a time when J was the authorized agent of the mining company and that plaintiffs had a right to suppose the same condition of things continued to exist after the employment as existed at the time of the employment, unless they had notice to the contrary, or unless there was something in the circumstances surrounding the matter that was equivalent to notice to them, and when the defendant mining corporation entered into a contract with J, by which the defendant ceased to operate its mine and J assumed charge of the mine as an independent contractor, then it was the duty of the defendant corporation to the plaintiffs, who were in its employ at the time they made the contract with J, to convey particular notice to the plaintiffs of this change. The rule is that when one has constituted and accredited another as his agent to carry on his business, the authority of the agent to bind his principal continues, even after actual revocation of such authority, unless notice of the revocation is given, and, as to persons who have been accustomed to deal with such an agent, until notice of revocation is brought home to them. When notice is sought to be inferred as a fact from circumstances, it becomes a question for the jury. The court here thinks this is a question of fact and submits it to you, and the question is submitted to you as a matter of fact, whether this labor for which this suit is brought was done and performed under such circumstances as would operate as notice, or under such circumstances that it can be said that notice can be inferred on the part of these claimants of this change. If these parties had notice of this change, they cannot recover here, for it is undisputed that a change took place; that the authority of J was revoked, and he entered into an inde-

⁵—*Morrison v. Ogdensburg & L. C. R. Co.*, 52 Barb. (N. Y.) 173.

pendent contract; and the question here is, did these claimants have notice, or, under the circumstances surrounding them, can you infer from this evidence legitimately that they received notice? And the question is submitted to you as a matter of fact, whether the defendant gave such notice as a prudent man should have given.⁶

§ 628. — New York.

The court instructs the jury that one who has dealt with an agent of another has a right to assume, if not otherwise informed, that the authority of the agent continues and revocation by the principal of the agent's authority will not affect the person so dealing with the agent unless such person has notice of the revocation, and if the jury believe from the evidence (that the plaintiff sold the [wood] described in the declaration to the defendant, and that under the terms of the contract the [wood] was to be delivered from time to time to the defendant, and that the plaintiff from time to time delivered the [wood] to A, the agent of the defendant, who was authorized to accept the [wood], but that before all the instalments of the [wood] had been delivered the agency of A was revoked by the defendant, but that plaintiff had no notice of the termination of the agency of A, but continued to deliver the final instalments of the [wood] to A as agent of defendant, then the jury are instructed that the acceptance of the [wood] by A on behalf of the defendant bound the defendant).⁷

II. MUTUAL RIGHTS, DUTIES AND LIABILITIES.

A. EXECUTION OF AGENCY.

§ 629. Individual interest of agent—Profits from transactions.

The court instructs the jury, that a party cannot take upon himself diverse interests; and that when A, the defendant, received and accepted the power of attorney from the plaintiff B, he became, to all intents and purposes, the agent of B, and

6—Tousignant v. Shafer Iron Co.,
96 Mich. 87.

7—McNeilly v. Continental Life
Ins. Co., 66 N. Y. 23.

that whatsoever transactions he had with C after the date of that instrument, in reference to the same transaction, he (A) was acting in that capacity, and as such, must account to his principal, B; for whatever funds is left in his hands after C is paid, belongs to plaintiff.⁸

The court instructs the jury that if an agent makes any profits in the case of his agency, by any concealed management in either buying or selling, or other transaction on account of his principal, the profits will belong exclusively to the principal.⁹

B. COMPENSATION.

§ 630. Right to claim compensation from both parties—Employment requiring exercise of discretion.

The court instructs the jury that an agent, in the ordinary acceptance of the term, cannot be the agent of two parties, having adverse interests, without the consent of both; because when he is entrusted with a discretion in buying and selling, he must exercise that discretion and judgment for the benefit of the person employing him. But where he is not invested with a discretion by one of the parties, but his instructions are fixed and determined by the one, he may then, without any violation of his duties, receive an employment from the other party having adverse interests, and negotiate the affair between the parties to a conclusion; because, as to one of them, he cannot change the terms of the proposal, and, therefore, he may act for another, in accepting the terms so fixed and determined. In such a case, his engagement is in a manner two-fold, and in this capacity he may bring about the sale or exchange desired by both parties, and claim a compensation from each.¹⁰

§ 631. Actions—Damages.

The court instructs the jury that if the plaintiff is entitled to any damages for breach of contract, the measure of the damage is the value of the contract at the time of breach; and in considering the value the jury must bear in mind that the defendants were

8—Cottom v. Holliday, 59 Ill. 176.

10—Alexander v. Northwestern

9—Cottom v. Holliday, 59 Ill. 176. Christian University, 57 Ind. 466.

not obliged to furnish any specified number of machines, or even to continue their manufacture. The plaintiff's rights under his contract were subject to the contingencies of business, depression of trade, which might tend to reduce the sales; and in estimating the damages consequent upon the loss of the contract the jury must take into consideration what the plaintiff probably could earn in some other employment or occupation during the period during which the contract ran.¹¹

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

A. IN GENERAL.

§ 632. Duty of third person to ascertain agent's authority.

§ 633. — Illinois.

The court instructs the jury that it is a rule of law that a person dealing with one known to be an agent, or claiming to be such, is bound at his peril to see that the agent has authority to bind his principal in such transaction, or that the agent is acting within the scope of his apparent authority.¹²

§ 634. — Missouri.

The court instructs the jury that one who deals with an agent is put upon inquiry as to the extent of the agent's authority, and assumes the risk of the agent having authority to bind his principal in the transaction in which they are engaged; but if the principal has held out the agent as having authority to transact the business, or knowingly permitted the agent to so act, the agent will be conclusively presumed to have the authority, whether it has actually been conferred upon him or not.¹³

§ 635. Implied and apparent authority of agent—In general.

§ 636. — Alabama.

The court instructs the jury that in order to show the authority of A to bind defendants by particular acts or declarations, it is

11—*Rightmire v. Hirner*, 188 Pa. St. 325, 43 Wkly. Notes Cas. 207.

12—*Meyers v. Johnson*, 186 Ill. App. 37.

13—*Muth v. St. Louis Trust Co.*, 94 Mo. App. 94, 4 Bank. Cas. Ann. 416.

not necessary to show that defendants specifically authorized said A to do those particular acts; but such acts and declarations, if made in the line and scope of such general authority as may have been conferred on him by defendants, would be binding on them.¹⁴

The court instructs the jury that if they believe from the evidence that A was superintendent of defendants' business, then defendants are bound by his acts and declarations done or made within the line and scope of his authority as such superintendent.¹⁵

§ 637. — Illinois.

The court instructs the jury that though a man cannot be deprived of his property without his consent, and a principal is not bound by the unauthorized act of his agent, yet he is bound by every act on his own part, which gives his agent an apparent authority upon which other persons rely to do the act, the validity of which may be in question—and therefore the inquiry in such cases is, whether the agent's possession of the property, or of the documentary evidence of title thereto, was necessary for the ordinary business of life, or authorized by the custom of trade, or whether the possession and other circumstances of the transaction, were unusual or unnecessary, and of a nature to mislead other persons as to the title to the property.¹⁶

§ 638. — New York.

The court instructs the jury that in many cases a principal is responsible for his agent's act, if it is within the general scope of the agent's employment, though it is in excess of the agent's authority, but that this is only true as between the principal and third persons when it is necessary to apply the maxim that where one of two innocent persons must suffer a loss because of fraud or the wrongful act of a third, that one must suffer the loss whose negligence made it possible for the loss to occur.¹⁷

14—*Tutwiler v. McCarty*, 121 Ala. 356.

15—*Tutwiler v. McCarty*, 121 Ala. 356.

16—*Burton v. Curyea*, 40 Ill. 320, 89 Am. Dec. 350.

17—*Clark v. Metropolitan Bank*, 10 N. Y. Super. Ct. (3 Duer) 241.

The court instructs the jury that apparent authority operates only by way of estoppel and can take the place of real authority only when the person claiming benefits from the exercise of such apparent authority has acted upon the appearance and if the jury believe from the evidence that the (defendant bank took drafts from plaintiff's clerk which had been indorsed by the clerk without authority and that the defendant bank had no knowledge of any of the circumstances alleged by the bank to show the apparent authority of plaintiff's clerk to indorse, but simply took the drafts upon the clerk's indorsement, then the defendant bank cannot allege that it was protected by the apparent authority of plaintiff's clerk to indorse the drafts alleged to have been converted by the bank).¹⁸

§ 639. Same—Effect of custom or usage.

§ 640. — New York.

The court instructs the jury that if no express authority is given to a selling agent to warrant goods sold, it will be presumed that only such authority is conferred upon the selling agent as is in conformity to the customs and usages of the trade, in which the principal is engaged, and if you believe from the evidence (that the defendant gave his agent power to sell wool oils as alleged in the declaration, and that the agent did not have express power to warrant goods sold, and if you further believe from the evidence that it was not the usage or custom of the trade or dealers in wool oils to warrant such oils on a sale, then you will find that the defendant's agent had no implied authority to sell with warranty to the plaintiff.)¹⁹

§ 641. — Virginia.

The court instructs the jury that if they believe from the evidence that the plaintiffs' fertilizers were first introduced into this community for sale ———, 19—, and the spring of 19—, and further believe that it was the custom or usage of the farmers of this section not to buy any fertilizer when first introduced,

¹⁸—People v. Bank of North America, 75 N. Y. 457.

¹⁹—Wait v. Borne, 7 N. Y. St. 113, 26 Wkly. Dig. 262.

upon the analysis thereof, but to require a warranty that the said fertilizer be as good as any other fertilizer on the market, dollar for dollar, as crop-producing, and if they further believe that A warranted the fertilizers which he sold to the defendant, as alleged in his plea, then they are instructed that the plaintiffs are bound by such warranty, although they may believe he was restricted from making such warranty by any contract entered into between the plaintiffs and said A, unless they further find from the evidence that the said written restriction was known to the said B at the time he made the said purchases.²⁰

§ 642. Same—Contracts of employment.

The court instructs the jury that if the defendant wrote to his son, A, to sell the property and use his discretion as to price, and that no further or other authority was given in reference to the sale or employment of brokers, then A had no authority to employ the plaintiffs and bind the defendant to pay their commissions.²¹

§ 643. Same—Borrowing money.

The court instructs the jury that it is not necessary for plaintiff to show any express authority in C to borrow money to render defendants liable. If money was borrowed by C in the general course and conduct of the business of defendants, and defendants knew this fact and acquiesced in it, and the note sued on was given for money borrowed of plaintiff, by C, for the business of defendants, and the money was in good faith used in such business, and plaintiff had no knowledge of any want of express authority on C's part to borrow money, then you will find for the plaintiff.²²

§ 644. Same—Collecting money.

The court instructs the jury that if the jury find from the evidence that ——— was a canvassing agent, obtaining subscriptions for the plaintiff for books published by him and sold

20—Reese v. Bates, 94 Va. 321.

22—Collins v. Cooper, 65 Tex. 460.

21—Doggett v. Greene, 254 Ill.

by subscription, and that said ——— was restricted by the terms of his employment from collecting for any books or parts of books, except such as were delivered by him,—and they further find that said canvassing agent never had possession of the parts and works for which this suit is brought, and did not deliver the same to the defendant,—then the court declares the law to be that the employment of ——— as canvassing agent gave him no authority to collect the money for which this suit is brought, and it devolves upon the defendant to show that he had such authority.²³

§ 645. Same—Promissory notes.

The court instructs the jury that even if they should believe from the evidence in this case that defendant A and defendant B had money in bank standing to the credit of one of them, and that each had authority from the other to check in the other's name on such money, it does not follow from this fact alone that B gave to A authority to sign B's name to promissory notes, and the court instructs the jury that should they believe from the evidence that B had signed several notes for A as security, B signing his own name to such notes, this fact alone does not show authority in A to sign B's name to other notes.²⁴

§ 646. Same—Settlements.

The court instructs the jury that if you should find from the evidence that, at the time said implements were invoiced by A, if they were so invoiced, that the said invoice was made for the purpose of a final settlement, and that a settlement was had, and you further find that A was acting for said company, with the express authority from said company to settle said note, and did in fact effect a settlement with B, then you will find for defendants B and C; but should you find that A only had authority to collect cash on said note and there was no settlement, then you will find for the plaintiff.²⁵

23—Chambers v. Short, 79 Mo. 204.

25—Lemond v. Smith, — Tex. Civ. App. —, 149 S. W. 751.

24—Hefner v. Palmer, 67 Ill. 161.

§ 647. Same—Representations.**§ 648. — Massachusetts.**

The court instructs the jury that if defendant employed and authorized R to sell the ——— and in pursuance of that authority R sold the ——— and induced the plaintiff to buy, and made false and fraudulent representations about the ———, upon which the plaintiff relied and which induced him to purchase, then the defendant would be responsible for that fraud, notwithstanding there were no instructions given to R by the defendant which authorized him to make fraudulent representations, and notwithstanding the defendant did not know that he practiced those fraudulent representations. Employing him as agent, or as his agent to do that thing, he became responsible for the methods which his agent adopted in doing that thing. * * * If the representations were false in fact, and R had no knowledge personally of the truth of these representations, but derived his information from others upon those facts, he, or the person for whom he was acting as agent in the same would be liable to an action for deceit.²⁶

§ 649. — Pennsylvania.

The court instructs the jury that after defendant had put the matter of selling her land in Mr. S's hands, he had a conversation with J, the brother of defendant, in which J suggested the propriety of employing E, who was a real estate broker, to effect the sale. Mr. S assented readily to J's idea and gave him a more general authority, because he said, "Employ two or three brokers, if necessary," and from that time forth he dismissed the same from his mind or at least took no further steps in regard to it, as defendant had, as she declares, dismissed it from her mind. J then proceeded in the execution of this power to call upon E, and to acquaint him with the situation of the property, giving him a circular which he had prepared, which contained a minute account of the property, among other things stating in explicit terms that the ground contained seven acres.

26—Haskell v. Starbird, 152 Mass.
117, 23 Am. St. Rep. 809.

One of the questions in this case may be as to J's authority to do this much. It is not denied by the defendants, indeed, it is a part of this case or at least of their testimony, that J was authorized to take whatever steps were necessary or to employ a real estate agent to effect the sale; but it does not necessarily follow that an authority to select a real estate agent to bring about a sale will authorize the agent to take measures to effect such sale. At the same time when a man is employed to do a thing, it is generally implied or may be so, that he is to do what is requisite to render his employment effectual; and without stating any proposition of law (it is a question for the jury to consider whether, if a man is told to select a real estate agent and employ him to sell a piece of property, that does or does not carry with it the duty to give a description of the property to the person so employed), to some extent it would seem to be so, because he must necessarily say where the property is situated, as, for instance, whether it is in the town or in the country. It would not do to call upon a broker and say, "I want you to sell a house," without saying where the house was. Some description therefore must be given and the doubt is as to the extent. I suppose it is a matter of inference or for consideration by the jury, whether a person who is authorized to select a broker and employs him to sell a house, may not state the number of stories, whether it is of brick or of stone, and give him some general idea, because otherwise the broker would be comparatively uninformed of what might be material for him to know in negotiating the sale. I do not say that this would be necessary, because after the broker had been told where the buildings were he might look for himself, but on the other hand I certainly do not mean to tell the jury that a right to give some description of the property might not exist. J certainly interpreted his authority in the largest sense.

As I have already said, he gave the broker a minute description of the house containing this more or less material fact, that the ground contained seven acres, and E, putting his interpretation upon the information he had received from G, as coming from a

person duly authenticated by the family, proceeded to advertise in the newspapers as a property of seven acres. Under this state of facts, the jury are instructed that it is for them to decide whether S, as defendant's agent so far empowered J, to act for defendant in the sale of the premises in question as to render defendant responsible for the representations of J, to the real estate broker E, and subsequent repetition of such statement by E, to the plaintiff, that the property in question contained seven acres.²⁷

§ 650. — Virginia.

The court instructs the jury that if they believe from the evidence that the lot described in the declaration was placed by plaintiff in the hands of B as his agent, for sale, and that he sold the same to W, and that W sold it to the defendant without disclosing to defendant he was the owner, but had defendant to execute the note, the foundation of this suit, to plaintiff; and if they further believe that W made representations to the defendant of material facts as inducements to purchase the said lot, and they believe those representations were in fact untrue, and said representations were reasonably relied upon by defendant to his prejudice, then the jury is authorized to allow the defendant such set-off against the plaintiff's demand as they deem just and proper.²⁸

§ 651. Undisclosed limitation of authority.

The court instructs the jury that as a general rule private instructions of the principal limiting the authority of his agent will not affect one who deals with the agent in ignorance of the special instructions and if the jury believe from the evidence that C borrowed money from plaintiff, claiming to act as agent of defendants, and if such act of borrowing was within the usual and ordinary scope or purview of the business in which C was employed, and which he was authorized by defendants to conduct and carry on, and plaintiff loaned the money to C for the benefit of defendants, then defendants would be bound for such money,

27—*Griswold v. Gebbie*, 126 Pa. St. 353, 12 Am. St. Rep. 878.

28—*Tyson v. Williamson*, 96 Va. 636.

even if, by the private contract between defendants and C, he was not authorized to borrow money, unless plaintiff knew he was not so authorized when he loaned the money.²⁹

§ 652. Exceeding of authority by special agent.

The court instructs the jury that even if they believe from the evidence that S did purchase the property for himself and L, yet if the jury believe, from the evidence, that L did not authorize him to do so, L is not bound by such purchase. That if the jury find that in the contract and arrangement, which resulted in the giving of the note in suit, the business between L and ——— was done by S, and that said S had no authority, as a general agent, from said L, beyond that resulting from their relation as general partners in the manufacture of ———, but only an authority to do that particular business, he (S) would be, as far as this case is concerned, a special agent of L in that business, and so far as the jury find that he (S), in doing it, exceeded the authority and instructions given to him by L, L would not be bound.³⁰

§ 653. Personal liability of agent.

The court instructs the jury that if they believe from the evidence that the defendant as alleged in the declaration, claimed to be the agent of A and to have authority to make the contract sued on on behalf of A and that the defendant so acting on behalf of A ordered the work, for the value of which this suit is brought, and if the jury believe from the evidence that the defendant was directed by A to order the work on the credit of ——— and not on the credit of A, then the jury will find the defendant liable for the work so ordered.³¹

The court instructs the jury that the liability of one who without authority assumes to act as agent to respond as a principal to the party dealing with him, is founded on his warranty as to his agency and cannot be extended to a case where the limits of his agency or the fact that he is not an agent is known to the

29—Collins v. Cooper, 65 Tex. 460.

31—New York Bank Note Co. v.

30—Lytle v. Boyer, 33 Ohio St. McKeige, 31 App. Div. (N. Y.) 188. 506.

party with whom he deals, nor to a case where the agent is induced to enter into a contract on the suggestion of the party with whom he deals that the alleged principal approves the transaction.³²

B. UNDISCLOSED AGENCY.

§ 654. Rights of undisclosed principal.

The court instructs the jury that if they believe from the evidence that the contract in suit to furnish materials and render services for defendant was made by A and that A was duly authorized by the plaintiff to make the contract, though A did not disclose the fact of his agency for plaintiff, then plaintiff may enforce such contract against the defendant on the performance of the contract subject to any defenses available against A.³³

§ 655. Liability of undisclosed principal.

§ 656. — New York.

The court instructs the jury that if they believe from the evidence that A bought the goods described in the declaration from the plaintiff, and that A used the style of agent in the transaction and that A was in fact acting as agent on behalf of the defendant, though A did not disclose upon whose behalf he was acting at the time of making the contract of purchase, and if the jury believe from the evidence that credit was not given by plaintiff exclusively to A, then plaintiff may elect to hold defendant liable for the goods.³⁴

The court instructs the jury that the liability of an undisclosed principal depends on the agent having acted in the business intrusted to him according to his power and that if the jury believe from the evidence that (the defendant furnished A money with which to make a purchase and that A bought the goods described in the declaration as alleged therein from the plaintiff

32—Aspinwall v. Torrance, 1 Lans. (N. Y.) 381, aff'd 57 N. Y. 331.

33—Van Lien v. Byrnes, 1 Hilt. (N. Y.) 133.

34—Kayton v. Barnett, 116 N. Y. 625; Meeker v. Claghorn, 44 N. Y. 349; Fish v. Wood, 4 E. D. Smith (N. Y.) 327.

on credit and that plaintiff had no knowledge that A was purchasing for a principal, then the plaintiff cannot recover from the defendant for the goods so sold on credit to A).³⁵

§ 657. — Virginia.

The court instructs the jury that if they believe from the evidence that, before and at the time of closing the said transaction, A was in the employ of the defendant, to be paid, and that he was thereafter paid, a consideration by the defendant for his services in relation to the said transaction, and that such relationship existing between the said A and the said defendant was unknown to the plaintiff, and not ascertained by him until long after consummating the said deal, that then, any representations made by the said A to the said plaintiff, prior to and at the time of the closing of the said transaction, in relation to the said ——— property, were made as the agent and in behalf of the said defendant, and that the defendant is bound by the same, to the same extent as if made by himself.³⁶

§ 658. Personal liability of agent.

The court instructs the jury that it is a rule of law that an agent who enters into a contract in his own name, without disclosing the identity of his principal, renders himself personally liable, even though the third person knows that he is acting as an agent, unless it affirmatively appears that it was the mutual intention of the parties to the agreement that the agent should not be bound.³⁷

The court instructs the jury that in order to avoid personal liability, it was the duty of A to disclose to plaintiff that defendant A was acting in a representative capacity, and also to disclose to plaintiff the identity of his principal. But, if plaintiff knew the identity of the principal, A then did not owe any duty of disclosing the identity of his principal.³⁸

35—*Laing v. Butler*, 108 N. Y. 637; s. c. 37 Hun (N. Y.) 144.

36—*Cerriglio v. Pettit*, 113 Va. 533.

37—*Frank v. Woodcock*, 72 Ore. 446, 143 Pac. 1105.

38—*Frank v. Woodcock*, 72 Ore. 446, 143 Pac. 1105.

C. RATIFICATION.³⁹

§ 659. Knowledge of facts.

§ 660. — Colorado.

The court instructs the jury that where the principal knows that his name has been signed to a certain bond by one assuming to act as his agent, though the principal does not know the exact terms of the bond or the extent of his liability thereon, he can not escape the consequences of his silence by purposely closing his eyes to the means of information within his control regarding the details.⁴⁰

§ 661. — Florida.

The court instructs the jury that if they believe from the evidence that the plaintiff sent the bill of lading described in the declaration to the defendant bank to be delivered to A on the payment by A of a sight draft and the acceptance of a time draft and that defendant bank surrendered the bill of lading solely on the payment of the sight draft and because A claimed that the goods which he had purchased from plaintiff were not as they were warranted, with the understanding that the amount of the balance due to the plaintiff was to be not the amount evidenced by the time draft but such amount as might be determined between the parties to the sale in the future, and if the jury further believe from the evidence that plaintiff accepted the proceeds of the sight draft from defendant bank with knowledge that A had refused to accept the time draft, and that the bill of lading had been delivered, but if the jury further believe from the evidence that plaintiff knew nothing about the agreement that the balance due from A should be ascertained by future adjustment, then the jury will not be warranted in inferring a ratification by the plaintiff of the act of defendant bank in surrendering the bill of lading without securing the acceptance of the time draft.⁴¹

39—Tort of child, see PARENT AND CHILD, § 5653.

40—Lynch v. Smyth, 25 Colo. 103, 54 Pac. 634.

41—Oxford Lake Line v. First Nat. Bank, 40 Fla. 349.

§ 662. — New York.

The court instructs the jury that the mere fact that the principal was not informed of an immaterial fact at the time of the alleged ratification, will not defeat it and that if you believe from the evidence (that the plaintiff empowered A, as his agent, to execute a lease of the premises described in the declaration, and that after the execution of the lease plaintiff accepted rent from the lessee and visited the premises and witnessed certain improvements made thereon by the lessee, then you are instructed that the plaintiff cannot allege a departure from the power merely because at the time of the making of the lease, A did not disclose to the plaintiff that the lease was given upon the condition of securing the consent of the plaintiff).⁴²

§ 663. Ratification in part.

The court instructs the jury that a principal cannot affirm an act of his agent in part and disaffirm as to the residue, and the defendant herein is not to be allowed to avail himself of the benefits of M's acts wherein they inure to his benefit and to ignore and disaffirm the acts of said M when they may operate to his prejudice provided M has acted within the scope of such agency.⁴³

§ 664. Implied ratification—Acceptance of benefits—In general.**§ 665. — Maryland.**

The court instructs the jury that if the jury believe from the evidence that plaintiff, authorized C, his agent to rent the house in question to defendant, for but one year, but that said agent rented it for two years, as alleged by the defendant's witnesses and that the defendant held the same for two years and that during the second year of the said tenancy plaintiff treated the defendant as his tenant by receiving the rent originally agreed

⁴²—Clark v. Hyatt, 55 N. Y. Super. Ct. (23 Jones & S.) 98.

Lyons, Lindenthal & Co., 38 Tex. 253.

⁴³—Planters' Mut. Ins. Co. v.

upon, then the jury may infer that the landlord ratified the contract for the two years lease and may find for the defendant.⁴⁴

§ 666. — New York.

The court instructs the jury that if they believe from the evidence that A assumed to act on behalf of the defendant and induced plaintiff to pay to the defendant moneys as alleged in the declaration for the purchase of an interest in the land described in the declaration, and that A made the false representations alleged in the declaration to induce the payment by plaintiff, and that plaintiff was induced by such false representations to pay over money and if the jury believe from the evidence that defendant received the money so procured from the plaintiff and defendant had knowledge of the representations made by A, then the jury are instructed that the defendant ratified the sale by A and the false representations made by him in regard thereto.⁴⁵

The court instructs the jury that if they believe from the evidence that (it was the duty of A to attend to the payment of rents on behalf of the defendant, and that A in the absence of funds, borrowed the amount necessary from the plaintiff as alleged in the declaration, to pay the rents on behalf of the defendant, and if the jury believe from the evidence that the money so borrowed was disbursed by A in discharge of his duty for the benefit of the defendant and in the payment of rents and that the benefit of the money so borrowed has ever since been retained by the defendant, then defendant is liable to the plaintiff for the money so borrowed).⁴⁶

§ 667. — Texas.

The court instructs the jury that if C borrowed money from plaintiff for the benefit of defendants, without authority from defendants, either express or implied, and if defendants, knowing that such money had been borrowed, ratified and acquiesced in the act of C, or knowing such money to be borrowed, accepted

44—Reynolds v. Davison, 34 Md. 662.

45—Leslie v. Wylie, 47 N. Y. 648.

46—Hearne v. Keene, 18 N. Y. Super. Ct. (5 Bosw.) 579.

the benefit of it, then they would be held bound by the act of C, as much as if they had authorized it before it was done.⁴⁷

§ 668. Same—Same—Bringing suit.

§ 669. — Georgia.

The court instructs the jury that in order for the act of A to be binding on the B Company as their agent, the act must have been by authority of the B Company, or must have afterwards been ratified by the company with a full knowledge of the facts. A suit instituted and continued after a full knowledge of all the facts would amount to a ratification with a full knowledge of the acts of the agent in the transaction, the mutual mistake on the part of both parties, or frauds on the part of A, inducing an honest mistake on the part of C, such a mistake or fraud as under the law would authorize the enforcement of the agreement which resulted in the execution of the note.⁴⁸

§ 670. — Missouri.

The court instructs the jury in bringing the action upon these notes, the ——— Bank and this plaintiff adopt and ratify all the acts of its agents or officers by which the notes in question came into the bank; that is, when this plaintiff seeks to recover upon these notes from this defendant, it is bound by what the evidence in the case shows to be the facts connected with the transaction.⁴⁹

§ 671. — Virginia.

The court instructs the jury that if they believe from the evidence that the lot described in the declaration was placed by the plaintiff in the hands of B, as a real estate agent, to sell the same, and that said B authorized W to sell the same, and paid him one half of the commission for selling the lot; and if they furthermore believe from the evidence that the sale was in fact thus made, and that the plaintiff, is now seeking to enforce the said sale, then they are instructed that the plaintiff has ratified the acts of said W, and is as responsible therefor, as well as for

47—Collins v. Cooper, 65 Tex. 460.

49—Chicago Title & Trust Co. v.

48—Dolvin v. American Harrow Co., 131 Ga. 300.

Brady, 165 Mo. 197.

such representations as the jury believe were made by said W, as he would have been if they had been done and made by himself.⁵⁰

The court instructs the jury that if they believe from the evidence that the lot described in the declaration was placed by the plaintiff in the hands of B, as a real estate agent, to sell the same, and that said B authorized W to sell the same, and paid him one half of the commission for selling the lot; and if they furthermore believe from the evidence that the sale was in fact thus made, and that W, the plaintiff, is now seeking to enforce the said sale, then they are instructed that the plaintiff has ratified the acts of said W, and is as responsible therefor, as well as for such representations as the jury believe were made by said W, as he would have been if they had been done and made by himself.⁵¹

D. NOTICE TO AGENT.

§ 672. In general.

The court instructs the jury that notice to an agent is in general notice to the principal, if the agent acquires knowledge of the fact said to be brought home to the principal while acting for the principal in the course of the very transaction which was the subject of the suit.⁵²

E. ACTIONS.

§ 673. Evidence—Presumptions and burden of proof—Existence of relation.

§ 674. — Illinois.

The court instructs the jury as a matter of law that before a principal can be bound by the acts of his agent, it must be shown by the party asserting such agency that the principal authorized such agent to act for him and in his behalf, and that such agent carried out the business of his principal and within the scope of

50—Tyson v. Williamson, 96 Va. 636.

51—Tyson v. Williamson, 96 Va. 636.

52—Henry v. Allen, 151 N. Y. 1, 36 L. R. A. 658; Ingalls v. Morgan, 10 N. Y. 178; Bank of United States v. Davis, 2 Hill (N. Y.) 451.

his authority as such agent; otherwise the principal is not bound by the acts of the agent.⁵³

The court instructs the jury as a matter of law that before A can be bound by the acts of his son, B, it must be shown by the defendant, by competent evidence, that A authorized B to act for him and in his behalf in executing the special agreement relied upon by the defendant.⁵⁴

§ 675. — New York.

The court instructs the jury that the presumption that a fact once shown to have existed, continues, applies to the relation of principal and agent.⁵⁵

§ 676. Same—Weight and sufficiency.

The court instructs the jury that if you find that C was an agent of defendants, but that express authority was not given to him, as such agent, to borrow money for defendants, then you may look to the contract between them as it may be shown, by the evidence, the nature and character of the business in which C was employed to act as agent, and all the transactions between them, and ascertain whether or not it is to be fairly implied as contemplated by them or embraced in the scope of his employment as agreed on between them, that he should have such power to borrow money to be used in such business.⁵⁶

The court instructs the jury that the question as to whether or not one is agent for another, with power to bind his principal where the interest of outside parties is involved, is one to be determined, not alone by the actual contract between the parties as to whom it is sought to establish the relation of principal and agent, but that is to be considered together with all the facts and circumstances which in addition bear thereon. The question of agency in this case is to be determined by the jury from all the evidence relating to the transaction of the business and all the facts and circumstances connected with the same, both as between

53—*Meyers v. Johnson*, 186 Ill. App. 37.

54—*Meyers v. Johnson*, 186 Ill. App. 37.

55—*Fassin v. Hubbard*, 55 N. Y. 465.

56—*Collins v. Cooper*, 65 Tex. 460.

A & Co. and B, and between said A & Co. and said B and parties dealing with them.⁵⁷

The court instructs the jury that as to whether or not A was the agent of B as the plaintiff claims, and acting for him, that is a question of fact which you are to determine from all the facts and circumstances in the case. The fact that A says that he was not the agent is not binding upon C. It is for you to say from the testimony whether A was in fact acting for B, either as agent or employee, and in passing upon this question it is your duty to take into consideration the instructions that B gave to A relative to the horse delivered at the time, if you find that he gave any instructions along that line. On the question of agency, you have a right to consider whether there is any testimony to show ratification—that is, the acceptance or acquiescence by B in what A did; that is, Did B consent to the action in his behalf by A? You have also a right in passing upon this question to consider whether there was an original authority; that is, whether B brought A there for the purpose of assisting him in taking charge of the horse in the yard, as has been testified to by the plaintiff. You have also the right to consider whether B held out to the world, and to D, that A was his agent, to do the things A did; that is, to take charge of and break the horse or take charge of the horse for B from the time the rope was given him in the yard there, as well as all other facts and circumstances in the case.⁵⁸

§ 677. Questions for jury.

The court instructs the jury that this action is brought by plaintiff against defendant to enforce the payment of two bonds and a mortgage given to secure the bonds executed by defendant and the defendant sets up the defense of payment. Defendant had entered into contracts with the city of ——— for the building of ——— and under this contract with the city of ——— he was to be paid for his work when the assessments for the work should have been collected by the city, and defendant not having a sufficient amount of money to carry on his undertaking with

⁵⁷—McIntyre v. Smyth, 108 Va. 736.

⁵⁸—Kendrick v. Hochradel, 167 Mich. 179.

the city applied to one S to borrow money for him and a bond and mortgage were executed by the defendant to L, to be turned over to whoever should furnish the money. S induced plaintiff to furnish the money required by the defendant and the arrangement between the defendant and S was that the money furnished by the plaintiff should be repaid when S should collect the assessments, and it seems that the plaintiff did not ask the delivery of the bond and mortgage which had already been drawn up and executed in favor of L, and did not insist on anything more than a general statement that the money furnished by him should be secured by mortgage. The money which was collected by S on the assessments was not paid to plaintiff and for the purpose of this case the jury will regard such money as having been misappropriated. It was misappropriated at a time when S, was responsible for it. There is some evidence that plaintiff knew of the arrangement between the defendant and S by which the moneys to be collected on assessments should be applied in payment of the loan made by the plaintiff. Now the court instructs the jury that it is for them to determine whether S misappropriated the moneys collected upon the assessment as the agent of defendant. If S misappropriated such moneys as agent of defendant, then your verdict should be in favor of plaintiff, but if the jury find from the evidence that S misappropriated the moneys collected upon assessments as the agent of plaintiff, then your verdict must be for the defendant.⁵⁹

59—Brecht v. McParland, 187 Pa. St. 620.

CHAPTER XLVII.

AGRICULTURE.

§ 678. Canada thistles—Compliance with statute by railroad.

§ 678. Canada thistles—Compliance with statute by railroad.

The court instructs the jury, as a matter of law, that the fact that a stray Canada thistle, growing here and there on the right of way or other lands of a railway company, controlling or operating a railroad in the state of Illinois, has been overlooked and permitted to mature its seed, is not of itself a violation of the provision of the statute of the state of Illinois, which reads: "If any company, association or person, owning, controlling or operating a railroad, shall refuse or neglect to dig up and destroy, or take other certain means of exterminating Canada thistles and other noxious weeds that may at any time be growing upon the right of way or other lands of such roads, or appertaining thereto, they shall be fined for each offense not less than fifty (50) nor more than two hundred (200) dollars, the fine to be paid as in the preceding section," when the said railroad company has done all that could be reasonably expected of it for the destruction of the thistles. And if you believe from the evidence in this case that the defendant has in good faith made a bona fide attempt to comply with said law, and has in good faith done all that could reasonably be expected of it for the destruction of said Canada thistles, even though you may believe that a few stray thistles were found growing on the right of way of the defendant company of other lands belonging to the defendant, still, in that case, your verdict should be for the defendant.¹

1—Chicago, M. & St. P. R. Co.
v. People, 132 Ill. App. 531.

CHAPTER XLVIII.

ALTERATION OF INSTRUMENTS.

- § 679. Materiality—Consideration.
- § 680. Same—Date.
- § 681. Same—Interest.
- § 682. — Indiana.
- § 683. — New York.
- § 684. Same—Medium of payment.
- § 685. Same—Signatures.
- § 686. Same—Indorsements.
- § 687. Intent.
- § 688. Consent of parties.
- § 689. Ratification.
- § 690. — Alabama.
- § 691. — Illinois.
- § 692. Effect on rights of parties.
- § 693. — Illinois.
- § 694. — Kansas.
- § 695. — Missouri.
- § 696. Spoliation.
- § 697. Evidence—Burden of proof.

Cross-References.

See FORGERY; bona fide holder of altered bill or note, see BILLS AND NOTES; recovery of excessive amount paid on raised draft, see BANKS AND BANKING; alteration of contract of subscription to corporate stock, see CORPORATIONS.

§ 679. Materiality—Consideration.

The court instructs the jury that a change in the consideration of an instrument is a material alteration and if you believe from the evidence that (here state facts of change as to consideration of instruments, as where a woman executes a bond and mortgage and intrusts them to her husband for delivery, and he before delivery alters the bond by raising the amount, and the mortgage by raising the consideration without her consent or subsequent

ratification) there is a material alteration, and your verdict will be for the defendant.¹

§ 680. Same—Date.

The court instructs the jury that if you find from the evidence that the plaintiff (state the particular in which the alteration consisted, as changed the date of the note from Dec. 1 to Jan. 1) and if you find from the evidence that the defendant did not consent to the making of such alteration then your verdict will be for the defendant.²

§ 681. Same—Interest.

§ 682. — Indiana.

The court instructs the jury that it is claimed by B, defendant, that, after he signed a note similar in all respects to the one sued on, excepting that the written words, “with interest at ten per cent.” were not then in the note, and since he signed the note, without his knowledge or consent, the said printed words were stricken out, and the said written words inserted. If such an alteration of the note was made by any holder of the note, or made with the knowledge of any holder of the note, without the knowledge of B, it would be a material alteration, and would release him from all liability on the note, and if the defendant B proves this, by a fair preponderance of the evidence, the verdict must be in his favor; and it would make no difference whether A, the plaintiff, was or was not the owner of the note at the time of the alteration, if he made the alteration after B signed it.³

§ 683. — New York.

The court instructs the jury that an alteration as to the amount of a note is a material alteration and that if you believe from the evidence (here state the facts, as the addition of the words “with interest” or the insertion of the words “with inter-

1—Cheek v. Nall, 112 N. C. 370.

3—Brooks v. Allen, 62 Ind. 405.

2—First Nat. Bank v. Payne, 19

Ky. L. Rep. 839.

est after six months" in a note without maker's consent) then your verdict will be for the defendant.⁴

§ 684. Same—Medium of payment.

The court instructs the jury that an alteration as to the medium of payment is a material alteration and that if you believe from the evidence (here state facts, as striking out the words "in gold or its equivalent" from a promissory note, in the clause for the payment of interest), and you believe from the evidence that the alteration was made without consent of the surety thereon, your verdict will be for defendant.⁵

§ 685. Same—Signatures.

The court instructs the jury that an alteration to be material so as to invalidate the instrument must change the effect of the instrument and though you may believe from the evidence that the alteration consisted in adding words of description to the name of the payee, that fact will not invalidate the instrument as the effect of the instrument is not thereby changed.⁶

§ 686. Same—Indorsements.

The court instructs the jury that if you believe from the evidence that the erasure in this case was of an unauthorized indorsement on the note, and you further believe from the evidence that the maker of the note had knowledge of the lack of authority, you are instructed that such alteration would not be a material alteration invalidating the note.⁷

§ 687. Intent.

The court instructs the jury that if you find from the evidence that the alteration (here insert facts, as the writing of the word "paid" where there was in fact no payment) was a mistake, and you further believe from the evidence that the alteration was made

4—Schwarz v. Oppold, 74 N. Y. 304; Meyer v. Huneke, 55 N. Y. 412; Kennedy v. Crandall, 3 Lans. (N. Y.) 1.

5—Church v. Howard, 17 Hun (N. Y.) 5.

6—Casto v. Evinger, 17 Ind. App. 298.

7—Waldorf v. Simpson, 15 App. Div. (N. Y.) 297.

without fraud the maker will not be discharged from his liability.⁸

§ 688. Consent of parties.

The court instructs the jury that if they believe, from the evidence, that the seal was appended to the note in question after its execution, and before the commencement of this suit, by and with the consent of the parties thereunto, then the plaintiff is not entitled to recover, and the jury should find for the defendant.⁹

§ 689. Ratification.

§ 690. — Alabama.

The court instructs the jury that if you believe from the evidence that the obligors (in a bond), with knowledge that it had been altered by the insertion of a place of payment, offered to pay a part thereof and asked for time in which to pay the balance, such offer and request will constitute a ratification of an assent to the alteration.¹⁰

The court instructs the jury that if you believe from all the evidence that there was a memorandum attached to the note sued on alleged by defendant, but that after defendant became fully informed and advised as to the fact (if it be a fact) that the memorandum was detached by A [payee], he made payments and had them indorsed on the back of the note or indorsed them there himself, without objection or condition, then you may reasonably infer and find from these facts that defendant has waived his objection to said alteration and has ratified the note in its present condition.¹¹

The court instructs the jury that if you believe from all the evidence in this case, that there was a note or memorandum attached to the note at the bottom as alleged by the defendant, and that such note or memorandum was detached or cut off by A [payee] before any payment was made and indorsed thereon, and

8—Louremore v. Berry, 19 Ala. 130; 54 Am. Dec. 188; Russel v. Longmoor, 29 Neb. 209.

9—Schwarz v. Herrenkind, 26 Ill. 208.

10—Dickson v. Bamberger, 107 Ala. 293.

11—Payne v. Long, 121 Ala. 385.

that all the payments now indorsed on the note were made or placed on the back of the note after the alleged alteration with full knowledge of the alteration on the note in the present condition, then you may infer from all these facts that B [maker] ratified said note and is bound by it.¹²

§ 691. — Illinois.

The court instructs the jury that if you believe from the evidence that one of the makers of the (here describe instrument, as note) distinctly and unconditionally promised to pay it, there is such a ratification of the alteration that it then becomes immaterial whether the alteration was a material alteration, as by such act he adopts the (instrument, as note) as his own and is bound to pay it.¹³

§ 692. Effect on rights of parties.

§ 693. — Illinois.

The court instructs the jury that if they believe, from the evidence, that the seal to the note in question was attached thereto at the time of the commencement of this case and the execution of the same, then the jury should find for the defendant.¹⁴

The court instructs the jury that if they believe, from the evidence, that the seal was attached to the note in question before the commencement of this case by the plaintiff, without the knowledge or consent of the defendant, then the defendant is entitled to a verdict, and the jury should find accordingly.¹⁵

§ 694. — Kansas.

The court instructs the jury that if you find from the evidence that (here state the facts, as that the time when the interest should commence to run is changed "from maturity" to "from date") then your verdict will be for the defendant.¹⁶

12—Payne v. Long, 121 Ala. 385.

13—Goodspeed v. Cutler, 75 Ill. 534. See Scott v. Bibb & Co., 48 Ill. App. 657; and Wurster v. Reitzinger, 5 Ill. App. 112.

14—Schwarz v. Herrenkind, 26 Ill. 208.

15—Schwarz v. Herrenkind, 26 Ill. 208.

16—Sheeley v. Simpson, 5 Kan. App. 465, 46 Pac. 994.

§ 695. — Missouri.

The court instructs the jury that if they believe from the evidence in the cause, that the promissory note, dated — day of —, 19—, read and shown to the jury in this case, was made by the defendant, M, and indorsed by the defendant A, and delivered by him to his co-defendant, M, for the purpose of enabling M, the maker, to raise money thereon for his own use; and if they shall further believe from the evidence that, after the defendant A had so indorsed and delivered said note to said M, the words and figures “with interest at ten per cent. per annum after maturity,” now appearing in said note, were written therein without the knowledge, consent or authority of the defendant A, by said M, or by any agent or clerk of his, whether done in the presence of any officer or agent of plaintiff, or not, and whether with or without the knowledge of the plaintiff,—the verdict should be for the defendant A on the — count.¹⁷

§ 696. Spoliation.

The court instructs the jury that if you believe from the evidence that A’s attorneys employed by and who brought the suit and took judgment on the note, altered the note, without the knowledge or consent of A, and without being authorized by him to make the alteration, such alteration would not relieve the defendants from liability on the note for the amount included therein when the note was executed.¹⁸

The court instructs the jury that if you believe from the evidence that the defendants executed the note offered in evidence, with an attorney fee of — in the warrant of attorney, and that if some person, not the plaintiff, changed the amount of the attorney’s fee in the warrant to — without the knowledge or consent of the plaintiff, your verdict should be for the plaintiff for the amount of the note and interest.¹⁹

17—Capital Bank v. Armstrong, 62 Mo. 59.

18—Lanum v. Patterson, 143 Ill. App. 244.

19—Lanum v. Patterson, 143 Ill. App. 244.

§ 697. Evidence—Burden of proof.

The court instructs the jury that the burden of proof is upon the plaintiff in this case, and unless the jury are satisfied, from the evidence, that the seal in question was added to the note since its execution, without the knowledge and consent of the parties thereunto, then they should find for the defendant.²⁰

The court instructs the jury that the law imposes upon the party offering a paper in evidence the explanation of any alterations which may appear therein, and therefore if the jury believe, from the evidence, that any alteration has been made in the note in question, the burden of proof is upon the plaintiff to explain the same, and unless the jury believe, from the evidence, that such alteration has been explained by the plaintiff, the presumption of the law is that it was made by the plaintiff, and the jury should find for the defendant.²¹

20—Schwarz v. Herrenkind, 26 Ill. 208.

21—Schwarz v. Herrenkind, 26 Ill. 208.

CHAPTER XLIX.

ANIMALS.

I. BREEDING.

- § 698. Sale of stallion—Return or tender on breach of warranty.

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- § 699. Regulations—What constitutes violation.
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IV. LIABILITY FOR INJURIES TO ANIMALS.

- § 726. Injuring or killing trespassing animals—In general.
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§ 729. Criminal offenses—Motive for act.

§ 730. Same—Aiders and abettors.

Cross-Reference.

Priority of lien of agister over lien of chattel mortgage, see CHATTEL MORTGAGES, § 2023.

I. BREEDING.

§ 698. Sale of stallion—Return or tender on breach of warranty.

The court instructs the jury that if you believe from the evidence that the plaintiffs did not return or tender a return of the said stallion to the defendant in accordance with the terms of the contract, as set out in the plaintiffs' declaration, on or before the — day of —, 19—, in as good and sound condition as said stallion was when sold by the defendant to the plaintiff, then you should find for the defendant.¹

II. RUNNING AT LARGE.

§ 699. Regulations—What constitutes violation.

The court instructs the jury that if they believe, from the evidence, that the defendant, —, suffered his hogs to run at large outside of the corporate limits of the town of —, with the expectation that they would run at large within the corporate limits of the town of —, and they came within the limits of said corporation by reason of their being so permitted to run at large outside of the limits of said town, that then the defendant has suffered the said hogs to run at large in said town, within the meaning of said ordinance, and they must find him guilty and assess a penalty within the provisions of the ordinance.²

§ 700. Same—Actions for penalties—Issues and proof.

The court instructs the jury that before the jury can find the defendant guilty, they must believe, from the evidence: 1st—That defendant's hogs were running at large within the corporate

1—Gillenberg v. Divers, 165 Ill. App. 544.

2—Town of Collinsville v. Scandal, 58 Ill. 221.

limits of the town of ————; and 2d—That said hogs were so running at large within the corporate limits of said town by sufferance of the defendant. Although the jury may believe, from the evidence, that the defendant's hogs strayed from their usual place of running, into and within the corporate limits of the town of ————, yet, if the jury further believe from the evidence that they were so running within the corporate limits of the said town of ———— without the knowledge or sufferance of defendant, they will find the defendant not guilty.³

III. LIABILITY FOR INJURIES BY ANIMALS.

§ 701. Personal injuries—Ownership of animal.

The court instructs the jury that under the law of this state a dog is recognized as a species of property. The word "owner," alone, is not of technical significance, and is to be construed according to the context and approved usage of the language. It means the person to whom the dog belongs. As bearing on the question as to who was the owner of this dog, you are instructed that if you find from the evidence that A, wife of the defendant, herself bought the dog, and paid for it out of her own separate money, then you should find that the dog in question was owned by A, and, if you so find, then your verdict should be for the defendant.⁴

The court instructs the jury that the fact, if you so find, that the defendant paid the taxes on the dog at the request of his wife out of his own money, would not have the effect to change the title, if you find that she bought and paid for the dog as last above explained. However, as bearing upon the question as to whether the defendant or his wife was the owner of the dog, you should take into consideration all the facts and circumstances shown or proven on the trial, including the question as to whether or not the defendant spoke of the dog as his dog; the manner and sense in which such expression was used, if used; whether the dog would go with the defendant at times, if shown, and as

³—Town of Collinsville v. Scanland, 58 Ill. 221.

⁴—Alexander v. Crosby, 150 Iowa 239.

shown, and the circumstances thereof; the fact of his paying the taxes thereon, if you so find, and as the court has said, all other facts and circumstances shown on the trial bearing on the question.⁵

The court instructs the jury that our statutes provide in substance that the owner of a dog shall be liable to any party injured for any damages done, except when the party is doing an unlawful act. The question for you to determine first is whether or not A was the owner of the dog, and if you find that he was not the owner, but that his wife [B] was the owner of the dog, then the defendant, A, would not be liable. If you find that B was the owner of the dog, then you need proceed no further, but return a verdict for the defendant.⁶

The court instructs the jury that if the defendant had the dog in his possession, and was harboring him on his premises as owners usually harbor their dogs, then he is the owner within the meaning of the law. If the dog was only casually upon his premises, and was not being harbored by defendant as owners usually harbor their dogs, then he was not the owner. In determining how this was at the time of the alleged attack, you will consider the defendant's former treatment of the dog, his declarations concerning him, and the habit of the dog as to staying at the defendant's place.⁷

§ 702. Same—Knowledge of vicious propensities.

§ 703. — Michigan.

The court instructs the jury that though you may believe that the animal was not actually vicious up to the time of the injury and that ————— had no knowledge of any viciousness in the bull, yet in view of the known and ordinary propensities of such an animal if you believe from the evidence that the manner of driving and managing the bull was negligent, then plaintiff is entitled to recover, if you believe from the evidence her conduct

5—Alexander v. Crosby, 150 Iowa 239.

6—Alexander v. Crosby, 150 Iowa 239.

7—O'Hara v. Miller, 64 Iowa 462.
See Trumble v. Happy, 114 Iowa 624.

on the occasion was not wanting in reasonable care and prudence in view of all the circumstances and surroundings of the injury.⁸

§ 704. — New Hampshire.

The court instructs the jury that it is not absolutely necessary that an owner should have actual knowledge that the animal has injured others in a similar way in order to make him liable for the injuries, it is sufficient if the owner of the animal has seen or heard enough to convince a man of ordinary prudence of its inclination to commit injuries of the class complained of by plaintiff.⁹

§ 705. — North Carolina.

The court instructs the jury that if you believe from the evidence that the owner of the horse had knowledge of one vicious act of the animal showing it to be dangerous, he is liable thereafter if he fails to properly secure the animal, and injury to another person results from failure to restrain.¹⁰

§ 706. — Texas.

The court instructs the jury that one who keeps a dangerous dog, with knowledge of its vicious propensities, incurs a liability for any injury caused by it to another person.¹¹

The court instructs the jury that before the plaintiff can recover anything in this suit, he must establish by a preponderance of the testimony that the defendant owned the dog that did the injury to plaintiff; that said dog was of a ferocious, vicious, and dangerous disposition; and that defendant knew that said dog was dangerous as aforesaid. But, after the owner of a vicious dog has notice of its vicious propensities, he cannot exonerate himself by showing that he used care in keeping and restraining the animal, for after such knowledge he assumes the risk of keeping him securely.¹²

8—Barnum v. Terpening, 75 Mich. 557.

9—Reynolds v. Hussey, 64 N. H. 64.

10—Cockerham v. Nixon, 33 N. C. 269.

11—Triolo v. Foster (Tex. Civ. App.) 57 S. W. 698.

12—Triolo v. Foster (Tex. Civ. App.) 57 S. W. 698.

§ 707. Same—Restraining animal.

The court instructs the jury that the fact that the defendant or defendant's wife may have been able to control the dog by calling him off or speaking to him when he would run at any one, even if the jury believe this fact proven, is not such a restraining as is contemplated by the law, and would not relieve or excuse the defendant from the charge of negligence if the other facts in said cause are proven that would require the defendant to restrain his dog.¹³

§ 708. Same—Provoking animal.**§ 709. — Iowa.**

The court instructs the jury that the defendant claims that plaintiff, in passing the bull, provoked the bull to make the attack upon him, by striking the bull with a cane or stick, without reasonable cause. If you find that the plaintiff struck the bull, and thereby excited him to make the attack you will not assume, as a matter of law, that the plaintiff was in fault, but you will inquire whether, under the circumstances, the plaintiff had or had not reasonable cause to strike the bull with his cane. You will carefully notice what the plaintiff did, if anything; his situation at the time, as it appeared to him; and all the circumstances surrounding him; and decide whether he acted as a man of ordinary prudence or not.¹⁴

§ 710. — Massachusetts.

The court instructs the jury that if the plaintiff did not take the rope with intent to steal it, and did not do anything but what the ordinary junk dealer would properly do, they might find that he was in the exercise of due care, but if he was not acting as an ordinary junk dealer, and went about the houses and into the barn to see what he could find, and that he took the rope intending to steal it, as claimed by the defendant, then they might find that he was not in the exercise of due care.¹⁵

13—*Dockerty v. Hutson*, 125 Ind. 102.

15—*Spellman v. Dyer*, 186 Mass. 176.

14—*Meier v. Shrunk*, 79 Iowa 17.

§ 711. Same—Warning of danger.

The court instructs the jury that if they believe from the evidence that at the time of the injury to the plaintiff there was displayed conspicuously in the ring in question a sign reading as follows: "Do not stand in the ring. Persons standing in this ring do so at their own risk;" and that the plaintiff knew of said sign, and that the plaintiff received his injuries while standing in the ring in question, then you are instructed that the plaintiff cannot recover and your verdict must be for the defendants.¹⁶

§ 712. Injuries to other animals—In general.

The court instructs the jury that plaintiff is not prevented from recovering for the loss of his horse bitten by defendant's dog by reason of the fact that the horse injured was harnessed to a wagon and was being led tied behind another wagon, as plaintiff had the right to lead the horse in that manner, and the fact that he was so leading him was not evidence of negligence.¹⁷

§ 713. Same—Knowledge of vicious propensities.

The court instructs the jury that if they find that the defendant's horse was in pasture on his wife's premises and while there broke over her part of the partition fence, separating her said lands from the field in which plaintiff's horse was being rightfully pastured by him, then the defendant's horse was unlawfully in the place where the plaintiff's horse was on pasture, and in such case, if the jury find that he killed plaintiff's horse, the defendant is liable to plaintiff for the injury, whether his horse was in fact vicious or not, and whether he knew of such viciousness or not.¹⁸

The court instructs the jury that if the defendant's horse was at the time, trespassing in plaintiff's field, on plaintiff's land, or on the land of a third party where plaintiff was pasturing his horse by the month, for a consideration paid by plaintiff to such owner, and there attacked and killed plaintiff's horse, defendant

16—Craney v. Schloeman, 145 Ill. App. 313, aff'd 240 Ill. 602.

17—Loulester v. Parsons, 151 Mass. 182.

18—Morgan v. Hudnell, 52 Ohio St. 552, 27 L. R. A. 862, 49 Am. St. Rep. 741.

is liable for the injury, whether or not he knew of the vicious propensity of his horse.¹⁹

§ 714. Same—Spread or communication of contagious or infectious disease.

§ 715. — Illinois.

The court instructs the jury that in order that plaintiff may recover in this case, the jury must believe from the evidence that the defendant's sheep not only might, but actually did, communicate the disease in question to plaintiff's sheep, and if the preponderance of the evidence fails to establish such facts or the evidence shows that it is probable that plaintiff's sheep became elsewhere infected, or that it was as likely they caught the disease elsewhere as from the defendant's sheep, then the jury should find the defendant not guilty.²⁰

The court instructs the jury that if they believe from the evidence that the defendants imported Texas cattle into ——— and that said cattle so imported and belonging to defendants passed over the pasture where the plaintiff's cattle were grazing, and that the Texas cattle so imported by defendants and belonging to them imparted the infectious disease described in the declaration to the plaintiff's cattle and that plaintiff's cattle died of such disease, and if the jury believe from the evidence that said cattle of defendants had power to impart the disease of which plaintiff's cattle are alleged to have died, then the jury shall find defendants guilty.²¹

§ 716. — Kansas.

The court instructs the jury that, if you believe from the evidence that the defendant, A, brought or caused to be brought into ——— county, State of ———, Texas cattle, or cattle liable to communicate Texas, Spanish or splenic fever to the domestic cattle of this state, and that said cattle came from the country south of this state between the first day of March, 19—, and the

19—Morgan v. Hudnell, 52 Ohio St. 552, 27 L. R. A. 862; 49 Am. St. Rep. 741.

20—Herrick v. Gary, 83 Ill. 85.

21—Newkirk v. Milk, 62 Ill. 172.

first day of November, 19—, and that defendant knew or had reason to know or could by ordinary diligence have known that said cattle were diseased cattle, or were cattle liable to communicate Texas, Spanish or splenic fever to the domestic cattle of this state; or if the defendant knew or could with ordinary diligence have known that such cattle were diseased with such disease and were liable to communicate it to the domestic cattle of this state, and such cattle so brought or caused to be brought into said ——— county, communicated such disease to the domestic cattle of the plaintiff, and thereby plaintiff's cattle died, you will find for the plaintiff and the value of such cattle as she lost as shown by the evidence.²²

The court instructs the jury that, if you find from the evidence that the defendant, A, purchased the cattle described in the petition in good faith in ——— in this state without any knowledge that said cattle were infected with Texas, Spanish or splenic fever and that he had no reason to believe that such cattle could or would communicate to cattle of this state, Texas, Spanish or splenic fever, and that he did not know or have reason to believe or know that such cattle would or could communicate the Texas, Spanish or splenic fever to the cattle of this state, until they arrived at ———, and that the sheriff immediately seized such cattle by virtue of a process issued by W, a justice of the peace, and before the plaintiff's cattle had been exposed and were by the sheriff placed in quarantine, and the defendant A was deprived of any control over said cattle, and that during the time the said cattle were quarantined by the sheriff, and the defendant deprived of the control of said cattle, the plaintiff's cattle took such disease by going upon said quarantined ground either while defendant's cattle were there in the custody of the sheriff or his deputy or after they were removed therefrom, then the plaintiff cannot recover in the action.²³

22—Patee v. Adams, 37 Kan. 133, 14 Pac. 505. (Question is whether under the statute defendant must be shown to have knowledge.)

23—Patee v. Adams, 37 Kan. 133, 14 Pac. 505. (Question is whether under the statute defendant must be shown to have knowledge.)

§ 717. Injuries to property—In general.

The court instructs the jury that if you believe from the evidence that the land was the property of plaintiff, and you believe from the evidence that the land was fenced and the defendant broke it down and thereby allowed his cattle to go upon the land, or if you believe from the evidence that the land was fenced and the fence had been broken down without defendant's fault, and he drove his cattle upon the land, the plaintiff will be entitled to recover.²⁴

The court instructs the jury that a man has no right to carelessly look on at the destruction of his property. It is his duty to use reasonable care to prevent such destruction; and if he fails to use ordinary care, he cannot recover for the injury which by ordinary care he might have prevented.²⁵

§ 718. Same—Duty to fence.

The court instructs the jury that if you find that the plaintiff could, by the use of ordinary care, have prevented the horses and cattle from eating and destroying his hay and corn, he cannot recover for such hay and corn thus destroyed, which by ordinary diligence he might have prevented. The plaintiff, after he knew the horses and cattle of others were destroying his hay and corn, should have used reasonable caution to have prevented further injury, such as fencing his stacks, and fencing his corn beyond the reach of such stock, provided he could reasonably have done so.²⁶

§ 719. Same—Sufficiency of fence.**§ 720. — Indiana.**

The court instructs the jury that if you find from the evidence, that the fence, over which the stock of the defendant entered on the lands of the plaintiff, was a partition fence, dividing the lands of the parties to this suit, and that the stock of the defendant crossed over such fence at a place where it was the

24—*Erbes v. Wehmeyer*, 69 Iowa 85.

25—*Little v. McGuire*, 38 Iowa 560.

26—*Little v. McGuire*, 38 Iowa 560.

duty of the plaintiff to maintain such fence, then defendant would not be liable in this case, unless the plaintiff has shown by the testimony of skillful men that the fence was such as good husbandmen generally keep.²⁷

§ 721. — Iowa.

The court instructs the jury that the plaintiff claims that his crop was destroyed by defendant's cattle. It is important that you determine whether the crop was destroyed by defendant's cattle; whether plaintiff's fence was a lawful fence, four and a half feet high, with spaces sufficiently close; was the fence four and a half feet high, and such as is generally, in this country, recognized as a good fence? This is a matter entirely in your discretion. You will then inquire whether defendant's cattle broke into plaintiff's field and destroyed his crop; and if you find that the fence was such a one as comes within the meaning of the law, and such a one as is recognized as a good common fence in the country, and the defendant's cattle broke through the inclosure, the defendant is liable for all damages resulting from such breach. In such case, it was the duty of the defendant to keep his cattle up, and not suffer them to run at large to the danger of his neighbor's property; and if property was destroyed, he would be responsible. No man has the right to suffer to run at large, animals of a dangerous kind, either to the person or property of another; and if he does, he is responsible for all damages which result from the acts of such animals. But if the fence was not a reasonable one, such as would be calculated to protect the property, the crop, and the loss was the consequence of the negligence of plaintiff, and that by ordinary care and prudence he could have protected the crops, it was his duty to do so; and if he failed to do so, and the fence was such as the custom of the country and the law would not recognize as a lawful fence, he would not be entitled to recover; the loss would be a consequence of his own negligence and fault.²⁸

27—*Hinshaw v. Gilpin*, 64 Ind. 116.

28—*McManus v. Finan*, 4 Iowa

The court instructs the jury that if you find from the evidence that the defendant's fence, with the exception of one or two small gaps, was sufficient to have turned the stock, and find that the plaintiff knew of these gaps, and that the stock would come through such gaps, and after knowing such facts, and knowing that the stock did come through said gaps, and if you find that plaintiff, with the exercise of ordinary care, could have prevented said stock from thus trespassing, and did not do so, he cannot recover for the damage which he might have thus prevented.²⁹

§ 722. Actions—Issues and proof.

The court instructs the jury that the plaintiff has alleged in each paragraph, among other things, that he received the injury complained of without fault or negligence on his part. This is a material and necessary allegation. Without such allegation his complaint would not have been sufficient to have constituted a cause of action and before the plaintiff can recover he must have proved by a fair preponderance of the evidence that he did receive said injuries, without fault or negligence on his part, directly and materially contributing to the injury. It is not enough to enable the plaintiff to recover that he shall have proved fault and negligence on the part of the defendant; he must also prove that he himself was free from such fault or negligence, and, if he has failed to prove by a fair preponderance of the evidence that he received the injury without such fault or negligence on his own part he cannot recover.³⁰

The court instructs the jury that the Commonwealth must prove that the defendant overdrove the horse knowingly, and intentionally; that the defendant, like all other men, was presumed to know what he did, and to intend the natural and necessary results of his acts; that if, in the proper exercise of his own judgment, he thought he was not overdriving the horse, he must be acquitted; and that upon these instructions the jury might come to the conclusion that it was a question of fact to be de-

29—Little v. McGuire, 38 Iowa 560.

30—Todd v. Danner, 17 Ind. App. 368.

terminated by the result of the testimony introduced by the Commonwealth and by the defense.³¹

The court instructs the jury that the plaintiff has alleged in each paragraph of his complaint that the steer in question was of a dangerous and vicious disposition, in the habit of attacking mankind and animals. He has also alleged that the defendant knew of such dangerous and vicious disposition of said steer and that he, the plaintiff, had no knowledge of such dangerous and vicious disposition. To entitle the plaintiff to recover he must have proved by a fair preponderance of the evidence not only that the steer was dangerous and vicious, but that the defendant knew that fact and the plaintiff was ignorant of it.³²

§ 723. Same—Evidence—Reputation of animal for viciousness.

The court instructs the jury that a dog cannot be proven to be vicious and liable to bite mankind by evidence that the general reputation is that the dog is vicious and so liable.³³

§ 724. Same—Questions for jury.

The court instructs the jury that some testimony has been produced here by witnesses who have stated to you the result of their reading in natural history, and the result of the opinion expressed by hunters and sportsmen, as to the general characteristics of the deer; and it is for you to say how much is proved by that evidence. The plaintiff claims to show by that evidence that the deer at a certain season of the year is a dangerous animal. It is for you to say whether, after the cross-examination of the witnesses, you can arrive at that conclusion.³⁴

The court instructs the jury that there are some questions in this case which the jury must decide, and the jury will be the sole judge as to those questions. The first of these questions is, Was the defendant, at the time the stallion escaped, using that degree of care and precaution to prevent the escape of the stal-

31—Com. v. Wood, 111 Mass 408.

34—Spring Co. v. Edgar, 99 U. S.

32—Todd v. Danner, 17 Ind. App. 368.

645, 25 L. Ed. 487.

33—Triolo v. Foster (Tex. Civ. App.) 57 S. W. 698.

lion which a person of ordinary caution and prudence would have used under like circumstances? In deciding this question, you should take into consideration all the evidence of the case, as to the size and age of the stallion and the manner in which he had been used and handled, his disposition, character, and propensities, the kind and character of halter which was used, the lack of fence about the barnyard, the purpose for which the stallion was brought out of the barn, probable consequences of his escape, and any and all other facts and circumstances in evidence which, in your opinion, will aid you in determining whether the defendant used due care and precaution to prevent the escape of the stallion.³⁵

§ 725. Same—Damages.

The court instructs the jury that the measure of plaintiff's damage for the loss or injury to the grass for the years ——— and ———, if you find that he has sustained any damages in that regard, will be the actual damage done to the grass and crop for these years by the defendant's cattle; that is the difference between the actual market value of the crop upon the land for those years as it was and what its market value would have been had the plaintiff's cattle not been driven or herded or pastured upon the land. To state it in other words, the question for you to determine from the evidence in fixing the amount of damages, if any, on this claim is how much less was the actual rental value of the land for the grass crop of these years by reason of the defendant's cattle having been driven or herded upon the land than it would have been had the cattle not been driven or herded upon the land? If you find that the plaintiff is entitled to recover in this case you will ascertain whether he has sustained any damages by reason of any permanent injury to the growth of grass on said land. The plaintiff's damages upon this claim, if he is entitled to recover any, will be such only as injuriously affect the market value of the land. The question here to be determined is how much less, if any, was the land worth in the

35—Whitney v. Ritz, — N. D.
—, 151 N. W. 762.

market by reason of the defendant's cattle having been driven or herded upon the land than it would have been had the cattle not been herded or driven on the land.³⁶

IV. LIABILITY FOR INJURIES TO ANIMALS.

§ 726. Injuring or killing trespassing animals—In general.

§ 727. — Arkansas.

The court instructs the jury that the question for you to decide in this case is the motive that controlled the defendant in the killing of this dog. You are instructed that if he acted in good faith, and believed it was necessary to kill this dog in order to protect his property, he would be justified in doing it under the law; but if he killed without taking into consideration the circumstances, if he acted negligently or wantonly in shooting the dog, then you will find for the plaintiff.³⁷

§ 728. — Illinois.

The court instructs the jury that if they believe from the evidence, that the relative value of the plaintiff's dogs and the portion of defendant's growing wheat which was being destroyed by said dogs, if the evidence shows that any wheat was being destroyed, was not disproportionate, and that the defendant to protect his property from such destruction, necessarily exercised the right to defend his property in a reasonable manner, all the circumstances surrounding the transaction being considered, then the jury will find for the defendant.³⁸

The court instructs the jury that the defendant had the right to use such means as were necessary for the purpose of putting the dogs out of his field, and if in so doing it resulted in the mutilation of the animal in question it would not be a violation of law, and if the jury believe, from the evidence, that the defendant used such means as a reasonable man would use, all the circumstances considered, to exclude the dogs from his field and from his wheat, and did no more harm to the dog than was necessary,

36—Harrison v. Adamson, 86 Iowa 693.

38—Lipe v. Blackwelder, 25 Ill. App. 119.

37—Kanis v. Rogers, — Ark. —, 177 S. W. 413.

under all the circumstances proved in the case, then the jury will find for the defendant.³⁹

§ 729. Criminal offenses—Motive for act.

The court instructs the jury that if you believe from the evidence that defendant killed the hogs while they were depredating on his crops and to protect them from destruction and not out of a spirit of cruelty to the animals you will find him not guilty.⁴⁰

§ 730. Same—Aiders and abettors.

The court instructs the jury that although the defendant stands indicted with others, he is not chargeable with anything which any other one named in the indictment may have done, unless he advised, aided, or abetted others in the commission of the offense, intending at the time, by his word or act, to aid or encourage the commission of the offense. Even though the jury should believe that A and B threw the hog in controversy over the fence some time between 10 and 12 o'clock of the day on which the hog was found dead, and the hog was dead at the time it was thrown over the fence, the defendant's participation in the act of throwing the hog over the fence would not constitute him guilty of the offense charged in this case, unless the jury believe beyond a reasonable doubt that he had before that time killed the hog, or assisted in killing it, or aided or abetted, counseled or encouraged some one or more in killing the hog.⁴¹

39—Lipe v. Blackwelder, 25 Ill. App. 119.

41—Howser v. State, 117 Ala. 176.

40—Stephens v. State, 65 Miss. 329.

CHAPTER L.

APPRENTICES.

§ 731. Discharge—Right to damages.

Cross-Reference.

Matters pertaining to relation of master and servant in general, see MASTER AND SERVANT.

§ 731. Discharge—Right to damages.

The court instructs the jury that if you find that plaintiff, after he was refused a raise of wages by defendant, wilfully neglected and slighted his work for the purpose of forcing the defendant to discharge him, then he cannot recover.¹

The court instructs the jury that the plaintiff was bound by the terms of said contract to the same extent as the defendant and plaintiff had no right to demand more wages than the contract provided, and had no right to resent the action of the defendant in refusing to give him higher wages, if you find that he did resent it.²

1—Lepan v. MacKinnon Boiler & Machine Co., 178 Mich. 18.

2—Lepan v. MacKinnon Boiler & Machine Co., 178 Mich. 18.

CHAPTER LI.

ARBITRATION AND AWARD.

§ 732. Award—Validity—In general.

§ 733. Same—Resignation of arbitrator induced by fraud of co-arbitrators.

§ 734. Same—Conclusiveness—Implied agreement.

§ 732. Award—Validity—In general.

The court instructs the jury that if you find from the evidence, that the plaintiff and defendant agreed to submit their differences to arbitration, and if you find such award was made as agreed, you should find for the plaintiff for the amount found by the arbitrators in such matter, unless you further find (1) that said award does not include all the differences in dispute between plaintiff and defendant at time of the alleged award; or (2) that defendant was not accorded a reasonable notice of the time of the hearing.¹

§ 733. Same—Resignation of arbitrator induced by fraud of co-arbitrators.

The court instructs the jury that if you believe from the evidence that one of the arbitrators, _____, was induced to resign or withdraw from the arbitration by reason of the agreement of the other two arbitrators, _____ and _____, to withdraw and resign their authority as such arbitrators, and thereby the said arbitrator _____, so resigning, was prevented from meeting with the arbitrators at the time of the making of the award, in such case the award is void, and you should find for the defendant.²

§ 734. Same—Conclusiveness—Implied agreement.

The court instructs the jury that if you find from the evidence in this case that the plaintiff and defendant mutually agreed to

1—Amos v. Buck, 75 Iowa 651.

2—McCord v. McSpaden, 34 Wis.

submit a matter in controversy between them to arbitrators, and to abide by their award, and that said arbitrators did meet under said agreement and render an award, you should find for the plaintiff. You are further instructed that if you find from the evidence that after said arbitrators had the matter under investigation they adjourned, and notified the parties that they could not agree and had adjourned, then your verdict should be for the defendant, unless you further find from the evidence in the case that the parties afterwards agreed to submit to and abide by any award they might render. You are further instructed that it is not necessary that the evidence show that the parties plaintiff and defendant actually agreed, in so many words, to submit the matter in controversy to, and abide by, the award, but such agreement may be inferred by you from the acts and conduct of the parties plaintiff and defendant, and all the facts and circumstances introduced as evidence must show that both parties agreed to submit the matter and to abide by the award; for if one of the parties agreed, and the other did not, the verdict should be for the defendant. You are further instructed that the plaintiff is required to make out his case by a preponderance of the evidence.³

3—Couch v. Harrison, 68 Ark. 580.

CHAPTER LII.

ARCHITECTS.

- § 735. Authority—Employment of labor.
- § 736. Compensation—Plans for building whose estimated cost exceeds amount stipulated.
- § 737. Same—Negligence in superintending construction of building.
- § 738. Liability of negligence—Care and skill required in superintending construction of building.

Cross-Reference.

See BUILDING AND CONSTRUCTION CONTRACTS.

§ 735. Authority—Employment of labor.

The court instructs the jury that if they believe from the evidence that defendants (employed A as their architect, to draw for them plans and specifications for a building to be erected for defendants and to superintend the building during its erection, and that defendants entered into a contract with B to erect such building and complete it for a stipulated price according to such plans and specifications, and if the jury believe from the evidence that the plans and specifications called for brick piers under said building and that the building so contracted for was in process of erection by B under the contract with the defendants, given in evidence in this case, and that A acted as architect under said contract, then, although the jury may further believe, from the evidence, that A while so acting, employed the plaintiffs to remove the brick piers and put stone ones in their places, and that there was necessity for so doing, yet the court instructs the jury as a matter of law, that A by virtue of his employment as architect, had no authority to bind defendants by employing plaintiffs to do said work and in the absence of proof that defendants authorized A beforehand to do so, or had knowledge of all the facts, and subsequently ratified such act of employment, the

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jury should find for defendants, and the court instructs the jury that if they believe from the evidence that at the time of doing the work in question here sued for B was constructing the building either by himself or his subcontractors, and that B was doing said work under the said special contract given in evidence, then, although the defendants, or one of them, was present at times when plaintiffs were doing the work in question, and said work was for their benefit or the benefit of the premises, still, the law will not imply an undertaking on the part of defendants to pay for said work.¹

§ 736. Compensation—Plans for building whose estimated cost exceeds amount stipulated.

The court instructs the jury that if they find that defendant employed plaintiff to draw plans for the ——— avenue house, and was advised by plaintiff, before the completion of the plans, that the house would cost ———, and that defendant, after being advised of the probable cost of the building, directed plaintiff to go on and complete the plans, he would be liable to plaintiff for his services as architect, although he may have previously determined not to invest so large amount in said building.²

The court instructs the jury that if they find that the defendant, after knowing or being fully advised of the cost of the construction of the houses according to the plans and specifications therefor exhibited in evidence, by a payment or otherwise, accepted the work of plaintiff thereon, he would be liable in like manner as if he had originally contracted with plaintiff for plans of houses to cost such sum.³

§ 737. Same—Negligence in superintending construction of building.

The court instructs the jury that if they believe from the evidence that plaintiff was employed by defendant as architect to superintend the erection of the building described in the declaration and that plaintiff had control of the workmen employed

1—Campbell v. Day, 90 Ill. 363.

3—Hight v. Klingensmith, 75 Ark.

2—Hight v. Klingensmith, 75 Ark. 218.

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in the construction of the building and that the workmen were to be paid in installments as the building progressed and on production of the architect's certificates, and that plaintiff suffered a substantial defect in the work to pass uncorrected, which ordinary vigilance could have prevented, then the jury are instructed that plaintiff cannot recover for his services.⁴

§ 738. Liability for negligence—Care and skill required in superintending construction of building.

The court instructs the jury that if a person employs an architect to draw plans for him and superintend the proper erection of the buildings and such architect is made the superintendent in the contracts between the owner and the contractors, and he only undertakes to give such superintendence as an architect usually gives, it is the duty of such architect to exercise such care and skill in the superintending of work on such buildings, as is customarily required from architects, and if the jury believe from the evidence that the defendant did not exercise the skill and care which architects are customarily required to exercise, and damages resulted to plaintiff from the failure to exercise such care and skill, then the jury should find for the plaintiff.⁵

4—Peterson v. Rawson, 15 N. Y. Super. Ct. (2 Bosw.) 234.

5—Vigeant v. Scully, 20 Ill. App. 437.

CHAPTER LIII.

ARREST.

- § 739. Right to arrest without warrant—In general.
§ 740. — Michigan.
§ 741. — South Carolina.
§ 742. — Texas.

Cross-References.

Liability for illegal arrest, see FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

§ 739. Right to arrest without warrant—In general.

§ 740. — Michigan.

If the jury shall find that the plaintiff, was at the time she was arrested walking on the street without molesting any one, then she was not committing any act that would justify the defendant in arresting her without a warrant, and his act in arresting her was unjustifiable, and the burden is on him to justify the act.¹

If the jury shall find that the plaintiff, at the time she was arrested by the defendant was conducting herself in an orderly manner, and not committing any breach of the peace, then the defendant had no right or authority to arrest her.²

No officer is justified in making an arrest without a warrant, when the person whom he arrests is peaceable and not engaged in open violence, as for example, by fighting, engaging in a riot, or about to escape after committing a felony.³

1—Pinkerton v. Verberg, 78 Mich. 573, 7 L. R. A. 507, 18 Am. St. Rep. 473.

2—Pinkerton v. Verberg, 78 Mich. 573, 7 L. R. A. 507, 18 Am. St. Rep. 473.

3—Pinkerton v. Verberg, 78 Mich. 573, 7 L. R. A. 507, 18 Am. St. Rep. 473.

The law does not look with favor on arrests made without a warrant, and an arrest without a warrant cannot be justified if the person arrested was not engaged in a breach of the peace, as for example in fighting or in a riot or about to escape after having committed a felony.⁴

§ 741. — South Carolina.

The court instructs the jury that an officer or a private individual may lawfully arrest, without a warrant, one whom he has reasonable grounds to suspect of having committed a felony. An officer or a private individual may also arrest, without a warrant, a person upon suspicion of felony, upon the information of a third person. An officer or a private citizen may lawfully arrest, without a warrant, one whom he has reasonable grounds to suspect of having committed a felony; and it is immaterial whether the suspicion arises out of information given by another, or whether it arises out of the officer's own knowledge.⁵

The court instructs the jury that an individual, without a warrant, acting in good faith, may arrest a particular individual for having committed a felony in a sister state on an occasion already passed.⁶

§ 742. — Texas.

The court instructs the jury that this is an action by plaintiff against the defendant, for the illegal arrest by defendant of plaintiff, under circumstances of aggravation, as alleged by plaintiff. Under the laws of ———, no civil officer has the right to arrest a citizen of ——— unless he has a warrant, and if demanded, to exhibit same; or unless some offense against the criminal law is committed, by the person arrested, in the presence of the officer.⁷

4—Pinkerton v. Verberg, 78 Mich. 573, 7 L. R. A. 507, 18 Am. St. Rep. 473.

5—State v. Whittle, 59 S. C. 297.

See State v. Davis, 53 S. C. 150, 69 Am. St. Rep. 845.

6—State v. Whittle, 59 S. C. 297.

7—Hall v. O'Malley, 49 Tex. 70.

CHAPTER LIV.

ARSON.

- § 743. In general.
- § 744. Nature and elements of crime—"Burning."
- § 745. Same—"Destruction or consumption of part of house."
- § 746. Same—Explosion.
- § 747. Issues and proof—Ownership of property.
- § 748. Parties to crime—Aiders and abettors.
- § 749. Same—Conspirators.
- § 750. Evidence—Weight and sufficiency—Confession.

Cross-References.

Fires caused by sparks from locomotives, see RAILROADS; matters pertaining to law of crime in general, see CRIMINAL LAW.

§ 743. In general.

The court instructs the jury that if they find and believe from the evidence that at the county of ——— and state of ———, at any time within ——— years next before the ——— day of ———, 19—, the date of the filing of the information in this case, that the defendant, A, did then and there unlawfully, willfully, maliciously, and feloniously set fire to and attempt to burn a certain building, to wit, a storeroom at No. ——— street, there situate and adjoining to a certain inhabited dwelling house of one B, there situate, and that said inhabited dwelling house of the said B, by the firing, if any, of the said storeroom as aforesaid was then and there endangered, then you will find the defendant guilty as charged in the information, and assess his punishment at imprisonment in the state penitentiary for any term not less than ——— years. Willfully means intentionally, not accidentally. Feloniously means wickedly and against the admonitions of the law, unlawfully. Maliciously means a wrongful act intentionally done without just cause or excuse.¹

1—State v. Myer, 259 Mo. 306.

§ 744. Nature and elements of crime—"Burning."

The court instructs the jury to find that the building was burned if it was in some appreciable degree burned or consumed. The burning is sufficient as an element in said crime, if it shall appear that the woodwork or inflammable parts of the said building were by the fire to some extent consumed. In other words, if fire was communicated to the woodwork or other inflammable materials of which said building was constructed or composed to such an extent as that the same were in some measure destroyed, the fire being shown to have been so communicated as that, unless put out, the said building would probably have been, as to the inflammable parts thereof, wholly destroyed, then the proof made will be sufficient to support the charge made in the indictment. If, therefore, you find from the evidence before you that the fire which was discovered in the building had so far progressed as that the woodwork or inflammable material in the room in question was found to be on fire, and that such woodwork was in some degree charred or destroyed by such fire, and that such fire, unless put out, would have gone on to a probable destruction of said building, then you will be justified in finding in the affirmative of the first proposition submitted to you, viz., that the building was in some appreciable degree consumed.²

§ 745. Same—"Destruction or consumption of part of house."

The court instructs the jury that if the surface of any plank or part of the latticework of said house was charred by the flames, this is a destruction or consumption of a part of said house, within the meaning of the law.³

§ 746. Same—Explosion.

The court instructs the jury that the explosion of a house by means of an explosive matter does not come within the definition of "arson," unless it results in setting the house on fire.⁴

§ 747. Issues and proof—Ownership of property.

The court instructs the jury that if the State failed to prove by evidence of title, ownership of the property fired as charged

2—State v. Spiegel, 111 Iowa 701.

4—Landers v. State, 39 Tex. Cr.

3—Benbow v. State, 128 Ala. 1. App. 671.

in the indictment, the jury can not find the defendant guilty.⁵

§ 748. Parties to crime—Aiders and abettors.

The court instructs the jury that if they find from the evidence, beyond a reasonable doubt, that defendant was informed of the object of A in going to the premises, and did hold the horse while he or another set fire to the house, they should find him guilty.⁶

§ 749. Same—Conspirators.

The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the defendants, or any of them, together or with others, prior to the fire in question entered into a conspiracy to commit the crime of arson as charged in the indictment, and you further believe from the evidence, beyond a reasonable doubt, that thereafter said conspirators, or any of them, pursuant to said conspiracy and in furtherance thereof, set fire to and burned said building as charged in the indictment, then such defendants, if any, as entered into said conspiracy, are guilty of the crime of arson.⁷

The court instructs the jury that if you find from the evidence in this case, beyond a reasonable doubt, that the defendants A and B, and C, prior to the commission of the crime charged herein, entered into a criminal conspiracy for the purpose of burning the property of D, as alleged in the indictment, and if you further find from the evidence, beyond a reasonable doubt, that pursuant to such conspiracy and in furtherance thereof C did burn the property of D, as alleged in the indictment, then the act of C was the act of all of the persons who joined the conspiracy, and all persons so participating in such conspiracy are guilty of arson.⁸

The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the defendants, or any of them, willfully and maliciously burned the building of A men-

5—Boles v. State, 46 Ala. 204.

7—People v. Harris, 263 Ill. 406.

6—People v. Jones, 123 Cal. 65, 55

8—People v. Spira, 264 Ill. 243.

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tioned in the indictment, or willfully and maliciously caused it to be burned in manner and form as alleged in the said indictment, without the consent of the owner thereof, then the defendants, or such of them as to whom you have such belief, are guilty of arson, and you will find them or him guilty as charged.⁹

§ 750. Evidence—Weight and sufficiency—Confession.

The court instructs the jury that if you believe from the evidence in this case that the house charged in the indictment was a gin house; if you should find that the house was burned maliciously, burned in the manner as charged in the indictment, and defendant has confessed that he did it that way, then that is sufficient corroboration, and that if you find there is any confession, and that it has been corroborated by other facts and circumstances satisfactory to your mind beyond a reasonable doubt it is your duty to convict the defendant.¹⁰

The court instructs the jury that if the evidence be clear and decisive, satisfying your minds beyond a reasonable doubt that the storehouse was willfully and maliciously burned, and if you believe that the defendant freely and voluntarily confessed that he did it, then such a confession thus corroborated may, in your discretion, serve as sufficient corroboration to authorize a conviction.¹¹

9—*People v. Spira*, 264 Ill. 243.

11—*Morgan v. State*, 120 Ga. 499.

10—*Wimberly v. State*, 105 Ga. 188.

CHAPTER LV.

ASSAULT AND BATTERY.

I. CIVIL LIABILITY.

- § 751. Nature and elements of tort—In general.
- § 752. — Kentucky.
- § 753. — Missouri.
- § 754. — Washington.
- § 755. Same—Insulting words.
- § 756. Same—Indecent assault on female.
- § 757. — Illinois.
- § 758. — Indiana.
- § 759. Intent and malice.
- § 760. Ability to inflict injury.
- § 761. Proximate cause of injuries.
- § 762. Persons liable—Aiders and abettors—In general.
- § 763. — Alabama.
- § 764. — Illinois.
- § 765. Same—Same—Person called by town marshal to latter's assistance.
- § 766. Defenses—Accident.
- § 767. Same—Agreement to fight.
- § 768. Same—Insulting words.
- § 769. Same—Good faith and absence of malice.
- § 770. Same—Self-defense—In general.
- § 771. Same—Same—Duty to retreat.
- § 772. Same—Same—Degree of force justifiable.
- § 773. — Arkansas.
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- § 775. — Kentucky.
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- § 777. — Missouri.
- § 778. — Texas.
- § 779. Same—Defense of property.
- § 780. — Georgia.
- § 781. — Illinois.
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- § 783. — Michigan.
- § 784. — Missouri.
- § 785. — Nebraska.

- § 786.~ — Washington.
- § 787. — Wisconsin.
- § 788. Same—Attempted escape of plaintiff after arrest for misdemeanor.
- § 789. Same—Disorderly conduct of plaintiff while under arrest.
- § 790. Issues and proof.
- § 791. Evidence—Presumptions and burden of proof.
- § 792. Same—Weight and sufficiency—In general.
- § 793. Same—Same—Degree of proof required.
- § 794. Questions for jury.
- § 795. Damages—Actual damages.
- § 796. — Indiana.
- § 797. — Iowa.
- § 798. — Kentucky.
- § 799. — Maryland.
- § 800. — Minnesota.
- § 801. — Nebraska.
- § 802. — Texas.
- § 803. — Wyoming.
- § 804. Same—Same—Mitigating facts.
- § 805. — Missouri.
- § 806. — Texas.
- § 807. Same—Exemplary damages.
- § 808. — Kentucky.
- § 809. — South Dakota.
- § 810. — Texas.
- § 811. — Wisconsin.
- § 812. — Wyoming.

II. CRIMINAL LIABILITY.

- § 813. Nature and elements of crime—In general.
- § 814. — Alabama.
- § 815. — Oregon.
- § 816. Same—'To beat' construed.
- § 817. Same—Insulting words.
- § 818. Same—Chastisement of child by person in loco parentis.
- § 819. Same—Aggravated assault—In general.
- § 820. Same—Same—On female.
- § 821. Intent and malice—Aggravated assault on female.
- § 822. Same—Shooting at another.
- § 823. Ability to inflict injury.
- § 824. Defenses—In general.
- § 825. — Georgia.
- § 826. — Texas.
- § 827. Same—Corrective purpose.
- § 828. Same—Excessive punishment of child.
- § 829. Same—Insulting words.
- § 830. Same—Self-defense—In general.

- § 831. Same—Same—Combat by mutual consent.
- § 832. Same—Same—Apprehension of danger.
- § 833. — Oregon.
- § 834. — Texas.
- § 835. Same—Same—Duty to retreat.
- § 836. Same—Defense of another.
- § 837. Evidence—Presumptions and burden of proof.

Cross-Reference.

Assault with intent to kill, see HOMICIDE.

I. CIVIL LIABILITY.

§ 751. Nature and elements of tort—In general.

§ 752. — Kentucky.

The court instructs the jury that if you believe from the evidence that on or about the — day of —, 19—, the defendant, A, not in his necessary, or to him apparent necessary, self-defense, as defined in instruction No. —, assaulted, beat, or bruised plaintiff, and thereby injured him, you will find for plaintiff.¹

§ 753. — Missouri.

The court instructs the jury that if defendant violently and willfully beat and wounded the plaintiff, then the verdict should be for him unless plaintiff first made an attack on defendant and that he resisted such attack by using no more force to repel it than was necessary.²

The court instructs the jury that they should find for the plaintiff, if they believe from the evidence that defendant maliciously assaulted plaintiff, and that in so doing he was not acting in self-defense of his person or of his father.³

The court instructs the jury that if the jury believe from the evidence that the defendants or either of them, either alone or with other persons present at the time, all acting in concert together, with the same common purpose or design, assaulted the plaintiff while the plaintiff was discharging his duties as a con-

1—Renfro v. Barlow, 131 Ky. 312.

3—Courtney v. Kneib, 131 Mo.

2—Johnson v. Daily, 136 Mo. App. App. 204.

ductor in the employment of the ———— Railroad Company and in charge of said company's car, and that while engaged in so assaulting plaintiff the defendants, or either of them, or any one or more of such persons, if any, present at the time and acting in concert as above explained with the defendants, or either of them, did strike or beat the plaintiff over his head or his hand or both with a beer bottle, and that such assault, striking and beating were so made on the plaintiff without just provocation, then you will find a verdict in favor of the plaintiff and against the defendant or defendants making such assault.⁴

§ 754. — Washington.

The court instructs the jury that an assault is an action, or conduct, on the part of the defendant—for instance, if you believe her testimony that he shook his fist in front of her face angrily and unlawfully, when he was in such proximity to her, as that he could, or might have, struck her, also near enough to produce a feeling on her part that she might be struck, that would be an assault. Then, of course, if he did strike her, that would be an assault and battery. She may recover in case you only find assault, or in case you find assault and battery, if you find it was made unlawfully and under the circumstances I have mentioned.⁵

§ 755. Same—Insulting words.

The court instructs the jury that words do not constitute an assault.⁶

The court instructs the jury that the plaintiff in this case is not entitled to recover any damages by reason of any words that it is claimed were spoken by the defendant.⁷

§ 756. Same—Indecent assault on female.

§ 757. — Illinois.

The court instructs the jury that if they believe from the evidence, that the defendant assaulted the plaintiff, as testified to

4—Brouster v. Fox, 117 Mo. App. 711.

5—Howell v. Winters, 58 Wash. 436, 108 Pac. 1077.

6—Galvin v. Starin, 132 App. Div. (N. Y.) 577.

7—Galvin v. Starin, 132 App. Div. (N. Y.) 577.

by her, by laying his hands on her, accompanied with the threat that he would kill her, or words, in substance, that if she did not consent to sexual intercourse with defendant, this in itself will warrant the jury in finding the defendant guilty, although the jury may further believe, from the evidence, that she ultimately freely assented to such intercourse. If, however, the jury believe that such ultimate assent was not freely given, but was yielded by the plaintiff only as a consequence of the preceding violence or force, then such sexual intercourse should be regarded by the jury as a part of the assault, and a ground for exemplary damages—that is, such as will compensate the plaintiff for any wrong to her, and to punish the defendant, and to furnish an example to deter others from like practices.⁸

§ 758. — Indiana.

The court instructs the jury that if they believe, and find from the evidence that on ———, 19—, the defendant went to the home of plaintiff in the town of ———, ——— county, ———, and then and there requested said plaintiff to have sexual intercourse with him and then and there, in a rude and insolent manner, and with force took hold of plaintiff, and hugged her and kissed her, and felt her breasts, and attempted to raise her clothing, during all of which time said defendant implored plaintiff to yield to his solicitations and sexual intercourse, all of which was against the will of said plaintiff, then your verdict will be for the plaintiff.⁹

§ 759. Intent and malice.

The court instructs the jury that the plaintiff had a right to go about the public roads or places on his own business, free from molestation by the defendant or any one, so long as he conducted himself in an orderly manner. And any one guilty of violating any of these rights is liable for the actual damages suffered therefrom by the injured person. It matters not whether the wrong be one of pure neglect or a wanton or wilful wrong;

8—*Miller v. Balthasser*, 78 Ill. 302.

9—*Timmons v. Kenrick*, 53 Ind. App. 490.

an action will lie for the actual damages suffered. Actual malice or wanton and wilful conduct on the part of the wrongdoer is material only on the question of punitive or exemplary damages and must be shown in order to recover such damages; but, if you find that the plaintiff in this case has been injured by the wrongful acts of the defendant, you have a right to assess actual or compensatory damages against the defendant caused by such wrongful acts regardless of whether there was any actual malice or intent to do wrong on the part of the defendant or not.¹⁰

§ 760. Ability to inflict injury.

The court instructs the jury that wantonly and recklessly pointing a revolver at another, when but a few feet away, under such circumstances as would instantly lead such other to believe it to be loaded, would be an assault, whether such revolver was in fact loaded or not, if you find from the evidence that the act of the person holding such revolver was such as to cause a reasonable person to believe that he intended to do harm with it.¹¹

§ 761. Proximate cause of injuries.

The court instructs the jury that if you find from the evidence that the plaintiff was diseased at and before the punishment complained of, and that her present condition is attributable to such former diseased condition, and not in any manner or part attributable to such punishment, then you must find for the defendant. If you find that the plaintiff was diseased at and before the punishment she received, if any, but that by the punishment her disease has been aggravated or intensified, then you will give her damages for just such injuries as she has sustained which were the result of the punishment.¹²

§ 762. Persons liable—Aiders and abettors—In general.

§ 763. — Alabama.

The court instructs the jury that if A aided, abetted, or encouraged B in entering into or continuing an unlawful assault

10—Williams v. Campbell, 22 Wyo. 1, 133 Pac. 1071.

12—Treschman v. Treschman, 28 Ind. App. 206.

.11—Atkins v. Gladwish, 27 Neb. 841.

on plaintiff, then he would be responsible for whatever B did in the furtherance of such assault, notwithstanding that he may not have explicitly encouraged, aided, or abetted any one particular act of defendant B.¹³

§ 764. — Illinois.

The court instructs the jury that if the jury believe from the evidence, that the plaintiff had not committed any offense alleged in the defendants' pleas, and that they both concurred in laying hands on him and arresting him, then the jury are instructed that they should find both the defendants guilty, and assess the plaintiff's damages.¹⁴

The court instructs the jury that if they believe from the evidence and under the instructions herewith given, that the defendants, A and B, were both engaged in the common purpose of unlawfully arresting the plaintiff, and that A had laid hold of the plaintiff, and that B immediately afterwards, in pursuance of said common purpose of unlawfully arresting said plaintiff, struck said plaintiff with a club, and that said striking was done in the presence of A, and that A did not try to prevent the same, but, on the contrary thereof, adopted and approved said act of said B in striking said plaintiff, then the jury are instructed that said A is as responsible in this action for said striking as is B.¹⁵

§ 765. Same—Same—Person called by town marshal to latter's assistance.

The court instructs the jury that the defendant A is not liable for the wrongful conduct of the defendant B unless he (A) was giving aid, assistance, or in some way encouraging the defendant B in the wrongful conduct. If you find that the defendant A was called by the defendant B, who was acting as town marshal, to go along with him for that purpose, and without any purpose

13—Abney v. Mize, 155 Ala. 391.

15—Mullin v. Spangenberg, 112 Ill. 140.

14—Mullin v. Spangenberg, 112 Ill. 140.

to do anything other than that which was necessary to arrest the plaintiff, and that while they were so engaged in such arrest, or attempt to recapture the plaintiff after he had fled, if he did flee, the defendant B shot the plaintiff, and that such shooting was necessary, still the defendant A would not be liable for damages resulting from such shooting unless the said defendant A in some way aided, abetted, or encouraged the defendant B to shoot the plaintiff; and you should, on such facts, find for the defendant A.¹⁶

The court instructs the jury that the fact, if it is a fact, that the town marshal called upon A to assist him in the discharge of his official duties, was sufficient authority on the part of A to justify him in going with such marshal to assist him in the discharge of his official duties; and if the defendant A did go with his codefendant to assist him under such circumstances as above stated, and remained on the outside of the house to watch, as directed by said marshal, and acted in good faith, and did not personally commit an assault or an assault and battery upon the plaintiff, then, in such case, he would not be liable, and you should find for the defendant A, even if you should believe that the defendant B [the marshal] exceeded his jurisdiction and acted without authority, and wrongfully committed an assault and battery upon the plaintiff.¹⁷

The court instructs the jury that every person must aid an officer in the execution of a warrant, if the officer requires his aid, and be himself present and acting in its execution. The person who is thus called on is protected by the call from being sued for rendering the requisite assistance. If the officer has no warrant, or authority that will justify him, he may be liable as a trespasser; but the person who is called upon for aid, having no means of knowing what the warrant is by which the officer acts, and who relies upon the official character and call of the

16—*Stuck v. Yates*, 30 Ind. App. 441.

17—*Stuck v. Yates*, 30 Ind. App. 441.

officer as his security for doing what is required to do, is clearly entitled to protection against suit by the person arrested.¹⁸

The court instructs the jury that if the jury should believe from the evidence in the case that the defendant A used more force than was necessary to accomplish the arrest, or to recapture the plaintiff after he fled, if he did flee, still, if the jury find that the defendant B used no more force than was necessary for such purpose, and that he was not aiding, abetting, or encouraging the defendant A in the use of such excessive force, in such case the plaintiff could not recover against the defendant B, and you should find for him.¹⁹

§ 766. Defenses—Accident.

The court instructs the jury that if they find from the evidence that the defendant did not assault the plaintiff, but having his pistol in his hands for a lawful purpose, and by the negligent or careless handling of the pistol or by accident the pistol was discharged and the plaintiff received an injury, he cannot recover damages for that injury in this action. Again, if the plaintiff assaulted the defendant, the defendant having the pistol in his hands and the discharge of the pistol was caused by the pushing and jostling and assault of the plaintiff and it was discharged without design on the part of the defendant, then the defendant would not be liable for damages for the injury consequent upon the discharge of the pistol.²⁰

§ 767. Same—Agreement to fight.

The court instructs the jury that if you believe from the evidence that plaintiff and defendant voluntarily and by agreement entered into a fight, still I charge you that such agreement, if made, was unlawful, for the reason that such agreement, if made, would be in violation of the laws of the state and void, and such agreement, if made, would not be any defense to this action.²¹

18—Stuck v. Yates, 30 Ind. App. 441.

19—Stuck v. Yates, 30 Ind. App. 441.

20—Krall v. Lull, 49 Wis. 403.

21—Morris v. Miller, 83 Neb. 218, 20 L. R. A. (N. S.) 907n, 131 Am. St. Rep. 636, 17 Ann. Cas. 1047.

§ 768. Same—Insulting words.

The court instructs the jury that the plaintiff, as conductor, had a right, and it was his duty, to remonstrate against offensive and disorderly conduct on the car, and that if defendants persisted in such conduct, he had the right to order such of them as persisted therein, from the car, and if necessary, to eject such person or persons; and further, that any words used by plaintiff in requesting them to desist from such conduct or in threatening to eject them from such car if they persisted in being rude, was no justification for an assault upon the plaintiff.²²

§ 769. Same—Good faith and absence of malice.

The jury are instructed that though a teacher may inflict reasonable and necessary corporal punishment upon a pupil, if the jury believe that the punishment inflicted was unnecessary and excessive the fact that the teacher acted honestly in good faith and without malice is no defense.²³

§ 770. Same—Self-defense—In general.

The court instructs the jury that the right of self-defense is derived from nature. To repel force by force is the common instinct of every creature that has means of defense. Sudden and strong resistance to unrighteous attack is not merely a thing to be tolerated. In many cases it is a moral duty. Municipal law has left to individuals the exercise of this natural right of self-defense in all cases in which the law is either too slow or too feeble to stay the hand of violence, and it is to be considered that a man repelling imminent danger cannot be expected to use as much care as if he had time to act deliberately.²⁴

The court instructs the jury that the law permits every man to defend himself when wantonly assailed, and in such defense it requires of him only such prudence as is common among ordinarily careful men, and that, if unusual and not to be

22—Brouster v. Fox, 117 Mo. App. 711.

24—Norris v. Whyte, 158 Mo. 20.

23—Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156n.

expected results follow from a defense so made, the original wrongdoer and aggressor must suffer for them, and not he who only engaged in his own defense, and could not reasonably have foreseen such unusual results.²⁵

The court instructs the jury that if a person wilfully trespasses upon the premises of another, and while so trespassing assaults the owner thereof, and the owner, while defending his person from such assault, inflicts an injury upon the party thus making such assault, the party thus injured cannot recover damages for the injury so received.²⁶

§ 771. Same—Same—Duty to retreat.

The court instructs the jury that if you find from the evidence that the witness A entered the defendant's store and engaged in loud, angry, and profane language, then the defendant had the right to direct him to stop the use of such language and quit the premises; and if you find from the evidence that, upon being requested to stop the use of improper language or to withdraw, the witness A made a move to strike the defendant with his hand, then such movement was an assault upon the defendant, although the blow may have been intercepted or failed to reach the defendant. And if you find that A did make such an offer to strike the defendant, then in that case the defendant, being upon his own premises, was not obliged to retreat, but he had the right then and there to repel such attack with a blow, using all the force necessary to cause A to cease his assault. The party assaulted in such a case is not required to use any close or nice calculation to determine just exactly the degree of force necessary, not overstepping such measurement a hair's breadth on either side, but he may use all such force as a reasonable, prudent man, under like circumstances of excitement and danger, would use to repel such an assault. And in case you find the defendant was justified in striking the plaintiff, A, then in that case he is not to be charged with any unusual or unlikely result which may have in fact followed the blow given in this particular case. By this is meant that if you should find that by reason of any

25—Norris v. Whyte, 158 Mo. 20.

26—Norris v. Whyte, 158 Mo. 20.

peculiar physical condition existing at the time in A, which was not apparent to B [defendant], and would not be apparent to persons of ordinary observing disposition, the blow struck in this case carried with it consequences and results that were unusual and beyond those which are ordinarily to be expected from such a blow, then in that case the mere unusual severity of the consequences will not make that liability to damages in the defendant which would not have been such liability had the blow been followed by only such consequences as might reasonably have been expected.²⁷

§ 772. Same—Same—Degree of force justifiable.

§ 773.—Arkansas.

The court instructs the jury that if you find from the evidence that the plaintiff, A, made an assault upon the defendant, B, with a dangerous weapon, and that B, in good faith, believed that it was necessary for him to strike A in order to prevent A from striking him with the weapon (to avoid the infliction of bodily harm upon himself) and that B used no more force than was necessary (as the situation appeared to the defendant under the circumstances) then you should find for the defendant.²⁸

The court instructs the jury that an assault is an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another; and if you find from the preponderance of the evidence that, at the time defendant struck plaintiff, plaintiff was committing an assault upon him, the defendant was justified in using such force as appeared to him reasonably necessary, acting as a prudent person would under similar circumstances, to resist the assault of plaintiff, and to prevent any renewal of such assault, if such renewal could be reasonably apprehended.²⁹

The court instructs the jury that if you find from a preponderance of the evidence that, at the time defendant struck plaintiff, plaintiff was attempting to strike defendant, or if it reasonably

27—Nortis v. Whyte, 158 Mo. 20.

29—Downey v. Duff, 106 Ark. 4.

28—Downey v. Duff, 106 Ark. 4.

appeared to defendant, viewed from his standpoint alone, by words or acts of plaintiff, that plaintiff was about to make an unlawful attack upon him, in that event defendant had a right to use whatever means was necessary to protect himself from serious bodily injury; and this is the case although it subsequently appeared that defendant used more force than was actually necessary to protect himself from serious bodily harm.³⁰

§ 774. — Indiana.

The court instructs the jury that a person in repelling an assault has no right to use greater force than, under the circumstances, he believes to be reasonably necessary for self-protection, and, if he does, he will be liable for the excessive force used.³¹

§ 775. — Kentucky.

The court instructs the jury that if you believe from the evidence that, at the time defendant assaulted the plaintiff, the defendant in good faith believed, and had reasonable grounds to believe, that the defendant was then and there in danger of bodily harm about to be inflicted upon him by the plaintiff, and that the defendant used no more force that was necessary, or appeared to him in the exercise of a reasonable judgment to be necessary, to protect himself from injury at the hands of plaintiff, you will find for the defendant, unless you believe that defendant brought on the difficulty by first striking plaintiff or assaulting him with a lap ring, in which event, you cannot find for defendant on the ground of self-defense.³²

§ 776. — Michigan.

The court instructs the jury that the defendant was the best judge of what was necessary to defend himself against the attack, and of the means to be used for his own protection. As a technical legal proposition this is undoubtedly correct, and it is true not only as a matter of law, but as a matter of common sense, that the party attacked is obliged in the very nature of the case, to exercise his best judgment at the time as to what

30—Downey v. Duff, 106 Ark. 4.

32—Renfro v. Barlow, 131 Ky.

31—Reichers v. Dammeier, 45 Ind. 312.

App. 208.

shall be done in his own defense, and his judgment is one which, if honestly exercised, is to a large extent controlling. It would be absolutely controlling unless the jury should find that his exercise of it at the time and under the circumstances was such an exercise as was unreasonable under all the evidence in the case.³³

The court instructs the jury that it is proper for you also to consider, if you find that plaintiff made the first attack, that the defendant, being required to act thus, in the excitement and heat of affray, could not be expected to exercise that nice discretion and accredited judgment which the jury by a careful sifting of the testimony of all the witnesses aided by the arguments of counsel and the charge of the court, would be able to do; and therefore his conclusion, though he acted honestly and in good faith, might not be perfectly correct and just. Therefore, this is the law, that if the defendant did use more force than is actually necessary for self-protection, if you find that he sincerely believed at the time that he was using only so much force as was necessary for his own defense, and if you also find that he acted honestly and in good faith in coming to that conclusion, and if you find also from the evidence that such a belief was a reasonable belief on his part under the circumstances that surrounded him at the time and as the situation appeared to him,—then he would not be guilty of an assault by reason of the use of such excessive violence. * * * The defendant would be justified in resorting to such reasonable force as to him seemed to be necessary in the honest exercise of his judgment to protect himself from the injury which he fully believed the plaintiff was about to inflict upon him. * * * If you find such appearance justified that belief, and defendant's judgment was honestly exercised in coming to that conclusion, he would then have a right to thus repel or prevent the actual assault, using such force, and such alone as was reasonably necessary or appeared to him as reasonably necessary at the time to protect himself.³⁴

33—Kent v. Cole, 84 Mich. 579.

34—Kent v. Cole, 84 Mich. 579.

The court instructs the jury that in defending himself against an unlawful attack of another, a man is justified in resorting to such violence and the use of such force as the particular circumstances of the case may require for his protection. Now, the degree of force to be employed in protecting one's person must be in proportion to the attack made, and must depend upon the circumstances in each particular case, and the imminence of danger as it appears to him at the time. The only purpose which justifies the employment of force against the assault is to defend one's self, that is the object to be attained; and a man is only justified in using such an amount of force as may appear to him at the time to be necessary to accomplish that purpose. As soon as that object is attained, it is his duty to desist. * * * If he used a kind of force towards his assailant in excess or out of proportion to what may be necessary to his own defense, as it honestly appeared to him at the time, he is himself guilty of an assault.³⁵

§ 777. — Missouri.

The court instructs the jury that if they believe the defendant apprehended that plaintiff was about to do him some great bodily harm, and that there was reasonable cause for believing the danger was imminent, and that such danger was about to fall upon him, then he had a right to act on appearances and to use such force as seemed necessary to avoid the danger, and he was not required to nicely gauge the amount of force necessary to repel the assault.³⁶

§ 778. — Texas.

The court instructs the jury that violence to the person does not amount to an assault and battery when it is inflicted in self-defense, against unlawful violence offered to the person; but only that degree of force must be used which is reasonably necessary to repel the threatened violence. The danger of violence to the person, in order to justify an assault and battery

35—Kent v. Cole, 84 Mich. 579.

36—Johnson v. Daily, 136 Mo. App. 534.

by any one, need not be real, but may be apparent only, provided he acted on a reasonable apprehension of danger of violence, and the circumstances must be viewed from the standpoint of the person acting thereon at the time.³⁷

§ 779. Same—Defense of property.

§ 780. — Georgia.

“Every man’s house is his castle.” This is an old expression and comes down to us from those feudal times when the grand people lived in large fortified houses which were called castles. In these castles they resisted any entrance except by permission. From this source has come the expression that “every man’s house is his castle.” In accordance therewith every man’s abode however humble is his castle; as is said “even though the winds of Heaven may blow through it and the rain pour into it the King of England cannot enter it.”³⁸

§ 781. — Illinois.

The jury are instructed that though plaintiff went upon the defendant’s premises to transact lawful business, he had no right to remain after defendant refused to do business with him and requested him to leave and if he refused to leave after such request defendant had the right to eject him by force provided he used no more force than was reasonably necessary.³⁹

§ 782. — Iowa.

The court instructs the jury that it is conceded that plaintiff and defendant were the owners in common of an undivided lot of turkey eggs. Under those circumstance, the plaintiff had no right to destroy any of them without defendant’s consent. And if, acting under reasonable apprehension that she was about to break some of the eggs, he proceeded in good faith to prevent her from doing so, and used no more force than reasonably appeared to be necessary for that purpose, he was justified in so

37—Sumner v. Kinney, — Tex. Civ. App. —, 136 S. W. 1192.

39—Woodman v. Howell, 45 Ill. 367, 92 Am. Dec. 221.

38—Hammond v. Hightower, 82 Ga. 290.

doing, and is not liable therefor. On the other hand, if he intentionally used more than was necessary, or did not act in good faith, but, actuated by some other motive, he intentionally inflicted physical violence on the plaintiff without her consent, then he acted unlawfully, and is liable in damages therefor.⁴⁰

§ 783. — Michigan.

The court instructs the jury that if the plums which are the property in question in this case, belonged to the defendant, and the plaintiff was attempting to remove them without consent or lawful authority from the defendant, and they belonged or were under control of defendant, he had a right to prevent her from so doing. But in the case suggested—that is, should you find that the plaintiff had no legal right to the plums, and that the defendant was seeking to retake only what belonged to him—he would only have had a right to use sufficient force to overcome the force used by A [plaintiff] in taking away the plums. Defendant would have no right to use more force than was reasonably necessary, under all the circumstances, to retake them; and, should you find that he did use more force than was reasonably necessary, he would be liable for such damages as were occasioned by such excessive use of force.⁴¹

The court instructs the jury that if the plaintiff was removing the plums belonging to the defendant without lawful right, then the defendant would be justified in attempting to take them from her, and could use sufficient force to compel the plaintiff to give them up.⁴²

§ 784. — Missouri.

The court instructs the jury that, while the keeping of a store for the sale of merchandise is an invitation to the public to visit such store, it is an invitation to visit it only for proper purposes in connection with the business there being carried on, and all persons going to such places are required to conduct themselves in a proper, orderly, and quiet manner, free from profane and

40—Keller v. Lewis, 116 Iowa 369.

42—Hamilton v. Arnold, 116 Mich.

41—Hamilton v. Arnold, 116 Mich. 684.

loud and boisterous language; and where a person, having entered a store, engages in such loud, boisterous, and profane language, or invites a quarrel, he becomes a trespasser upon the premises, and may be requested to withdraw by the proprietor or any person in his employ. And, in case such trespasser refuses to withdraw, he may be forcibly removed; using such force as may be necessary for that purpose.⁴³

§ 785. — Nebraska.

The jury are instructed that though reasonable force may be used to eject a trespasser, the use of a dangerous weapon is not justified in repelling a trespass which does not threaten injury to life or limb.⁴⁴

§ 786. — Washington.

The court instructs the jury that he would have a right to request her to depart, but the fact that she did not comply with the request would not justify him in making an assault. He might, after proper request, use sufficient force to put her out of the store; he would have a right to do that, but he would have no right to make an assault of the kind I have described nor an assault and battery as I have described.⁴⁵

§ 787. — Wisconsin.

The court instructs the jury that a man may use reasonable and necessary force to eject a trespasser who intrudes upon his premises against his known commands, but he cannot use wanton or unnecessary violence in so doing, or he becomes liable to respond in damages to an injury which he may thereto inflict.⁴⁶

§ 788. Same—Attempted escape of plaintiff after arrest for misdemeanor.

The court instructs the jury that if the jury believe from the evidence that the plaintiff was violating, in the presence of the defendant, the ordinance of ——— prohibiting loud and profane swearing within the corporate limits, and the defendant not

43—Norris v. Whyte, 158 Mo. 20.

45—Howell v. Winters, 58 Wash.

44—Everton v. Esgate, 24 Neb.

436, 108 Pac. 1077.

235.

46—Palmer v. Smith, 147 Wis. 70.

being actuated by ill will, malice, hatred, or malevolent purpose, arrested the plaintiff, and the plaintiff, not being out of the control of the defendant, attempted to escape, and to prevent such an escape the defendant fired his pistol, such firing would not constitute an assault.⁴⁷

The court instructs the jury that if the jury find from the evidence that the plaintiff had violated the town ordinance against loud and profane swearing on the streets, and that the defendant had attempted to arrest him, and that plaintiff got loose and was running from defendant, and while so running defendant had shot at him with a pistol, then, in law, that would be an assault.⁴⁸

§ 789. Same—Disorderly conduct of plaintiff while under arrest.

The court instructs the jury that if plaintiff, while in defendants' custody, became violent, and used loud, vulgar, profane, and abusive language, so as to disturb defendants and others in the vicinity, and refused to desist when requested, it was the duty of the defendants, as officers, to enforce order and prevent the continuance of plaintiff's disturbance and disorderly conduct, and to use reasonable and sufficient force to accomplish the purpose.⁴⁹

§ 790. Issues and proof.

The court instructs the jury that if they should believe from the evidence that the defendant did not assault the female plaintiff in the manner and form, in substance, as alleged in the petition, they should find for the defendant.⁵⁰

The court instructs the jury that if the evidence fails to show by a fair preponderance thereof that this assault, if any was committed, was unlawful, or fails to show any force or violence was used by the defendant upon the plaintiff, then the plaintiff is not entitled to recover anything.⁵¹

47—*Sossamon v. Cruse*, 133 N. C. 470.

48—*Sossamon v. Cruse*, 133 N. C. 470.

49—*McNally v. Arnold*, 127 Iowa 437.

50—*Ragsdale v. Ezell*, 20 Ky. L. Rep. 1567.

51—*Kerley v. Gernscheid*, 20 S. D. 363.

§ 791. Evidence—Presumptions and burden of proof.

The court instructs the jury that when an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention.⁵²

§ 792. Same—Weight and sufficiency—In general.

The court instructs the jury with reference to the complaint against A [defendant], filed before the justice of the peace of _____ county on _____, 19—, and with reference to the judgment of said justice of the peace on said complaint, that the same were admitted in evidence in this cause as any other fact in evidence; said judgment is not conclusive of defendant having committed an unlawful assault and battery upon plaintiff as charged in said complaint for the purpose of this cause, but you may consider said judgment as any other evidence in arriving at your verdict, and give it such weight and probative force as you may deem it entitled to.⁵³

The court instructs the jury that you should bear these instructions in mind and consider them in connection with the evidence as to the acts and intentions of the plaintiff and his companions, so far as they were known to the defendant, as well as the character of the individual members comprising the group, and their disposition toward him, whether friendly or otherwise, so far as known to him, in determining whether or not, at the time of the shooting of the plaintiff, the defendant had reasonable ground to apprehend a design to do him or his wife great personal injury, or to commit a felony against his property, and whether he had reasonable cause for believing that there was imminent danger of such design being accomplished.⁵⁴

§ 793. Same—Same—Degree of proof required.

The court instructs the jury that in this action the plaintiff is only required to make out her case by a mere preponderance of

52—Sumner v. Kinney, — Tex. Civ. App. —, 136 S. W. 1192.

53—Sumner v. Kinney, — Tex. Civ. App. —, 136 S. W. 1192.

54—Palmer v. Smith, 147 Wis. 70.

evidence, to entitle her to recover; and any of the evidence, either circumstantial or positive, which induces belief, is proper to be considered by the jury in determining whether or not the defendant is guilty.⁵⁵

§ 794. Questions for jury.

The court instructs the jury that the only question for you to determine is whether this man did or did not use more than sufficient force for the purpose of reclaiming his property.⁵⁶

§ 795. Damages—Actual damages.

§ 796. — Indiana.

The court instructs the jury that the jury, in estimating the damages, might consider the shame, humiliation, loss of honor, reputation, or social position, if any was shown.⁵⁷

§ 797. — Iowa.

The court instructs the jury that two kinds of damages may be allowed if it finds for the plaintiff under the other instructions given; that, if the plaintiff is entitled to recover at all, he may be allowed such actual damages as will fully compensate him for medical attention, and for the mental and physical pain and humiliation inflicted upon him and that, if it finds the assault to be malicious and wanton, exemplary damages may be awarded; but that no exemplary damages can be allowed unless actual damages are found.⁵⁸

§ 798. — Kentucky.

The court instructs the jury that if you find for plaintiff, you may award him such sum by way of compensatory damages, not exceeding ——— as you believe from the evidence will fairly compensate him for any physical or mental suffering which he endured as the necessary result of his injuries, if any.⁵⁹

55—*Miller v. Balthasser*, 78 Ill. 302.

56—*Miller v. Sadowsky*, 138 Mich. 502.

57—*Kelley v. Kelley*, 8 Ind. App. 606. See *Timmons v. Kenrick*, 53 Ind. App. 490.

58—*Fleming v. Loughren*, 139 Iowa 517.

59—*Renfro v. Barlow*, 131 Ky. 312.

§ 799. — Maryland.

The court instructs the jury that if they find for the plaintiffs, they should award such damages as will, under all the circumstances of the case, compensate for the injury to the person and feelings suffered by A by reason of the unlawful act of the defendant, if they shall find that the defendant assaulted and struck her; and if they further find that the female plaintiff was treated with reckless violence and indignity, then they may think proper, from all the evidence, to punish such conduct, and deter the defendant from like conduct in the future.⁶⁰

§ 800. — Minnesota.

The court instructs the jury that they are at liberty to take into consideration the injuries, so far as they have been shown by the evidence; the pain and suffering endured by the injured party; his loss of time, if loss of time has been proven, and award such damages as the jury may think proper and right in view of all the circumstances proven on the trial of this case. If you find that the injuries were inflicted wilfully and maliciously, then you are not limited to mere compensation for the actual damages sustained, but you may give such further sum by way of exemplary damages, as an example to others, to deter them from offending in a like manner.⁶¹

§ 801. — Nebraska.

The court instructs the jury that if from the evidence and instructions in the case you find for the plaintiff, you will then allow the plaintiff damages in such sum as you believe, from all the evidence in the case, will actually compensate her for the injuries sustained by her, if any. You will take into consideration the nature, location, and extent of the injury. You will allow plaintiff the fair and reasonable amount of necessary medical services for which plaintiff may have become obligated, if any, and for her loss of time from her occupation, if any. You will allow plaintiff damages for her mental and physical suffer-

60—Thillman v. Neal, 88 Md. 525.

61—Gorstz v. Pinske, 82 Minn.

456, 83 Am. St. Rep. 441.

ing, if any such has been proved. Mental suffering and physical pain are incapable of measurement by any fixed and arbitrary rule, but must from its nature depend largely upon the judgment of the jury, governed by the circumstances of the particular case. You cannot allow damages by way of punishment. That is for the criminal law, and not for the jury in a civil case. The damages, if any allowed, must be compensatory only.⁶²

The court instructs the jury that where an injured party, by reason of the injuries which is the foundation of the action, has incurred necessary expenses for medical attendance, nursing, etc., and has become liable or indebted for the payment of such expenses, the reasonable and fair valuation of such services may be recovered, although not yet paid by the party injured.⁶³

The court instructs the jury that if they, under the instructions of the court, from the evidence believe that the plaintiff is entitled to recover in this action, then in assessing her damages, the jury are at liberty to take into account the character and extent of the plaintiff's injuries, so far as they have been proven by the evidence, the pain and suffering endured by her, if any, in consequence of such injury, her costs of medical attendance, if such a loss of time and costs have been proved, and where such damages as the jury may, from the evidence, think proper and right in view of all the facts and circumstances proved on the trial. The jury can only allow actual damages by way of compensation. In this case damages by way of punishment are not allowed.⁶⁴

§ 802. — Texas.

The court instructs the jury that if you find for the plaintiff under the instructions heretofore given, you will allow such damages as seem to you to be right and proper under all of the facts and circumstances in evidence. In estimating the damages you have a right to consider bodily and mental pain, if any, endured by the plaintiff, loss of time, if any, caused by such

62—Kast v. Link, 90 Neb. 25.

64—Rees v. Rasmussen, 5 Neb.

63—Rees v. Rasmussen, 5 Neb. (Unoff.) 367.
(Unoff.) 367.

assault, if any; and his diminished capacity for labor, if any,—resulting directly from defendant's wrongful acts, if the evidence shows these circumstances to exist. You may also take into consideration the surgical bills, if any, which the plaintiff has incurred. It was not necessary that the amount of damages resulting from personal injuries should be proved by witnesses, but it is to be determined by you from your own general knowledge and experience. The damages above spoken of are known as "actual damages."⁶⁵

§ 803. — Wyoming.

The court instructs the jury that in estimating the damages which accrue from an assault and battery, it is not necessary that any specific sum should have been named or stated in the evidence. Actual damages are those which flow directly and naturally from the act complained of, and such damages, if any, which you find from the evidence, and allowed by you, shall not exceed ———, the amount claimed in the petition.⁶⁶

§ 804. Same—Same—Mitigating facts.

§ 805. — Missouri.

The court instructs the jury that no words, however insulting or aggravating they may be, will justify an assault, and such insulting or aggravating words cannot be considered by the jury for the purpose of mitigating or reducing the amount of actual damages.⁶⁷

§ 806. — Texas.

The court instructs the jury that no verbal provocation justifies an assault, but insulting or abusive words may be given in evidence in mitigation.⁶⁸

§ 807. Same—Exemplary damages.

§ 808. — Kentucky.

The court instructs the jury that if you believe that defendant, not in his necessary, or to him apparent necessary, self-defense,

65—Knittel v. Schmidt, 16 Tex. Civ. App. 7.

66—Williams v. Campbell, 22 Wyo. 1, 133 Pac. 1071.

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67—Burley v. Menefee, 129 Mo. App. 518.

68—Sumner v. Kinney, — Tex. Civ. App. —, 136 S. W. 1192.

assaulted, bruised, or injured plaintiff, and further believe that defendant wantonly and maliciously assaulted, bruised, or injured plaintiff, you may, in addition to compensatory damages, award plaintiff punitive damages, not exceeding in all the sum of _____. If, however, you believe from the evidence that plaintiff gave to the defendant such provocation to assault and bruise plaintiff as would cause an ordinarily prudent man under like or similar circumstances so to assault and bruise the plaintiff, and that such provocation, if any, did prompt defendant to assault plaintiff, you may consider such provocation, if any, in mitigation of the punitive damages, if any, which you may find for plaintiff.⁶⁹

The court instructs the jury that if they believe from the evidence that the defendant assaulted the female plaintiff [a married woman] in the manner and form, in substance, as alleged in the petition, then the jury should find for the plaintiffs such damages as they may have sustained; and the court further says to the jury that in estimating the damages, if any, sustained by the plaintiffs, they are not confined in their verdict to the actual damages, but the jury may, in their discretion, assess other and additional sums, by way of smart money or exemplary damages, not exceeding in all the amount claimed in the petition.⁷⁰

§ 809. — South Dakota.

The court instructs the jury that by "malice" or "malicious" is meant a wish or desire to vex, annoy, or harass another. So it will be for you to determine whether or not, if the assault and battery was committed, it was malicious. If the evidence fails to show by a fair preponderance thereof that it was malicious, then you should not give the plaintiff any exemplary damages. If it does show, however, by a fair preponderance, that it was malicious, then the plaintiff is entitled to exemplary damages such as you deem proper under all the circumstances. You cannot find exemplary damages, however, unless you find the plaintiff has suffered some actual damages. If you find he suffered

⁶⁹—Renfro v. Barlow, 131 Ky. 312.

⁷⁰—Ragsdale v. Ezell, 20 Ky. L. Rep. 1567.

actual damages, then you may find for him in exemplary damages, if you find that the assault was malicious.⁷¹

§ 810. — Texas.

The court instructs the jury that if malice has been shown by the evidence, or may be reasonably inferred from the conduct of the defendant as shown in evidence, you may, in your discretion, give exemplary damages by way of punishment to the defendant, and for the purpose of setting a wholesome example to others.⁷²

§ 811. — Wisconsin.

The court instructs the jury that, if they should find that the assault and battery was inflicted under circumstances of aggravation or cruelty, with vindictiveness or malice, they might award exemplary damages by way of punishment to the defendants.⁷³

§ 812. — Wyoming.

The court instructs the jury that in addition to any actual damages (if you find that there were any), you may award exemplary damages to the plaintiff, in case you should find that the wrongful acts, if any, by the defendant causing such actual damages were committed in a wanton, willful, or reckless manner, or in case you find such acts were committed wantonly, recklessly, and without due regard to the rights of the plaintiff, or if you find that wrongful acts of the defendant causing such damages were from any bad motive or so recklessly done as to imply a disregard for the obligations and rights of the plaintiff.⁷⁴

II. CRIMINAL LIABILITY.⁷⁵

§ 813. Nature and elements of crime—In general.

§ 814. — Alabama.

The court instructs the jury that if the defendant negligently handled the gun that inflicted the wound in disregard of the

71—Kerley v. Gernscheid, 20 S. D. 363.

72—Knittel v. Schmidt, 16 Tex. Civ. App. 7.

73—Lamb v. Stone, 95 Wis. 254.

74—Williams v. Campbell, 22 Wyo. 1, 133 Pac. 1071.

75—Matters pertaining to law of crime in general, see CRIMINAL LAW.

safety of others, then he would be guilty of assault and battery with a weapon.⁷⁶

The court instructs the jury that any touching by one person of the person of another in rudeness or in anger is an assault and battery, and every assault and battery includes an assault.⁷⁷

§ 815. — Oregon.

The court instructs the jury that an assault is an intentional attempt to do violence to the person of another, coupled with present ability to carry that intention into effect.⁷⁸

§ 816. Same—"To beat" construed.

The court instructs the jury that "to beat" is not necessarily to whip, to injure, or to hurt, but includes any unlawful imposition of the hands or arms.⁷⁹

§ 817. Same—Insulting words.

The court instructs the jury, for the defendant, that insulting words do not constitute an assault, and if the jury believe from the evidence, beyond a reasonable doubt that A struck the defendant the first blow, and afterwards defendant defended himself with no more force than was necessary to ward off the attack, as he had a legal right to do, then the jury must find the defendant not guilty.⁸⁰

§ 818. Same—Chastisement of child by person in loco parentis.

The court instructs the jury that if you believe and find from the evidence that the defendant, A, in ——— county, and state of ———, within ——— years next before the ——— day of ———, 19—, did willfully and feloniously whip B with a whip, by which said B was wounded, or disfigured, then you will find the defendant guilty, as she is charged in the indictment, of wounding, or disfiguring, said B by said whipping, as you from the evidence, shall believe her to have been so wounded or disfigured. And if

76—Crenshaw v. State, 153 Ala. 5.

77—Jacobi v. State, 133 Ala. 1
(writ of error dismissed 187 U. S.
133, 47 L. Ed. 106.)

78—State v. Selby, 73 Ore. 378,
144 Pac. 657.

79—Lowry v. State, 8 Ga. App.
379.

80—Wicker v. State, — Miss. —,
65 So. 885.

you shall believe and find from the evidence; A at said time and place, and upon such whipping, by her, of said B, and in continuance by her of the punishment so inflicted upon said B by said whipping did willfully and feloniously burn said B with a hot iron stove-lid lifter, by which said B was wounded or disfigured, then you will find the defendant guilty, as she is charged in the indictment, of wounding or disfiguring said B by said burning, as from the evidence you shall believe, and find her to have been so wounded or disfigured. If you find the defendant guilty of either wounding or disfiguring said B by either said whipping or burning, you will fix her punishment therefor at imprisonment in the penitentiary not less than — years nor more than — years, or at imprisonment in the county jail not less than — months, or at both a fine not less than — dollars, and imprisonment in county jail not less than — months, or at a fine of not less than — dollars.⁸¹

The court instructs the jury that if defendant struck A with a whip, or burned her with the hot stove-lid lifter with such severity as to break, cut, or burn entirely through the skin upon her body and to her flesh, then said A was wounded within the meaning of the other instruction; and if the lick of the whip or the burns left a scar or scars, then she was disfigured within the meaning of the instructions.⁸²

§ 819. Same—Aggravated assault—In general.

The court instructs the jury that before the defendant can be convicted of an aggravated assault and battery, you must believe from the evidence that serious bodily injury was inflicted; and in case of a reasonable doubt as to whether serious bodily injury was inflicted you will give the defendant the benefit of such doubt, and acquit him. What, in law, is meant to be serious bodily injury, is such an injury as is attended with danger.⁸³

81—State v. Nieuhaus, 217 Mo. 332.

82—State v. Nieuhaus, 217 Mo. 332.

83—Grayson v. State (Tex. Cr. App.) 42 S. W. 293.

§ 820. Same—Same—On female.

The court instructs the jury that an assault becomes aggravated by indecent familiarity of the person of a female by an adult male against her will and without her consent.⁸⁴

The court instructs the jury that if defendant, an adult male, committed an aggravated assault upon A, a female person, by catching hold of the clothes of the said witness A with his left hand, and by putting his right hand under her clothing and upon her leg against her will and consent, they would find him guilty.⁸⁵

The court instructs the jury that if you believe the defendant, in the county of _____ and state of _____, at or about the time alleged in the information, committed an aggravated assault and battery upon the person of one A, and the defendant was an adult male, and the said A was a female or child, as above defined, and that the assault was committed, if in fact you find from the evidence that an assault was committed by the defendant upon A about the time alleged in the information, by using violence upon her, by putting his hands under her clothes and feeling her person, then you will find the defendant guilty, and assess his punishment at a fine.⁸⁶

§ 821. Intent and malice—Aggravated assault on female.

The court instructs the jury that if the defendant took hold of the arm of the said A, but did so with no intent to injure her or her feelings, and had probable ground to believe, and did believe, that such taking hold of her arm would not be objected to by her, the said A, or would not be offensive to her or her feelings, then he would not be guilty of any offense, and you will acquit the defendant.⁸⁷

The court instructs the jury that if you believe from the evidence that A sustained bodily injury at the time alleged in the

84—Sample v. State, 52 Tex. Cr. App. 505.

85—Sample v. State, 52 Tex. Cr. App. 505.

86—Berry v. State (Tex. Cr. App.) 40 S. W. 984. Since the prosecutrix was both a female and a child

the court holds that the jury could not have been misled by the use of the word "or" in the phrase "the said A was a female or child."

87—Shields v. State, 39 Tex. Cr. App. 13.

information, but you further believe that said injury, if any, was not caused by any violence on the part of the defendant, and that he was at the time intending to do her no injury, or if you have a reasonable doubt of the same, to acquit the defendant.⁸⁸

The court instructs the jury that if you believe from the evidence that the defendant, in the county of ———, and state of ———, did, upon the person of A, commit an aggravated assault and battery, by making use of any violent or indecent familiarity towards or upon her, with intent to injure her, or that he indecently and violently placed his arms around her, and did make indecent proposals to and concerning her, with intent to injure her, then, if you so believe, you will find him guilty. On the other hand, if you do not so find and believe, you will acquit him.⁸⁹

The court instructs the jury that if you believe from the evidence that the defendant did, in ——— county, ———, on or about the — day of ———, 19—, on the person of A [8 year old girl] commit an assault, by making use of any violent or indecent familiarity toward or upon her, with intent to injure her, or he indecently or violently fondled her person, with intent to injure her, then you must find defendant guilty.⁹⁰

The court instructs the jury that if you believe the defendant put his arm on the back of the buggy seat, and thereby touched the prosecutrix, A; or if you believe that he took hold of her and endeavored to embrace her, but did so with no intention of injuring her or her feelings, and had probable ground to believe, and did believe, that such touching or taking hold of her, if any, or such attempt to embrace her, if any, would not be objected to by her, or would not be offensive to her, or hurt her feelings—then he would not be guilty of any offense, and you will acquit. And in passing upon this issue, you will look to all the facts and

88—Yates v. State, — Tex. Cr. App. —, 152 S. W. 1064. See Carrel v. State, — Tex. Cr. App. —, 178 S. W. 331.

89—Stripling v. State, 47 Tex. Cr. App. 117.

90—Hill v. State, 37 Tex. Cr. App. 279, 66 Am. St. Rep. 803.

circumstances in evidence, and the conduct of the parties, both before and after the commission of the alleged offense; and if you have a reasonable doubt of the defendant's guilt, or of his intent to injure the prosecuting witness, you will find him not guilty.⁹¹

The court instructs the jury that if you believe from the evidence that the prosecuting witness, A, invited the defendant to visit her, at the time of the alleged assault, and that the defendant went to see her in response to said invitation, and that said prosecuting witness by her conduct toward and with the defendant was calculated to lead him to believe, and he did believe, that his visits and attentions to her were agreeable to the said prosecuting witness, and that he did not intend to do her any injury in person or to her feelings, without her consent, and if you have a reasonable doubt as to such facts, you will find the defendant not guilty.⁹²

The court instructs the jury that if any male adult should use any unlawful violence upon the person of a female with intent to injure her, whatever be the means or degree of violence, he is deemed guilty, under the law, of an aggravated assault and battery.⁹³

§ 822. Same—Shooting at another.

The court instructs the jury that in considering the offense of shooting at another, it is not necessary to show either malice or the specific intent to kill. It would make no difference, if the defendant shot at the prosecutor, not in his own defense or under circumstances of justification, according to the principles of the Code, with what intent he shot him—whether to kill him or not; and it would make no difference whether he had malice or not.⁹⁴

§ 823. Ability to inflict injury.

The court instructs the jury that an assault cannot be committed by a person pointing in a threatening manner an unloaded

91—*Stripling v. State*, 47 Tex. Cr. App. 117.

92—*McGill v. State*, 71 Tex. Cr. App. 443.

93—*Millard v. State* (Tex. Cr. App.) 59 S. W. 273.

94—*Greenwood v. State*, 9 Ga. App. 876.

gun at another, and this, too, regardless of the fact whether the party holding the gun though it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear.⁹⁵

The court instructs the jury that a person with an unloaded gun does not have the present ability to inflict an injury upon another many yards distant, however apparent and unlawful his attempt to do so might be.⁹⁶

§ 824. Defenses—In general.

§ 825. — Georgia.

The court instructs the jury that if the assault made upon him, if you find one was made, did not amount to a felony, but was an assault less than a felony, such as an assault and battery, then he would not have the right to shoot at another, either as a defense for the offense of assault with intent to murder, if you find that element is in it, or as a defense for the offense of shooting at another not in his own defense. If an assault was made upon him, although it was a bare assault, and did not amount to a felony, it would reduce the offense, if one has been committed by the defendant, from assault with intent to murder to shooting at another; but it would not justify him in using a deadly weapon—shooting a pistol. If you find that he shot after an assault had been made upon him, and that assault amounted to a felony, then he would have the right to shoot, and he would be guilty of nothing. If you find that the assault made upon him was less than a felony—assault and battery—then that would reduce the offense if he is otherwise guilty of one, from assault with intent to murder to shooting at another; but it would not justify shooting at another if it was a bare assault. If you find however, that the assault made upon him amounted to a felony, or that the surroundings were such as to create apprehension in his mind, as a reasonably courageous man, and not of a coward, that his life was in danger, or that a felony was about to be

95—People v. Sylva, 143 Cal. 62,
76 Pac. 814.

96—People v. Sylva, 143 Cal. 62,
76 Pac. 814.

committed upon him, then he would not be guilty either of assault with intent to murder or of shooting at another not in his own defense.⁹⁷

§ 826. — Texas.

The court instructs the jury that both parents had an equal right to the custody of their children, and if the wife had procured the custody of the child, and defendant assaulted her on that account, it was not justifiable, and that defendant would be guilty of an aggravated assault.⁹⁸

§ 827. Same—Corrective purpose.

The court instructs the jury that if they find from the evidence that the defendant did chastise W, but that at the time the defendant was a school teacher, and said W was his pupil, and that the chastisement was administered to him by defendant because said W had engaged in a fight at school with another pupil, or had used improper and unbecoming language, or had in any other way violated the rules and regulations of the school; and that such chastisement was inflicted by the defendant upon said W for the purpose of correcting him, and in good faith and without any intention on the part of the defendant to injure said W, and without any passion, spite or ill-will towards said W, then you will find the defendant not guilty, even though you should find from the evidence that the chastisement administered was more severe than was actually necessary.⁹⁹

The court instructs the jury that if the jury find from the evidence that the defendant at the time she whipped prosecutrix, A, with a riding whip, had the charge, custody, and control of said A, for the purpose of rearing, training, and educating her, and shall further find that the punishment administered with said riding whip was reasonable and moderate, and that such punishment was administered for the purpose of correcting the faults of said A, and not to gratify feelings of malice or revenge,

97—Greenwood v. State, 9 Ga. App. 876.

99—Dowlen v. State, 14 Tex. Cr. App. 61.

98—Whitehead v. State (Tex. Cr. App.) 37 S. W. 422.

then such whipping was justifiable, and the jury cannot find defendant guilty of any offense under the law for or on account of such whipping.¹

§ 828. Same—Excessive punishment of child.

The court instructs the jury that a parent has a legal right to correct and punish a child for disobedience, provided such punishment is not excessive; and, in event it is excessive, that such parent would not be subject to corporal punishment by the co-parent, but would be only punishable by the law.²

§ 829. Same—Insulting words.

The court instructs the jury that they may look to the fact, if it be a fact, that A used abusive or insulting language to B at or near the time of the difficulty, and such language may be taken in mitigation or justification of the offense, as the jury may determine.³

§ 830. Same—Self-defense—In general.

The court instructs the jury in relation to the law of self-defense, that one cannot claim its benefits after he has intentionally put himself where he knows or believes he will have to invoke its aid. Circumstances justifying assault, in the law of self-defense, must be such as to render it unavoidable. If you believe from the evidence, and beyond a reasonable doubt, that the defendant could have avoided any conflict between himself and A without increasing the danger to himself, it was his duty to avoid such conflict and so render a resort to the law of self-defense unnecessary.⁴

§ 831. Same—Same—Combat by mutual consent.

The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that defendant and A met together and quarreled, bandying opprobrious or insulting words, and fought willingly or by mutual consent, it is immaterial which of them commenced the quarrel; and the defendant cannot, under

1—State v. Nieuhaus, 217 Mo. 332.

2—Cox v. State, 99 Ark. 90.

3—Rogers v. State, 117 Ala. 192.

4—State v. McCann, 43 Ore. 155,
72 Pac. 137.

this state of facts, if you believe such beyond a reasonable doubt, set up the plea of self-defense.⁵

§ 832. Same—Same—Apprehension of danger.

§ 833. — Oregon.

The court instructs the jury that if the shots were fired at A while he was going away from the person firing the shots, and there was no apparent danger of immediate attack from A, then nothing that A had done prior to such shooting at him would justify the person so shooting.⁶

§ 834. — Texas.

The court instructs the jury that if the defendant believed that he was in personal danger, or in danger of serious bodily injury, and assaulted A so believing, viewing the facts from the defendant's standpoint, or if the jury have a reasonable doubt of said facts, then they should find him not guilty.⁷

§ 835. Same—Same—Duty to retreat.

The court instructs the jury that if you believe from the evidence that the defendant was lawfully cutting off the water of A, and that, whilst so doing, he was assaulted by said A, and that said defendant reasonably apprehended that said A would do him bodily harm, then you are instructed that the defendant had the right to repel such assault by all the force he deemed necessary, and that he was not compelled to retreat from said A, but might, in his turn, become the assailant, inflicting bodily wounds until his person was out of danger.⁸

§ 836. Same—Defense of another.

The court instructs the jury that if you find that Dr. A first made an unjustifiable assault upon the defendant, or that the defendant had grounds to believe, and did honestly believe, that Dr. A was about to do him personal injury, then the defendant had a right to use such violence as was necessary to protect himself from personal injury, but if he did what was unnecessary,

5—Johnson v. State, 136 Ala. 76.

6—State v. Erickson, 57 Ore. 262,
110 Pac. 785.

7—Marsden v. State (Tex. Cr.
App.) 110 S. W. 897.

8—Jackson v. Com., 96 Va. 107.

or did more than was necessary in order to defend himself, he became and was guilty of assault and battery; and in this connection I instruct you that no mere words, no matter how irritating or insulting, will justify an assault and battery.

In regard to defendant's claim that what he did was lawful as a necessary protection of the injured man, I instruct you that if you find it to be a fact that Dr. A's presence in the operating room and his conduct therein before the assault was dangerous to the injured man, or if the defendant had good reason to believe, and did in good faith believe, such to be the case, he had no right to begin by assaulting Dr. A; but he had the right to request, and he should have requested him, under such circumstances, to leave the room. Then, if Dr. A refused, he should have gently laid his hand upon him, and not proceeded with greater force than might have been made necessary by resistance. And, in deciding as to what degree of force he was justified or would be justified in using in overcoming such resistance, you must take into consideration all the circumstances of the case, including the physical appearance of the two men, and anything else that will throw light upon that, or bring your minds to a just realization of the facts as they existed. If the defendant did not request Dr. A to leave the room, but assaulted him in the first instance, he did what was not necessary for the protection of the injured man, and was guilty of assault and battery.⁹

§ 837. Evidence—Presumptions and burden of proof.

The court instructs the jury that where an injury is actually caused by violence to the person or to the feelings of a person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention. The injury intended may be either bodily pain, constraint, a sense of shame, or other disagreeable emotions of the mind.¹⁰

9—*People v. Reyecraft*, 156 Mich. App. 117. See *Yates v. State*, — Tex. Cr. App. —, 152 S. W. 1064.

10—*Stripling v. State*, 47 Tex. Cr.

CHAPTER LVI.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

- § 838. Right to make assignment in general.
- § 839. Assent by creditors to assignment.
- § 840. Delivery of property to assignee—Bond by third person.
- § 841. Fraud—Intent of assignor.
- § 842. — Illinois.
- § 843. — Minnesota.
- § 844. Same—Knowledge on part of assignee as to fraudulent intent of assignor.
- § 845. Same—Intent of assignee.
- § 846. Same—Badges of fraud—Secret agreement with assignee as to possession of property.
- § 847. — Illinois.
- § 848. — Indian Territory.
- § 849. Same—Same—Incompetency of assignee appointed.
- § 850. Same—Same—Employment of assignor in closing up business of assignment.
- § 851. Same—Evidence—Presumptions and burdens of proof.
- § 852. — Illinois.
- § 853. — Minnesota.
- § 854. Same—Same—Weight and sufficiency.
- § 855. Mismanagement or fraudulent disposition of property by assignee.
- § 856. Priority of judgment debtor over assignee.

§ 838. Right to make assignment in general.

The court instructs the jury that a debtor in failing circumstances may assign his property for the benefit of creditors. An assignment when made in good faith, and accompanied and followed by possession of the property assigned, is warranted by law. Therefore, if the jury believe, from the evidence, that the assignment in question was made in good faith, and that the plaintiff took open and actual possession of the property assigned, previous to the time when the execution in favor of W was received by the defendant ———, then the law is for the

plaintiff, and he is entitled to a verdict in his favor for a return of the property mentioned in the declaration.¹

§ 839. Assent by creditors to assignment.

The court instructs the jury that the document under which plaintiff claims in this case, provides that the assent of the creditor need not be a written assent. It is only necessary that creditors should give such assent to its provisions as will recognize and affirm the acceptance and possession of the property by the assignee, as made and held for their benefit and in their behalf, in accordance with the terms of the assignment. The acquiescence is something more than negative. It is acquiescence and consent; a state of mind on the part of the creditor who knowing the facts, gives the assignee to understand that he acquiesces in his keeping the property under the trust, and disposing of it accordingly. It is not necessary that the word assent should be used. It is not necessary that any legal formula should be employed. If the assignee informs the creditors of the facts, and makes a fair statement to them of the facts, exhibiting to them the deed of trust, if they want to see it, and they so conduct themselves towards him in what they say and do that he, a reasonable man, understands them to assent, and acts in good faith upon that understanding, then for the purpose of this case they must be taken to have assented.²

§ 840. Delivery of property to assignee—Bond by third person.

The court instructs the jury that if they find, from the evidence, that the goods and chattels in question were transferred to the plaintiff, and that he was entitled to the possession thereof at the time of the execution and delivery of the instrument declared on; and if the jury further find that the plaintiff was about to take possession thereof, and that thereupon A [the assignor] procured the defendant to execute said instrument, and that A, after the execution of the same, by arrangement with the defendant, continued in possession of said goods and

1—Wilson v. Pearson, 20 Ill. 81.
These instructions were given on behalf of plaintiff.

2—Nutter v. King, 152 Mass. 355.

chattels, then the possession of A was the possession of the defendant, and it became and was the duty of the defendant to deliver up the goods to the plaintiff, or pay the sum of money, according to the condition of said instrument. The arrangement between A and the defendant, if proved, constituted a sufficient delivery to entitle the plaintiff to recover for a violation of his agreement.³

The court instructs the jury that the assignment, [by] A, to the plaintiff, read in evidence, bearing date — day of —, 19—, entitled the plaintiff to, and gave him the right of immediate possession of the property enumerated in said instrument, in writing, read in evidence as against said A, and conferred on the plaintiff the right to dispose of the same to the defendant, in the manner in which he did, by instrument, in writing, introduced in evidence.⁴

The court instructs the jury that if they find that the property enumerated in said instrument, in writing, declared on and read in evidence, was in possession of said A [the assignor], and that plaintiff was about to take possession at the time the defendant executed the same, with the consent and instance of A, and thereupon the defendant voluntarily consented to allow A to retain the possession thereof, then this was a sufficient delivery by the plaintiff to the defendant to entitle the plaintiff to recover in this action.⁵

§ 841. Fraud—Intent of assignor.

§ 842. — Illinois.

The court instructs the jury that if they shall believe from the evidence, that the assignment by O was made to plaintiff with the intent to hinder and delay any of his other creditors, in the collection of their debts, to enable O, under the color thereof, to continue his business, and in possession of his property for his own benefit, then such assignment is fraudulent and void as to his creditors, and the jury should find a verdict for the defendant.⁶

3—Leverenz v. Haines, 32 Ill. 357.

4—Leverenz v. Haines, 32 Ill. 357.

5—Leverenz v. Haines, 32 Ill. 357.

6—Wilson v. Pearson, 20 Ill. 81.

The court instructs the jury that if they believe from the evidence, that the assignment from O to plaintiff was made with intent to hinder, delay or defraud the creditors of O, then the verdict should be for the defendant; and in deciding upon the intent, the jury may take into consideration subsequent as well as prior circumstances, and the transactions of the parties, to explain such intent.⁷

§ 843. — Minnesota.

The court instructs the jury that if the real object or intent of ———, the assignor, in making this assignment was not the one expressed on its face, but to induce, persuade or force creditors to agree and consent to a compromise, which he was then attempting to make with his creditors, and to compel such creditors to accept about one-half of their claims, then and in such case, the assignment was fraudulent, and void as to creditors.⁸

The court instructs the jury that if the jury find that ———, assignor, made the assignment with the intent and for the purpose of effecting a compromise with his creditors, or for the purpose of facilitating one already commenced, then the assignment is void, and you must return a verdict for the defendant.⁹

The court instructs the jury that the only subject of inquiry for the jury (so far as the question of fraud is concerned) is the intent with which the assignment was made, and acts wholly independent of the fact of assignment cannot be considered.¹⁰

The court instructs the jury that an assignment is not fraudulent because it may or even must operate to obstruct or delay creditors; for every assignment, though made in good faith, must so operate. The jury must find that the intention of the act was to defraud creditors, and not to devote the property assigned to the payment of debts. If there was an intention to delay creditors, it would render the instrument void, but if there was

7—Wilson v. Pearson, 20 Ill. 81.

9—Bennett v. Ellison, 23 Minn.

8—Bennett v. Ellison, 23 Minn. 242.

242.

10—Guerin v. Hunt, 8 Minn. 477.

no such intention, the necessary delay attending the execution of the trust was not material.¹¹

§ 844. Same—Knowledge on part of assignee as to fraudulent intent of assignor.

The court instructs the jury that if they believe from the evidence that ———, the assignor, executed the assignment with the fraudulent intent of compelling his creditors to consent to a compromise which ——— was attempting to make with his creditors, then the jury are instructed that such assignment will be void as to creditors, even though they believe from the evidence that plaintiff, the assignee, had no notice or knowledge of such fraudulent intent at or prior to the time he accepted the assignment.¹²

The court instructs the jury that plaintiff, under this assignment, does not stand in the position of a purchaser for valuable consideration; and the fact (if such be the case) that he had no knowledge that it was ———, assignor's intention, in making the assignment, to effect a compromise with his creditors cannot cure the effect of such intention on ———, assignor's part. If such intention existed on ——— assignor's part, at the time he executed the assignment, it is void, no matter whether plaintiff knew ———, assignor's intention or not, and your verdict should be for the defendant.¹³

§ 845. Same—Intent of assignee.

The court instructs the jury that as to the assignment under which the plaintiff claims in this case, there is but a single question for you to pass upon, viz.: What was the intent of the assignor and what was his purpose in making it? The intent with which plaintiff received the assignment is immaterial.¹⁴

11—Guerin v. Hunt, 8 Minn. 477.

14—Bennett v. Ellison, 23 Minn.

12—Bennett v. Ellison, 23 Minn. 242.

242.

13—Bennett v. Ellison, 23 Minn.

242.

§ 846. Same—Badges of fraud—Secret agreement with assignee as to possession of property.

§ 847. — Illinois.

The court instructs the jury that if they believe, from the evidence, that at or about the time of the assignment from O to plaintiff, there was an understanding or stipulation between them, though not expressed in the assignment itself, to allow O a specified sum for his services in the management of the property assigned, and that O should retain possession of the same for his own benefit, as agent for plaintiff, or otherwise, to enable him to control his business to the hindrance of his creditors, such stipulation or understanding is evidence of fraud, and the defendant is entitled to a verdict.¹⁵

§ 848. — Indian Territory.

The court instructs the jury that, although there is a clause in the deed of assignment offered in evidence in this case which prohibits the assignee from taking charge or control of the property assigned until he had filed his inventory and bond as the law provides, yet if you believe from the evidence in this case that at the time the assignor, A, delivered the deed of assignment to the assignee, B, that he and the assignor entered into an agreement or understanding by which the assignee was to take possession of the assigned property before he filed his inventory and bond, and that the assignee, in pursuance of such understanding, did take charge of said property, either by himself or agent, before he filed his inventory and bond, that such acts would render the assignment fraudulent and void in law, and you should find for the plaintiff or attaching creditor. And in determining whether or not there was such an agreement or understanding between the assignor, A, and the assignee, B, you have a right to take into consideration all the facts and circumstances surrounding the case; and if you believe from the evidence, and all the circumstances surrounding the case, that

15—Wilson v. Pearson, 20 Ill. 81.

there was such an understanding, you will find for the plaintiff or attaching creditor.¹⁶

§ 849. Same—Same—Incompetency of assignee appointed.

The court instructs the jury that the assignor having the choice of his assignee without consultation with or consent of his creditors, must take care that he appoints a person competent to protect the rights of all parties interested under the assignment. If it appears that the selection of an incompetent assignee was made in order to allow the assignor to control the administration of the estate, then the assignment will be declared void, because such an intent on the part of the assignor would be a fraud upon his creditors and if it should appear that the assignee was incompetent in fact from any cause, but that his selection was not made from any improper motive on the part of the assignor, then the assignee would be subject to removal, and the assignment will be sustained.¹⁷

The court instructs the jury that the business competency of the assignee is only material, so far as it tends to establish an intention on the part of the assignors to retain control over the property by reason of want of competency, and if the jury fail to find that such was the design of the assignors in the selection of ———, it is immaterial what were his business qualifications. In the absence of such fraudulent intention on the part of the assignors the only effect of such incompetency would be to render the assignee liable to removal on the proper application of a creditor.¹⁸

The court instructs the jury that incompetency in an assignee, which in law would amount to a "badge of fraud," and which would tend to invalidate an assignment, is not merely a want of ability to read or write, or of the accomplishments taught in schools, but it also implies that the assignee is wanting in the capacity to manage and conduct the ordinary business of the assignment, and that the assigned estate must suffer neglect or

16—Badgett v. Johnston-Fife Hat Co., 1 Indian Terr. 133.

17—Guerin v. Hunt, 8 Minn. 477.

18—Guerin v. Hunt, 8 Minn. 477.

be managed by the assignee as the instrument or tool of the assignors, for their benefit, and in fraud of the rights of creditors.¹⁹

§ 850. Same—Same—Employment of assignor in closing up business of assignment.

The court instructs the jury that the employment by the assignee of one of the assignors in closing up the business of the assignment is not inconsistent with the objects of the trust, and is not necessarily indicative of a fraudulent intent in making the assignment. The jury will judge from the facts in the case whether the object was for the assignor still to retain the control over the goods, in connection with the question as to the original intent of the assignor in making the assignment.²⁰

§ 851. Same—Evidence—Presumptions and burden of proof.

§ 852. — Illinois.

The court instructs the jury that actual fraud is not to be presumed, but should be proven by the party alleging it. The law presumes that good faith controls business transactions; therefore, if the jury believe, from all the circumstances in evidence, that the nature and design of the assignment to plaintiff were bona fide, to secure and pay (after paying the just and reasonable expenses attending the executing the trust), the net proceeds of the property assigned in and toward the payment of the debts of O, and that said assignment was not contrived, as a fraud on the part of O and the plaintiff, to cheat or hinder the creditors of O, the law is for the plaintiff; if the jury shall also find that the assignee took possession of the property, and that such possession was continued to and at the time of the levy.²¹

§ 853. — Minnesota.

The court instructs the jury that the deed of assignment being in due form and regular on its face, fraud will not be pre-

19—Guerin v. Hunt, 8 Minn. 477.

21—Wilson v. Pearson, 20 Ill. 81.

20—Guerin v. Hunt, 8 Minn. 477. (Plaintiff's instruction.)

sumed with reference to it, but the burden of proof is on the defendants to show it fraudulent. The presumption is that the deed was made in good faith and that it is untainted with fraud.²²

§ 854. Same—Same—Weight and sufficiency.

The court instructs the jury that if they shall find, from the evidence, that the assignment in question was in fact made by O to plaintiff, and that plaintiff entered into and took open, actual and exclusive possession of the goods assigned, then the subsequent declarations and actions of plaintiff, introduced in evidence in this suit, and the subsequent declarations and actions of O, can only be taken into consideration by the jury, for the purpose of determining the intent at the time of the inception of the assignment, viz., whether such assignment was made with intent to hinder or delay creditors of O, and enable him, under cover thereof, to carry on business.²³

§ 855. Mismanagement or fraudulent disposition of property by assignee.

The court instructs the jury that if an assignment is bona fide, and not shown to be fraudulent as to creditors, then neither mismanagement nor fraudulent disposition of property under an assignment, by an assignee, can affect the instrument, or his title under it; they may be grounds for a removal by a court of equity, but cannot be inquired into in an action at common law, brought to try his title to the property assigned.²⁴

The court instructs the jury that the mode of management of the trust by the assignee does not of itself affect the assignment. If it was valid at its inception, the acts and conduct of the parties subsequent to the assignment are only material, as they serve to throw light upon the question of the original intent in making the assignment.²⁵

§ 856. Priority of judgment debtor over assignee.

The court instructs the jury that if they find, from the evidence, that after the alleged assignment to plaintiff, and after

22—Guerin v. Hunt, 8 Minn. 477.

23—Wilson v. Pearson, 20 Ill. 81.

24—Wilson v. Pearson, 20 Ill. 81.

25—Guerin v. Hunt, 8 Minn. 477.

the levy of the execution in favor of W by the defendant, and possession taken by him, the debtor and assignor, O, confessed a judgment in favor of plaintiff for the amount of a claim owing to plaintiff, and that plaintiff thereupon caused execution to be issued, and directed a levy upon the assigned property to be made by defendant, and that the said judgment was so confessed, and execution was so levied with the intent to abandon said assignment, then the levy under the execution in favor of W acquired a priority of lien over the goods in question, and the jury should find for the defendant.²⁶

The court instructs the jury that if they shall find from the evidence, that the assignment in question was bona fide, then, unless it is also shown by the evidence that the assignee, the plaintiff, did take actual and exclusive possession of the goods before the levy by defendant under the execution in favor of W, the verdict should be for the defendant.²⁷

26—Wilson v. Pearson, 20 Ill. 81. . 27—Wilson v. Pearson, 20 Ill. 81.

CHAPTER LVII.

ASSUMPSIT.

§ 857. Money had and received.

§ 858. Money paid.

§ 857. Money had and received.

The court instructs the jury that the plaintiffs may recover in this suit, if the jury believe, from the evidence, that the defendant had in his possession, when this suit commenced, money which, in equity and good conscience, belongs to the plaintiffs; and if the jury believe, from the evidence, that said defendant received the proceeds of the grain described in the declaration, and that said grain belonged to the plaintiffs, then the jury will find for the plaintiffs; and if the jury so believe, and believe from the evidence, that said defendant promised to pay to the plaintiffs the money in controversy in this case, then the jury will find for the plaintiffs.¹

The court instructs the jury that if they believe, from the evidence, that the defendant R promised to pay the plaintiffs the proceeds of the sale of the ——— mentioned in the first above instruction, then the jury may take this fact into consideration in determining whether the defendant R received the proceeds for the sale of said ———, and the jury will find for the plaintiffs if they so believe that he received the proceeds of the same.²

§ 858. Money paid.

The court instructs the jury that if they believe from the evidence that (the defendant proposed to give the sum of ——— to relieve his township from a draft and upon the condition that his sons should be relieved from liability to draft, and if the jury

1—Reichwald v. Gaylord, 73 Ill. 503.

2—Reichwald v. Gaylord, 73 Ill. 503.

believe from the evidence that plaintiff on the faith of that promise expended time and money for the purpose of relieving the township from liability to draft and succeeded, and by his efforts relieved the sons of the defendant from liability to be drafted into the military service of the United States, then the jury should find for the plaintiff for the sum of ———).³

3—Wilson v. McClure, 50 Ill. 366.

CHAPTER LVIII.

ATTACHMENT.

- § 859. Grounds for attachment—Nonpayment of debt—Implied agreement as to time for payment.
- § 860. Same—Nonresidence of debtor—Temporary absence.
- § 861. Same—Transfer of property.
- § 862. — Indiana.
- § 863. — Texas.
- § 864. Property subject to attachment—Property remaining in possession of debtor after sale.
- § 865. Interpleader—Effect of possession by, or right of possession of interpleader's agent.
- § 866. Same—Mortgagee of property.
- § 867. Same—Purchaser of property.
- § 868. Replevin—Purchaser of property.
- § 869. Same—Evidence—Burden of proof.
- § 870. — Florida.
- § 871. — Illinois.
- § 872. Wrongful attachment—When action lies.
- § 873. Same—Evidence—Burden of proof.
- § 874. Same—Damages—Actual damages.
- § 875. — Alabama.
- § 876. — Michigan.
- § 877. Same—Same—Exemplary damages.

§ 859. Grounds for attachment—Nonpayment of debt—Implied agreement as to time for payment.

The court instructs the jury that if, by reason or pursuant to a uniform practice, extending through years, it was mutually understood by the defendant company and the plaintiff that the plaintiff was to have until "pay day" of the succeeding month in which to pay for goods purchased during the month preceding, then he was entitled to such time, though it was never expressly and in so many words agreed between the parties; in other words, an agreement for time may be implied from the acts of the parties, the circumstances and conditions of their business relations,

though express words may not have been employed to indicate their agreement.¹

§ 860. Same—Nonresidence of debtor—Temporary absence.

The court instructs the jury that even the temporary absence of a debtor from the state, though he does not inform his creditors, does not authorize an inference prejudicial to his integrity, nor authorize an attachment against him or his property.²

§ 861. Same—Transfer of property.

§ 862. — Indiana.

The court instructs the jury that a person, being in debt or failing circumstances, has a right to prefer one creditor or class of creditors over another creditor or creditors, and the fact that he conveys property, either by a mortgage or a deed, to one creditor or class of creditors, and does not convey any property to certain other creditors, is not fraudulent, and that fact of itself will not sustain or justify the issuing of a writ of attachment; and, if you find from the evidence that the defendant did so transfer his property, then your finding should be for the defendant on this branch of the case relating to the attachment.³

§ 863. — Texas.

The court instructs the jury that a sale or mortgage of property no more than enough to reasonably pay or secure a bona fide debt of a creditor, does not constitute a disposition of such property with intent to defraud creditors.⁴

The court instructs you that if you believe from the evidence that the grounds set out in the affidavit for attachment were not true, plaintiff would be entitled to actual damages which the proof shows he may have sustained. The affidavit recites that the plaintiff had disposed of his property for the purpose of defrauding his creditors and if you believe from the evidence that the plaintiff at, and before the suing out of the attachment, had

1—Hayes v. Union Mercantile Co.,
27 Mont. 264, 70 Pac. 975.

2—W. F. Vandiver & Co. v. Wal-
ler, 143 Ala. 411.

3—Island Coal Co. v. Rehling, 22
Ind. App. 305.

4—Williams v. Kane (Tex. Civ.
App.) 55 S. W. 974.

disposed of his property with intent to defraud his creditors, or if you find that plaintiff had disposed of his property and the natural effect of such disposition was to withdraw and place the property of plaintiff beyond the reach of his creditors, then you will find for defendant.⁵

The court instructs the jury that they shall inquire into the truth or veracity of the affidavit made for the attachment alleged in this suit to be wrongful and if it be true or if the jury believe from the evidence that at the time said affidavit was made to secure the attachment, on the ground that the plaintiff in this suit was about to convert the property into money for the purpose of placing it beyond the reach of his creditors, then the plaintiff is not entitled to any actual damages against the person suing out the attachment and the sureties on the attachment bond, but if the jury shall believe from the evidence that the plaintiff was not about to so convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors, then the jury are instructed that such attachment was wrongfully sued out and you will find for the plaintiff.⁶

§ 864. Property subject to attachment—Property remaining in possession of debtor after sale.

The court instructs the jury that when you come to determine whether or not A retained actual possession of this property after the sale to plaintiff, if any such sale you find there was, you are instructed that to retain actual possession of property after a sale so as to make the property subject to the debts of the seller, the possession must be actual, of the same character and kind of possession as had before the sale.⁷

§ 865. Interpleader—Effect of possession by, or right of possession of interpleader's agent.

The court instructs the jury even if they believe from the evidence that A had the possession or the right of possession of the property attached, as agent for the interpleader, then you are instructed that such possession or such right of possession

5—Blum v. Strong, 71 Tex. 321.

6—Blum v. Davis, 56 Tex. 423.

7—Leader v. Farmers' Loan & Trust Co., 144 Iowa 180.

of said A as interpleader's agent would not defeat the claim of interpleader.⁸

§ 866. Same—Mortgagee of property.

The court instructs the jury that if you find and believe from the evidence that on ———, 19—, the defendant, A, was indebted to the interpleader B, in the sum of and as evidenced by the note for ——— offered in evidence, and that the chattel mortgage offered in evidence was executed by said A and wife, and delivered to said interpleader and accepted by him, for the sole purpose of securing said note for ———, then your verdict will be for the interpleader, B.⁹

§ 867. Same—Purchaser of property.

The court instructs the jury that if you find from a fair preponderance of the evidence in this case that on the ——— day of ———, 19—, the interpleader, A, purchased the property described in the bill of sale introduced in the evidence from the B Company, Limited, or from B or from either of them, and paid therefor the sum of ——— by paying to the ——— National Bank of ———, said sum of ——— in surrender a note held by said Bank against B, and you further find from a fair preponderance of the evidence that the said A sent one C to the place where the said property was situated to take possession of the said property for him, the said A, and that the said C did go to the place where the said property was located, and did take possession of said property for the said A, and you further find that the said purchase and taking possession of said property was in good faith on the part of the said A, then I instruct you that such possession was paramount to the rights of these plaintiffs as creditors of the said B or the said D Company.¹⁰

The court instructs the jury that if you find from a fair preponderance of the evidence that in the organization of the ——— Company the capital stock of said company con-

8—Gate City Nat. Bank v. Boyer,*
161 Mo. App. 143.

10—Burke v. Sharp, 88 Ark. 433.

9—Lafferty v. Hilliker, 109 Mo.
App. 56.

sisted in the equity of A and B had or thought they had in the lease in question, then I instruct you that such a fact in no manner affected the rights of the said C [interpleader] with respect to the property in question herein.¹¹

The court instructs the jury that a bill of sale regular on its face is prima facie evidence of a contract of sale in good faith, and, unless you find from the evidence that there was a contemplated fraud on the part of the grantor and known by the grantee at the time the bill of sale in question was executed and purchase price paid, then your verdict should be for the interpleader herein.¹²

The court instructs the jury that fraud is never to be presumed, but must be proven by good and sufficient evidence in the cases. Therefore, before you can find for the plaintiff on the ground of fraud, you will have to find that the interpleader, A, at the time of the purchase knew of grantor's intent to defraud the plaintiffs.¹³

The court instructs the jury that circumstantial evidence relied upon to make a case of fraud must be established by proof of facts which as a whole make out a clear case, and the evidence not only connects the grantor, but the grantee, in the participation of the intended fraud, and unless you find from the evidence that A, the interpleader, knew of the fraud at the time, and then and there assisted in a disposition of the grantor's property for the sole purpose of defrauding the plaintiffs or any other creditor, your verdict should be for the interpleader.¹⁴

The court instructs the jury that A and A Company, Limited, are two separate and distinct parties, and the fact that A may have had the subsequent possession of the property purchased from A Company, Limited, cannot be construed to be the possession of the grantor A Company, Limited.¹⁵

The court instructs the jury that if you find from the evidence in this case that A, the interpleader herein, by written

11—Burke v. Sharp, 88 Ark. 433.

12—Burke v. Sharp, 88 Ark. 433.

13—Burke v. Sharp, 88 Ark. 433.

14—Burke v. Sharp, 88 Ark. 433.

15—Burke v. Sharp, 88 Ark. 433.

lease, rented or hired the property in controversy herein to the B Company by the terms of which lease the B Company had the option to purchase said property upon the payment of the sum stipulated therein, and wherein it was stipulated that the said A had the option to declare said lease at an end upon the condition thereof being broken, then I instruct you that in the law the title to the said property remained in the said A until the conditions of said lease and a creditor of the lessee (the B Company) acquired no right to said property paramount to the rights of the said A by the furnishing of goods or extending of credits to the lessees upon the strength of the statement by the lessees that they were the owners of the said property.¹⁶

The court instructs the jury that the bill of sale introduced in evidence was executed and delivered in the state of ———, and that the transaction relating to the purchase of the property described herein was had in the state of ——— and is governed by the laws of that state, and, under the laws of the state of ———, the taking possession of said property at the time or within a reasonable time after the purchase of said property was all that was necessary for the said A to do in order to complete said purchase, and give him a right thereto as against subsequent purchasers or creditors of the seller of said property.¹⁷

The court instructs the jury that, if you find from the evidence that plaintiffs extended credit to the A Company upon the representation of said company, or a duly authorized agent thereof, that the property in controversy herein was the property of the A Company, yet such representation did not give the plaintiffs the right to attach, and their attachment does not constitute a lien on said property paramount to or against the rights of the said B, unless you further find that the said B had actual knowledge and notice that said A Company had made such representations.¹⁸

16—Burke v. Sharp, 88 Ark. 433.

18—Burke v. Sharp, 88 Ark. 433.

17—Burke v. Sharp, 88 Ark. 433.

The court instructs the jury that if you find from the evidence herein that the sale of said property and the payment therefor took place in ———, on ———, 19—, and that at that time a part of said property was located in the state of ——— and a part in the state of ———, and you further find that one A went to the place where said property was located at the request of the said B and took possession thereof for him within such time as was required by law to travel to the place where said property was located by the usual mode of travel, then I instruct you that the taking possession of said property was within a reasonable time as contemplated by law.¹⁹

The court instructs the jury that the validity of a bill of sale, regular on its face, cannot be overcome by oral testimony, unless it is shown to have been for fraudulent purpose, and unless you find from a fair preponderance of the evidence that the bill of sale introduced in evidence was made for the purpose and with the intent to defraud the creditors of B Company, Limited, then you should find that the bill of sale is valid and entitled to full faith and credit.²⁰

The court instructs the jury that if you believe from the evidence that at time A purchased the property in controversy from B Company, Limited, he took precaution as a reasonably prudent man would in order to determine whether or not said property was free from incumbrances, and that he was assured by C and D that they would or had released any claim they might have to said property, then I instruct you that such precaution may be considered by you as an evidence of good faith in the purchase of said property.²¹

§ 868. Replevin—Purchaser of property.

The court instructs the jury that if the jury believe from the evidence that the plaintiffs purchased the goods in controversy in good faith, and that they paid A a reasonably fair market value for them without any knowledge on their part of any

19—Burke v. Sharp, 88 Ark. 433.

21—Burke v. Sharp, 88 Ark. 433.

20—Burke v. Sharp, 88 Ark. 433.

fraudulent intent on the part of A (if such intent existed) to thereby defraud his creditors, or to hinder and delay them in the collection of their valid claims, and without knowledge on their part of such facts and circumstances as would have put an ordinarily prudent person upon inquiry, and which, if followed up, would have led to the discovery of such fraudulent purpose on the part of A, then the jury should find a verdict for the plaintiffs; but, on the contrary, if the plaintiffs purchased the goods of A, even though they paid A for them their fair market value, yet if A at the time had a purpose to defraud his creditors, or to hinder and delay them in the collection of their debts, and plaintiffs knew of such purpose, or if they had knowledge of such facts or circumstances as would have induced an ordinarily prudent person to make inquiry, and which inquiry, if made with reasonable diligence, would have led to the discovery of such fraudulent purpose of A, and plaintiffs did not make such inquiry, then the jury should find a verdict for the defendant.²²

§ 869. Same—Evidence—Burden of proof.

§ 870. — Florida.

The court instructs the jury that where the defendant relies on the allegation of fraud to maintain a levy on goods purchased of another, the burden of proof is on the party alleging such fraud to prove with the preponderance of the evidence such allegation, otherwise you will find for the plaintiffs.²³

§ 871. — Illinois.

The court instructs the jury that the burden of proof is upon the defendants to show title in the defendant A, to the property replevied. The court further instructs the jury that if you believe from the evidence that the evidence bearing upon said A's title to said goods is evenly balanced, or that it preponderates in favor of the plaintiff, then the court instructs the jury that you should find for the plaintiff.²⁴

22—Williams v. Finlayson, 49 Fla. 264.

23—Williams v. Finlayson, 49 Fla. 264.

24—Fabian v. Traeger, 117 Ill. App. 176, aff'd 215 Ill. 220.

§ 872. Wrongful attachment—When action lies.²⁵

The court instructs the jury that if they believe from the evidence that A was not about to fraudulently dispose of his property, and that no ground existed for the issuance of the attachment, then B would be liable for all actual damages that the evidence shows you the plaintiff has suffered.²⁶

The court instructs the jury that if you find, from the evidence, that the plaintiff was not about to remove permanently from the state, that he did not intend to give up his residence in this state, and take up a residence in another state, then although the defendant A honestly believed that the plaintiff was about to remove permanently from the state, and had probable cause for such belief, still he would be liable to the plaintiff, if there was no other cause for attachment.²⁷

§ 873. Same—Evidence—Burden of proof.

The court instructs the jury that if they believe from the evidence that the attachment sued out by defendants against the plaintiff, the — day of —, 19—, was sued out with sufficient cause, then the jury will find a verdict for the defendants; and the burden of showing the absence of sufficient cause rests upon the plaintiff.²⁸

§ 874. Same—Damages—Actual damages.**§ 875. — Alabama.**

The court instructs the jury that the elements of actual damages, as claimed in this case, are damages to the goods, attorney's fee in attachment suit and in contest of exemptions, and in loss of credit and business, and they must look to the evidence for the amount of these damages.²⁹

§ 876. — Michigan.

The court instructs the jury that it is not denied but what these notes were made by A, and you will recall that there was

25—Wrongful attachment by landlord, see LANDLORD AND TENANT.

26—W. F. Vandiver & Co. v. Wal-
ler, 143 Ala. 411.

27—Troy v. Rogers, 113 Ala. 131.

28—Offterdinger v. Ford, 92 Va.
636.

29—W. F. Vandiver & Co. v. Wal-
ler, 143 Ala. 411.

a stipulation here which reduces the amount of these notes at the present time to \$——. The amount is reduced by certain costs and by the amount of the so-called B notes which were assumed and taken as payment by C, the plaintiff in the case.

This attachment was taken out upon the —— day of ——, 19—, and defendant A was served with a copy on the —— day of ——, 19—, in —— county, this state. He then had notice of issuing of the writ, of course, and of the fact that the officer had taken possession of these potatoes; and then on the —— day of —— he came into this court and made a motion to dissolve that writ of attachment. When a party claims that a writ is issued without proper cause, he has a right to go into court, and he may go to a circuit court commissioner, and make a motion to dissolve the attachment upon the ground that it was improperly issued. That was done, in this case, upon the —— day of ——, 19—, and it seems that the motion was to come on here on the —— day of ——, following, for hearing, and that upon that day the parties met here and a stipulation was agreed upon and signed by the attorneys, which I have read to you. After that the defendant did amend his plea by adding notice that he had been injured by the levying of this attachment upon certain real estate and upon the potatoes in question, and that there was a loss of —— bushels by decay worth —— cents a bushel; also, that upon the remainder, —— bushels, he had suffered a loss of —— cents per bushel on account of the decline in the market price, the price falling between the days of the levy and the date of the release.

It seems that I am in error about that claim. I see that what they claim is that they are entitled to recover the highest market value between the time of the levy and the time of the release on the —— of ——, and if you find that the defendant is entitled to recover, I instruct you that that is the correct measure of damages. Where one person takes wrongful possession of the personal property of another, he is entitled to recover the highest market value of that property during the time that he was deprived of it.

If you are satisfied, gentlemen of the jury, from the preponderance of evidence in this case, that the defendant is entitled to recover damages because of this attachment having been improperly issued and levied upon his property, then I give you as a measure of damages, as follows:

The defendant is to be allowed his actual damages arising from such attachment, and for that reason I have already said to you that I withdraw from your consideration of any alleged loss on account of his being unable to sell this real estate. It is too uncertain, in view of all the testimony in the case—in view of the fact that you cannot compel any man to carry out a trade in real estate unless you have it in writing, and there is no evidence here of any of those alleged arrangements being in writing, so that A could not compel the other parties to have carried them out. He is entitled to recover actual damages to the potatoes levied upon under the attachment, and, as you have heard, he claims — bushels total loss, at — cents per bushel, and also for the depreciation of the — bushels at — cents a bushel, according to his evidence. Of course it devolves upon him to establish the damage—if you are satisfied he is entitled to recover by a preponderance of evidence, as well as the other facts necessary to his recovery, he must establish the amount he is entitled to recover. If you find the facts claimed established by him by a preponderance of the evidence under the instructions I have already given you, then I instruct he is to be awarded such actual damages as you find he has suffered in that regard, as a direct and proximate result of such levy under said attachment.

I am also requested to instruct you, and do, that the defendant is only entitled, in case he is entitled to recover to such damages as is shown by the evidence to have proceeded directly from the levy of such attachment, but not such as may have arisen from the acts of the defendant himself. That is true. If you find that the defendant placed these potatoes in question in storage with the purpose of retaining them for a very much advantageous market or for a rise in price, and was not prevented by reason of the attachment from disposing of them at a time when he could

have disposed of them to the best advantage, then he is not entitled to offset that claim.

In no event can you find damages in this case in favor of the defendant for more than \$——. In other words, you cannot, as in an ordinary action where there is an offset in assumpsit, give judgment for the balance which you find in excess is due to the defendant, or in case of what we call recoupment, but you can only take into consideration the damages up to the amount of the present claim of the plaintiff in this case \$——, and you have nothing to do with the balance. And your verdict in that case would be no cause for action, if you should so find.³⁰

§ 877. Same—Same—Exemplary damages.

The court instructs the jury that if they believe from the evidence that the suing out of the attachment was wrongful, as it has been defined by the court, and that the attachment was issued without probable cause, punitive as well as actual damages can be recovered, though the attachment is sued out by an agent, if the principal, with full knowledge, ratified the act of the agent.³¹

30—Brown v. Spiegel, 167 Mich. 645.

31—W. F. Vandiver & Co. v. Waller, 143 Ala. 411.

CHAPTER LIX.

ATTORNEY AND CLIENT.

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Cross-Reference.

Embezzlement by attorney, see EMBEZZLEMENT, § 2844.

I. RETAINER AND AUTHORITY.

§ 878. Existence of relation in general.

The court instructs the jury that if you find from the evidence in this case that the defendants, as attorneys, were employed by A to assist him in negotiating a purchase of the land named in the complaint, and to look up and pass upon the title thereto, and that at the time the defendants were so employed, and performed the work of looking up the title to said land, they had no knowledge or information that said A was acting as the agent of the plaintiff, B, then I instruct you that the relation of attorney and client did not exist as between the plaintiff and these defendants, or either of them, in connection with such employment, and your verdict should be for the defendants.¹

¹—Curry v. Butcher, 37 Ore. 380,
61 Pac. 631.

§ 879. Conduct of litigation.**§ 880. — Michigan.**

The court instructs the jury that when one puts his case against another into the hands of an attorney to be prosecuted to judgment, it is a reasonable presumption that the authority he intends to confer upon the attorney includes such action as the latter may decide to be legal, proper and necessary in the prosecution of the demand, and that consequently whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his act, even though they prove to be unwarranted by the law.²

§ 881. — New York.

The court instructs the jury that when a demand is placed in the hands of an attorney for collection, he has authority to determine what proceedings he will take and in making such determination and acting thereon, he binds his client, whether the proceeding was one in which the services of the attorney were absolutely essential or not.³

§ 882. Compromises, settlements and releases.**§ 883. — New York.**

The court instructs the jury that the ordinary employment of an attorney at law does not authorize him to compromise or release a claim, settle a suit, or alter the terms of his client's contract.⁴

§ 884. — Tennessee.

The court instructs the jury that if they believe from the evidence that the defendant's husband purchased the land involved in this suit, for the benefit of his wife, at a time when the husband was free from debt, and on suit being brought by the husband's creditors to set aside the conveyance as being in fraud of their rights, the attorney for defendant, believing that the

2—*Foster v. Wiley*, 27 Mich. 244,
15 Am. Rep. 185.

4—*Mandeville v. Reynolds*, 68
N. Y. 528.

3—*Poucher v. Blanchard*, 86 N. Y.
256.

defendant had no valid defense, agreed to a compromise and consented that a decree should be rendered against the defendant, and if the jury believe from the evidence that the defendant did not consent to such compromise, then the jury are instructed that such compromise cannot stand.⁵

§ 885. Notice to attorney.

§ 886. — Michigan.

The court instructs the jury that knowledge or notice obtained by an attorney of matters in which he is not acting professionally for his client, is not imputable to the client.⁶

§ 887. — Mississippi.

The court instructs the jury that notice to the attorney of a purchaser of land, on paying for the same, that the wife of the grantor claimed the property, is notice to the purchaser.⁷

§ 888. — Texas.

The principle that a client is chargeable with notice given to his attorney does not necessarily extend to charging a man who consults an attorney about the title to land with all the knowledge which such attorney may possess on the subject.⁸

§ 889. Delegation of authority by attorney.

The court instructs the jury that an attorney employed to prosecute a suit in the absence of direction from his client, cannot delegate his authority as such to another attorney.⁹

§ 890. Ratification by client.

§ 891. — Illinois.

The court instructs the jury that while an attorney must have a special authority in order to compromise a suit, yet an unauthorized settlement by an attorney will become valid upon rati-

5—Mathews v. Massey, 63 Tenn. (4 Baxt.) 450.

6—Larzelere v. Starkweather, 38 Mich. 96.

7—Edwards v. Hillier, 70 Miss. 803.

8—Meuley v. Zeigler, 23 Tex. 88.

9—Morgan v. Roberts, 38 Ill. 65; Buckley v. Buckley, 64 Hun (N. Y.) 632.

fication; and such ratification may be inferred from knowledge, acquiescence and acceptance of the benefits.¹⁰

§ 892. — Indiana.

The court instructs the jury that if they believe from the evidence (that A acting as attorney for plaintiff agreed with defendant to pay a sum of money to the defendant, and that the defendant at the same time was to execute a deed to the plaintiff and that this payment of money and execution of the deed was to be in settlement of all matters in controversy between plaintiff and the defendant, and if the jury believe from the evidence that the money was paid to defendant in pursuance of such agreement and that the defendant executed the deed in pursuance of the agreement, and that the plaintiff accepted the benefits of the agreement and accepted the deed made in pursuance thereof, and took possession of the land, and if the jury believe from the evidence that the want of authority of A to make the agreement was not known to the defendant, then the plaintiff's acceptance of the benefits of the contract, if he did so accept, constitutes a ratification of the act of his attorney in making the agreement).¹¹

II. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

§ 893. Good faith.

§ 894. — Arkansas.

The court instructs the jury that attorneys, in dealing with their clients, are required to exercise the highest order of good faith and to disclose to them all information in their possession as to the material facts of the case which would or might influence the client in entering into or refusing to execute the contract in the issue.¹²

§ 895. — New York.

The court instructs the jury that it is the duty of an attorney towards his client that he shall not use any information which

10—*Wetherbee v. Fitch*, 117 Ill. 67.

12—*Weil v. Fineran*, 78 Ark. 87.

11—*Travellers' Ins. Co. v. Patten*, 119 Ind. 416.

he has derived from his client to the prejudice or injury of his client, and that he shall not act in opposition to his client's interests.¹³

§ 896. Learning, skill, care and diligence.

§ 897. — In general.

The court instructs the jury that an attorney must employ in his undertaking a reasonable degree of care and skill, for the want of which he must respond in damages to the client to the extent of the injury sustained, but that the attorney is not liable for every mistake that may occur in practice. If he acts with a proper degree of attention, with reasonable care and to the best of his skill and knowledge, he will not be held responsible.¹⁴

§ 898. — Maryland.

The court instructs the jury that if they find from the evidence in this case that the plaintiff became surety for P and W, who were the principal debtors, on the bond read in evidence, and that afterwards judgments were obtained in the ——— court of ——— county against the parties to the said bond; and that at the time of the entering of the said judgments the said P was utterly insolvent and is still insolvent, but that the said W was and still is solvent and fully able to pay and satisfy the said judgments, and further find that the said plaintiff then applied to and retained the defendant as his attorney and counsellor, as to his liabilities and rights as said surety on the said bond, and if the jury further believe from the evidence that at the time of the said retainer and application, the defendant was an attorney at law, admitted to practice in the said court and where the said judgments were of record; and that being retained by the said plaintiff for the parties above mentioned, the defendant in respect to the liabilities and rights of the said plaintiff, under the law, as such surety, advised him that he was responsible for the one-half of the money represented in and by the said judgments; and that

¹³—Hatch v. Fogerty, 33 N. Y. 151; Wilson v. Russ, 20 Me. (2 App.) Super. Ct. (1 Jones & S.) 166. 421.

¹⁴—Stevens v. Walker, 55 Ill.

he could not avoid losing the one-half of the said sum of money; and also advised him to pay the one-half of the said sum of money; and to execute and deliver to the said W the release read in evidence, and also further find that the said plaintiff acted upon the said advice and in pursuance thereof paid the one-half of the said money and executed and delivered the release read in evidence, then the plaintiff is entitled to recover provided the jury further find that the advice given and acted upon by the said plaintiff was not such advice as an attorney of ordinary skill, prudence, and intelligence would or ought to have given.¹⁵

§ 899. — Michigan.

The court instructs the jury that an attorney is not an insurer of the result in a case in which he is employed, without a special contract to that effect, nor can more than ordinary skill, care and diligence be required of him without such contract; and where an attorney has acted in good faith, and with a fair degree of intelligence, in the discharge of his duties under the usual implied contract, any error which he may make must be so gross as to render wholly improbable any disagreement among good lawyers as to the manner of the performance of the services in the given case, before the attorney can be held responsible.¹⁶

§ 900. — New York.

The court instructs the jury that besides the fidelity an attorney owes to the interests of his client, he must also have sufficient learning to determine, with reasonable accuracy, upon the appropriate remedies for enforcing or securing the rights of his client, and sufficient skill to conduct the proceedings appropriate to such remedies.¹⁷

§ 901. Failure of attorney to defend suit.

The court instructs the jury that if they believe from the evidence that defendant was employed by plaintiff to defend the

15—Cochrane v. Little, 71 Md. 323.

16—Babbitt v. Bumpus, 73 Mich. 331, 16 Am. St. Rep. 585.

17—Hatch v. Fogerty, 33 N. Y. Super. Ct. (1 Jones & S.) 166.

suit described in the declaration and that defendant failed to defend the suit and by reason of such failure judgment was rendered against the plaintiff, then before the defendant can be made liable for the whole amount of the judgment recovered against the plaintiff, the jury must believe from the evidence that the defendant was made aware of the nature of the defense he was expected to make in the suit described in the declaration.¹⁸

§ 902. Joint adventure between attorney and client.

The court instructs the jury that while the law is, that dealings between attorney and client, resulting in advantage to the former, will be closely scrutinized, and the attorney be required to show the utmost good faith and fairness, and that the client dealt with full knowledge of his rights, the law does not prohibit all dealings between the attorney and client or declare all contracts made by the attorney with the client *ipso facto* void, or voidable at the instance of the client, and if the jury believe from the evidence that (the plaintiff with full knowledge of all the facts entered into a joint venture with the defendant, his attorney, and that the defendant acted in perfect good faith, then the defendant will not be required to account to the plaintiff for defendant's share of the profits derived as a result of the joint venture).¹⁹

III. COMPENSATION AND LIEN OF ATTORNEY.

§ 903. Right to compensation—In general.

The court instructs the jury that if you find that the plaintiff performed certain legal services for the defendant with the defendant's knowledge and consent, and that defendant received the benefits thereof without objection, then plaintiff will be entitled to recover the reasonable value of such services, unless defendant has established by a fair preponderance of the evidence that they were performed under a contract made by him with A, by which A agree that plaintiff should perform the said services, and the value thereof should be indorsed upon an indebted-

18—Grayson v. Wilkinson, 13 Miss. (5 Smedes & M.) 268.

19—Rolfe v. Rich, 149 Ill. 436, aff'g 46 Ill. App. 406.

ness which was then owing by A to the defendant, and that the plaintiff had knowledge of such agreement.²⁰

§ 904. Same—Necessity that benefit result from services.

§ 905. — Alabama.

The court instructs the jury that, the law is that when plaintiffs were employed and entered upon their employment in the case of ———, their duty was a vigilant prosecution of the rights of ——— in that litigation. If you believe from the evidence they were employed by defendant, it is immaterial what benefit the defendant derived from the services rendered by them in this cause in the prosecution of the rights of said ———. If said services were not procured by said defendant, it is not liable to plaintiffs in this case.²¹

§ 906. — Indiana.

The court instructs the jury that the mere fact, if it be a fact, that the litigation between A and B did not result to such advantage to A as he may have hoped it might, does not preclude the right of C to recover in this action. If A employed C to prosecute that suit, and if C honestly and faithfully discharged his duties in that behalf, he is entitled to be paid for his services, if he has not been paid, although the litigation terminated to the dissatisfaction and detriment of A.²²

§ 907. — New York.

The court instructs the jury that if they believe from the evidence that the plaintiff as attorney was employed by the defendant to conduct the litigation described in the complaint and that the plaintiff gave the advice alleged in the complaint and pursued the proceedings therein described for the purpose of attaining the ends of his employment, then although the litigation instituted by plaintiff on behalf of defendant was unsuccessful,

20—Hudspeth v. Yetzer, 78 Iowa
11.

21—Humes v. Decatur Land Im-
provement & Furnace Co., 98 Ala.
461.

22—Blizzard v. Applegate, 77 Ind.
516.

the court instructs the jury that the advice given and the course pursued by plaintiff did not indicate a lack of ordinary skill and capacity so as to deprive plaintiff of the right to compensation.²³

The court instructs the jury that an attorney is not required to insure a client as to the ultimate result of the proceedings which he has advised, nor is the client justified in refusing to compensate him because in the subsequent development of affairs, it appears that a course other than that adopted would have resulted more advantageously for the client.²⁴

§ 908. Right to lien—In general.

The court instructs the jury that the plaintiff, L, managed the case of ——— on behalf of defendant, and defendant knew that he was managing it. There is no pretense that he objected to the managing of that suit by L; and he knew that the suit was commenced; that he had a suit in this court against the ——— company, in which L was his attorney. It is denied that he ever employed him to do it so as to make himself liable to pay him his fees, but it is not denied that he knew he was doing it. There is no pretense that L was representing a name which he had no right to represent. He was not doing wrong to defendant then, in managing that suit and prosecuting it to completion. Judgment was rendered which produced the money for which defendant sued. Now, I say to you, as a matter of law, that as soon as that judgment was rendered, whoever might be the owner of the judgment, L had a lien upon it for the amount of his fees and disbursements in the case. It was money he had a lien upon, so that whatever he is entitled to collect from ———, he is entitled to take out of the money that was received upon that execution.²⁵

§ 909. Parties liable for compensation—In general.

The parties making the contract by which plaintiffs' services in the case of ——— were procured, if you find such contract

23—Bowman v. Tallman, 27 How. Pr. (N. Y.) 212.

24—Harriman v. Baird, 6 App. Div. (N. Y.) 518.

25—Lindner v. Hine, 84 Mich. 511.

was made, are alone' liable to plaintiffs for their fee in said cause.²⁶

The court instructs the jury that, however valuable the services of plaintiffs, for which this suit is instituted, may have been to the defendant, yet plaintiffs cannot recover of said defendant unless they were employed by it in the suit in which such services were rendered.²⁷

The court instructs the jury that, notwithstanding the defendant may have been benefited by the services rendered by plaintiff in the case of ———, if you believe such to be a fact, yet the jury is not authorized to go beyond the parties making the contract by which such services in such cause were procured in search of an implied promise to pay for such incidental benefit.²⁸

The court instructs the jury that, so far as the liability of this defendant is concerned it makes no difference what plaintiffs understood as to the defendant being liable to them for their fee in said case of ———. If you believe from the evidence that plaintiffs' services in said cause of ——— were not procured by the defendant; then this defendant is not liable to plaintiffs for their services in said case, and your verdict should be for the defendant.²⁹

§ 910. Same—Corporation.³⁰

The court instructs the jury that if you believe from the evidence that both G the president of the defendant company and the defendant were interested in the property involved in the litigation of G v. ——— and that G individually employed plaintiff to press an interpretation of the contract involved in said suit favorable to the interest of said G and said defendant, and

26—Humes v. Decatur Land Improvement & Furnace Co., 98 Ala. 461.

27—Humes v. Decatur Land Improvement & Furnace Co., 98 Ala. 461.

28—Humes v. Decatur Land Improvement & Furnace Co., 98 Ala. 461.

29—Humes v. Decatur Land Improvement & Furnace Co., 98 Ala. 461.

30—Liability of bank on contract by president with attorney, see BANKS AND BANKING, § 996.

that plaintiff was not at the same time employed by said defendant in said cause, then this was G's individual act,—G's individual contract,—and the defendant would not be liable to plaintiff therefor.³¹

The court instructs the jury that, if you believe from the evidence that plaintiff was employed by G the president of the defendant company, in the case of G v. ——— and the defendant company was in like interest with said G in the result of the litigation of the case of G v. ———, and that said defendant was benefited by the services rendered by plaintiff in said cause, yet there is no rule of law which fastens the liability upon said defendant for any part of plaintiff's fee in said case unless plaintiff was employed therein by said defendant company.³²

§ 911. Set-off.

§ 912. — Illinois.

The court instructs the jury that, if they believe from the evidence that the defendant has proved the items claimed by him as a set-off, then the jury, if they find that the defendant is indebted to the plaintiff, should deduct from the claim of the plaintiff such sum as the jury may from the evidence believe has been proven; and if the jury further believe from the evidence that the items of set-off claimed by the defendant ———, exceed in amount the sum claimed by the plaintiff, then the jury should find a verdict for the defendant for such sum as the evidence shows that the defendant has proved himself entitled to recover from the plaintiff over and above the just claim of the plaintiff against the defendant.³³

§ 913. — Texas.

The court instructs the jury that if you, the jury, do not find that the firm of A & B, or that A, for said firm, told C that they

31—Humes v. Decatur Land Improvement & Furnace Co., 98 Ala. 461.

32—Humes v. Decatur Land Improvement & Furnace Co., 98 Ala. 461.

33—Rolfe v. Rich, 149 Ill. 436, Blashfield Vol. I—77

aff'g 46 Ill. App. 406. In the above instruction, it would be error to require the defendant to show the amount of his claim to the satisfaction of the jury, as this imposes a higher degree of proof than the law requires.

would take the two D notes for collection for a fee of — per cent., and you do not believe that plaintiff and the said A & B had a contract for an equal division of the amount collected on said notes, then I instruct you that under the law the said A & B will be entitled to receive a reasonable compensation for their services rendered plaintiff for the collection of the entire amount, collected and uncollected, against D, as appears from the evidence before you, and no more; and if the sums already collected and appropriated by them exceed such reasonable compensation, then plaintiff will be entitled to a verdict against the said A & B for such sums as were so collected and appropriated in excess of such reasonable compensation, together with interest.³⁴

§ 914. Actions—Issues and proof.

The court instructs the jury that if you find from the evidence that plaintiff performed any services for defendant in and about the estate of her brother B, deceased, but that such services were not legal services, but were business transactions only, then you will not be warranted in considering the expert testimony adduced on the trial in this case, tending to show the value of legal services as such.³⁵

The court instructs the jury that if the jury believe from the evidence that defendant did not employ plaintiff as a lawyer to perform the alleged services in question, then plaintiff cannot recover and your verdict must be for the defendant.³⁶

§ 915. Same—Evidence—Burden of proof—Contract.

The court instructs the jury that the burden is on the plaintiff to show by a preponderance of the evidence that the defendant entered into the contract with him on which this action is based and for the breach of which he asks for damages.³⁷

§ 916. Same—Same—Same—Fraud in procuring execution of contract.

The court instructs the jury that if you find that the agreement about which plaintiff testified was voluntarily entered into

34—Britt v. Burghart, 16 Tex. Civ. App. 78.

35—Warder v. Seitz, 157 Mo. 140.

36—Warder v. Seitz, 157 Mo. 140.

37—Weil v. Fineran, 78 Ark. 87.

by the defendant then the burden of showing that her consent to the same was procured by misrepresentation or concealment of material facts amounting to a fraud is upon the defendant.³⁸

§ 917. Same—Same—Same—Special contract relied on as defense.

The court instructs the jury that the burden of proving that there was such a special contract rests upon the defendant, A, and unless she establishes it by a preponderance of evidence her defense, founded upon such special contract, fails entirely.³⁹

§ 918. Same—Same—Weight and sufficiency—Want or failure of consideration for note.

The court instructs the jury that if you find from the evidence that the note in suit was given after the suit of A and others against B and others was affirmed by the Supreme Court of _____, and after the work for which the note was given should have been done, these facts you should consider in connection with other evidence, in determining whether either of the pleas of want or failure of consideration has been proved.⁴⁰

§ 919. Same—Same—Same—Value of services.

The court instructs the jury that in determining the value of the plaintiffs' services the jury are not bound by the opinions of the witnesses, unless the jury shall find from all the evidence taken together, including the nature of the services, the time occupied in the performance of them, and the result of them, and the benefit derived by the defendants from the rendition of said services, that said opinions are correct.⁴¹

The court instructs the jury that in determining the value of the plaintiffs' services the jury are not bound by the testimony of the expert witnesses; that testimony may be considered by the jury; but if, in their judgment, the value fixed by those witnesses is not reasonable, they may disregard it, and find the amount which, in their judgment, would be reasonable.⁴²

38—Weil v. Fineran, 78 Ark. 87.

41—Head v. Hargrave, 105 U. S.

39—Cusick v. Boyne, 1 Cal. App.

45, 26 L. Ed. 1028.

643, 82 Pac. 985.

42—Head v. Hargrave, 105 U. S.

40—Blizzard v. Applegate, 77

45, 26 L. Ed. 1028.

Ind. 516.

§ 920. Same—Same—Questions for jury.

The court instructs the jury that if you find from a preponderance of the evidence that defendant did enter into a contract with plaintiff to pay him the sums of money expended by him in finding her, and a \$—— fee for his services in that connection, and the further sum of —— per cent. of any share of her mother's estate which he might recover for her, and if you further find that said contract was made in good faith, and not procured by fraud, misrepresentation, or concealment of material facts on the part of the plaintiff, and that afterwards the defendant revoked the power of attorney executed by her to plaintiff, then it is for you to say whether such revocation was intended by her and understood by him as dismissing him from the case, and denying him the right to proceed and carry out his part of the contract; if you should find that it was so intended and so understood by both parties, then you should find for plaintiff such sum in damages as you believe he is entitled to recover under the other instructions given herein.⁴³

§ 921. Same—Same—Measure of recovery.**§ 922. — In general.**

The court instructs the jury that if they believe from the evidence that defendant retained plaintiff to take charge of the litigation described in the declaration and that thereafter defendant wrongfully discharged plaintiff, the measure of damages will be the full amount of compensation agreed upon less the expenses which would have been incurred by plaintiff in carrying out the agreement and that plaintiff was not under obligation to seek other employment for the time in which he would have been employed by defendant if he had carried out his agreement.⁴⁴

§ 923. — Arkansas.

The court instructs the jury that if they believe from the evidence that the plaintiff is entitled to recover, the measure of damages is the amount of money he would have received had he

43—Weil v. Fineran, 78 Ark. 87.

Am. Dec. 659; Myers v. Crockett,

44—Hunt v. Test, 8 Ala. 713, 42

14 Tex. 257.

been allowed to complete the performance of his contract, less the value of such services as he would have been required to render, and also deducting any expense which he would have been compelled to incur in carrying out the contract on his part.⁴⁵

The court instructs the jury that if you believe from the evidence that the defendant contracted with the plaintiff, A, as an attorney at law, to pay him — per cent. of her interest in the estate of B, in case he should establish her right thereto, and recover same for her, and, by power of attorney, constituted and appointed plaintiff her agent and attorney to procure such interest, and also agreed to pay him \$—— for his services in making search for defendant and proving her identity and establishing her to be an heir of deceased, and also promised to reimburse plaintiff for all sums expended by him in finding her and all sums expended in her interest, and if the jury further believe from the evidence that the plaintiff did make such search, locate and develop defendant to be the daughter and heir of the deceased, and entitled to share in her estate, and if then the plaintiff while he was taking all necessary steps in her behalf towards a recovery of her interest in said estate was prevented by defendant from doing so by revoking his employment as such attorney, then plaintiff is entitled to a verdict in his favor for all sums expended by him and which she agreed to repay, and also the sum of \$—— for his services in making search for defendant and showing her to be an heir of deceased, and is also entitled to recover damages for a breach of his contract of employment in any sum which the jury may feel warranted from the evidence in awarding to him, not exceeding \$——. And in arriving at such verdict the jury may take into consideration the value of the estate of deceased, as it may have been proven in evidence.⁴⁶

§ 924. — Illinois.

The court instructs the jury that if they find from the evidence that the plaintiff has performed services for the defendant, with

⁴⁵—Weil v. Fineran, 78 Ark. 87.
See Brodie v. Watkins, 33 Ark. 545,
34 Am. Rep. 49.

⁴⁶—Weil v. Fineran, 78 Ark. 87.

her consent, since ——— and has advanced and paid moneys for her while acting as her solicitor, in matters connected with her employment, they will find for the plaintiff a reasonable value for such services, as shown by the evidence, and also the amount of moneys which the evidence shows he has advanced for her.⁴⁷

§ 925. — Minnesota.

The court instructs the jury that they should determine what plaintiffs' services were reasonably worth as rendered in this case, without regard to the number of lawyers engaged, and also that in fixing the value of such services they would have a right to take into consideration the services rendered by A; that is, they could take into consideration the time he devoted and the skill he brought into the trial of the case in determining the reasonable value of the services performed by the plaintiffs, provided the services rendered by A were with the knowledge and acquiescence of defendant.⁴⁸

§ 926. — Missouri.

The court instructs the jury that in the absence of a contract fixing the value of services rendered by the attorney, the attorney rendering the services has a right to reasonable compensation and that in considering the reasonableness of such compensation the jury may take into consideration all the circumstances of the case and are not bound by the opinions of witnesses experienced as experts, but those opinions should be considered in connection with the other evidence in the case.⁴⁹

§ 927. — Texas.

The court instructs the jury that in ascertaining the reasonable value of the services of plaintiff you will consider the nature of the litigation, the amount involved and the interests at stake, the capacity and fitness of plaintiff for the required work, the services and labor rendered by plaintiff, the length of time occupied

47—Bennett v. Connelly, 103 Ill.
50.

49—Rose v. Spies, 44 Mo. 20.

48—Calhoun v. Akeley, 82 Minn.
354.

by him and the benefit if any derived by defendant from the litigation. You are further instructed to look to all the evidence in the case and to exercise your sound discretion and judgment thereon and allow plaintiff such reasonable amount as you may believe he is justly entitled to not to exceed the amount claimed in his petition.⁵⁰

50—International & G. N. R. Co.
v. Clark, 81 Tex. 48.

CHAPTER LX.

AUTOMOBILES.

I. STATUTORY REGULATIONS.

§ 928. Lights—Purpose.

II. INJURIES TO PERSON OR PROPERTY ON STREET OR HIGHWAY.

- § 929. Right to use streets and highways.
- § 930. — Arkansas.
- § 931. — Georgia.
- § 932. What constitutes negligence—In general.
- § 933. Same—Failure to turn to right.
- § 934. Same—Excessive speed.
- § 935. — Missouri.
- § 936. — Washington.
- § 937. Same—Failure to stop on discovery of danger—Blind person.
- § 938. Same—Same—Frightening animal.
- § 939. Contributory negligence—In general.
- § 940. Same—Blind persons.
- § 941. Same—Failure to look before starting to cross street.
- § 942. Same—Acts in emergencies.
- § 943. Proximate cause of injuries—In general.
- § 944. Same—Concurrent negligence.
- § 945. Persons liable—Negligence of agent.
- § 946. Actions—Issues and proof.
- § 947. Same—Evidence—Presumptions.

III. INJURIES TO OCCUPANT OF AUTOMOBILE OR TO AUTOMOBILE ITSELF.

- § 948. Contributory negligence—In general.
- § 949. Same—Excessive speed.
- § 950. Same—Acts in emergencies.
- § 951. Proximate cause of injuries—Concurrent negligence.

Cross-Reference.

Manner of driving, see HOMICIDE, § 3439.

I. STATUTORY REGULATIONS.

§ 928. Lights—Purpose.

The court instructs the jury that the purpose of lights on an automobile is not only to enable a person approaching an automobile to see it but also to enable the driver of an automobile to see a reasonable distance in the direction in which the automobile is proceeding, and that the lights must be sufficient for this purpose.¹

II. INJURIES TO PERSON OR PROPERTY ON STREET OR HIGHWAY.

§ 929. Right to use streets and highways.**§ 930. — Arkansas.**

The court instructs the jury that no man has the right to use a public street of a city as a speedway, but every man has a right to drive an automobile on the streets, just as much right as a man has to drive a buggy in it, or to cross it on foot, but wherever any man uses a dangerous machine, he must guard the exercise of that right with a proper care and due regard for the lives and safety of people who have an equal right to be upon the streets.²

§ 931. — Georgia.

The court instructs the jury that an automobile has an equal right of passage on a public highway with a buggy or any other conveyance. It does not have a greater right to the highway or road than a buggy or conveyance, but it has the same right to go along the road; yet the driver of each must observe towards the other proper caution—each must observe ordinary care and caution.³

§ 932. What constitutes negligence—In general.

The court instructs the jury that pedestrians have in general, and under reasonable restrictions as to exercise of care by them,

1—Giles v. Ternes, 93 Kan. 140,
143 Pac. 491.

2—Madding v. State; — Ark. —,
177 S. W. 410.

3—Shore v. Ferguson, 142 Ga. 657.

a right to travel anywhere upon a public highway, and it is negligence for a driver of a vehicle upon a public highway to recklessly run upon a pedestrian who is standing or walking with his back toward him.⁴

§ 933. Same—Failure to turn to right.

The court instructs the jury that you are to take all the evidence, all the circumstances, and determine whether he was doing anything he ought not to have done under all the circumstances. He had the right to make that turn. He had a right to use any part of the street that he was coming into, subject only to the rights of other people who might be there. If two vehicles meet in a street, it is the duty of each one of them, as seasonably as they can, to get each on his own right-hand side of the traveled way of that street. But that law does not compel a man always to be on the right side. He can use any part of the street, so long as he is not interfering with the rights of other people, and the fact that this happened on the right-hand side of the street is only another piece of evidence to be considered by you. You are to consider whether A was endeavoring, in making a turn, to get on the right-hand side near the hydrant, where, under certain circumstances, he properly belonged.⁵

§ 934. Same—Excessive speed.

§ 935. — Missouri.

The court instructs the jury that if you find and believe from the evidence that _____ avenue is a public street in the city of _____, crossing another public street known as _____ avenue, and that said streets at the place of their intersection are much used for travel, and if you further find and believe from the evidence that on or about the _____ day of _____, 19____, the defendant was running and operating the automobile mentioned in the evidence, running the same upon and along _____ avenue in an eastwardly direction from a point west of _____ avenue, and if you further find from the evidence that at said

⁴—Raymond v. Hill, 168 Cal. 473,
143 Pac. 743.

⁵—Johnson v. Shaw, 204 Mass.
165.

time the plaintiff was lawfully upon said ——— avenue and attempting to cross said street at or about its intersection with the west line of ——— avenue, and you further find that at said time and place the defendant approached said west line of ——— avenue in his automobile and that he then and there negligently and carelessly operated said automobile by running it at an excessive high, and dangerous rate of speed and by failing to check the speed thereof as it approached said west line of ——— avenue, or carelessly and negligently failed to give a warning or signal of the approach of the automobile as it approached said west line of ——— avenue, and if you further find that by reason of such acts or either of them the defendant's automobile ran into or against plaintiff and injured him, and if you further find from the evidence that plaintiff was exercising ordinary care for his own safety, then your verdict must be for plaintiff.⁶

§ 936. — Washington.

The court instructs the jury that the ordinance of the city of ——— limits the speed of automobiles, and motor vehicles along ——— street, as far south as the south side of ——— street, at a rate of speed not to exceed ——— miles per hour, except at street crossings, and the laws of the state of ——— set the maximum rate of speed at which a vehicle may proceed over street crossings, such as the crossing at ——— and ——— streets, at ——— miles per hour when a person is on the crossing; so if you find in this case, that the defendant was propelling his automobile southward along ——— street at a rate in excess of ——— miles an hour, and in excess of ——— miles per hour on the intersection of the two streets, when there was another person on the crossing, then you will find the defendant guilty of negligence, and if you find that the defendant was exceeding the speed limit, as I have defined above, and that that was the proximate cause of the collision, and if you further find

⁶—Cool v. Petersen, 189 Mo. App.

that the plaintiff was not himself guilty of contributory negligence, then your verdict shall be for the plaintiff.⁷

§ 937. Same—Failure to stop on discovery of danger—Blind person.

The court instructs the jury that if you find that the plaintiff was blind, and that this fact could have been discovered by the defendant by the use of ordinary care before the plaintiff was struck by the automobile, then it was the duty of the defendant to stop his machine upon discovering such fact, in order to prevent the accident, and, if he failed to do so, he would be guilty of such negligence as would make him liable in this action.⁸

§ 938. Same—Same—Frightening animal.

The court instructs the jury that if the defendant, by himself or agent, was running or driving the automobile in question, and that the horse which was drawing the buggy in which plaintiff was riding became frightened or showed that it was about to become frightened by the approach of such automobile, and that said defendant either knew that fact or by the exercise of ordinary care and diligence might have known that fact, then it was his duty to cause such automobile to come to a full stop until such horse had passed such automobile.⁹

The court instructs the jury that, if they believe from the evidence that the defendant was driving the automobile along the public highway, and that it appeared to him, or might, by the exercise of reasonable diligence on his part have appeared to him, that the team of mules, drawing the conveyance in which the plaintiff was riding, was about to become frightened, and if they further find that the defendant did not thereupon cause the automobile to come to a full stop until said team had passed, and that plaintiff was himself exercising reasonable care and caution, and was injured by reason of the failure of the defendant to bring the automobile to a full stop, then the defendant is

7—Anderson v. Kinnear, 80 Wash. 638, 141 Pac. 1151.

9—Ward v. Meredith, 220 Ill. 66, aff'g 122 Ill. App. 159.

8—McLaughlin v. Griffin, 155 Iowa 302.

liable to the plaintiff for the loss and damage sustained by him by reason of such injuries.¹⁰

§ 939. Contributory negligence—In general.

The court instructs the jury that, if he [plaintiff whose wagon was struck from behind by automobile ambulance] was sleeping or nodding, he was guilty of contributory negligence, and cannot recover.¹¹

§ 940. Same—Blind persons.

The court instructs the jury that a blind person has the same rights on the public street as any other person, and it is not ordinarily negligence for a blind person to go upon the streets unattended, if such person use ordinary care as defined in these instructions; but, if you believe from the evidence that the plaintiff was blind, that fact would not excuse him from his obligation to use due care. He was nevertheless bound to exercise that degree of care that an ordinary prudent person would have exercised under the circumstances as shown by the evidence, and the fact that he was blind not only did not excuse him from the exercise of ordinary care, but required of him the greater use of his other sense to discover, if possible, whether any vehicle was approaching the street over which he was crossing, and, if he failed to exercise such care, he cannot recover; but if you find that he did exercise such care, and he was injured on account of the defendant's negligence, then you should find for the plaintiff.¹²

§ 941. Same—Failure to look before starting to cross street.

The court instructs the jury that if you should find from the evidence that the plaintiff, immediately before he started to cross the street, failed to look north to observe whether there were approaching vehicles, and if you should find that such failure to look north amounted to negligence, that is, it was the failure to exercise ordinary care on his part, yet, if you further find that he had reached a place on the street where, if the de-

10—Christy v. Elliott, 216 Ill. 31, 1906, 122 N. W. 923.
11—L. R. A. (N. S.) 215n, 108 Am. St. Rep. 196n, 3 Ann. Cas. 487.
12—McLaughlin v. Griffin, 155 Iowa 302.

fendant had operated its motor truck in accordance with the provisions of the city ordinance, he would have been out of the danger zone, then his failure to look north at the time when he started to cross the street would not preclude a recovery, because of his right to rely upon the use of the street by the defendant in a lawful manner, and of his right to expect the automobile truck to be at a place where under the ordinance it had a right to be.¹³

§ 942. Same—Acts in emergencies.

The court instructs the jury that the act of a pedestrian on a public highway in running in front of an automobile as the result of fright or terror, caused by the sudden discovery of the automobile near him, or by a noise caused by the automobile, does not necessarily constitute contributory negligence on his part, or, in other words, if the act of the defendant caused fear and loss of presence of mind on the part of the plaintiff, so as to impel her to rush into danger, as stated before, her mere terror or mistake of judgment in so acting shall not be taken by you to be contributory negligence on her part.¹⁴

§ 943. Proximate cause of injuries—In general.

The court instructs the jury that it does not follow that because there was an accident and some injury there can be a recovery by the plaintiff in this case. It must have been an injury caused by some actionable negligence of the defendant's servant, from which plaintiff was free, and while he himself was guilty of no negligence. And you must also find that the injury was not caused by the unlooked for and unexpected action of A [driver of approaching wagon].¹⁵

§ 944. Same—Concurrent negligence.

The court instructs the jury that if you find from the evidence that has been introduced that both the plaintiff and the defendant were guilty of negligence (that is, did not use the de-

13—Mosso v. E. H. Stanton Co.,
— Wash. —, 148 Pac. 594.

14—Raymond v. Hill, 168 Cal. 473,
143 Pac. 743.

15—Grogitzki v. Detroit Ambulance Co., — Mich. —, 152 N. W.
923.

gree of care which an ordinarily prudent person would use under the circumstances and conditions in which they were situated), then and in that event your verdict should be for the defendant. A good guide to determine whether the plaintiff was guilty of negligence contributing to the injury is: Would there have been no accident and no injury to the plaintiff but for the negligence of the plaintiff? And, finally, did plaintiff, under all the circumstances of the case, exercise that degree of care which an ordinarily prudent man would have used under the same circumstances? If you find that the plaintiff did not use such degree of care, then he cannot recover in this action.¹⁶

§ 945. Persons liable—Negligence of agent.

The court instructs the jury that if they find either that the defendant left the automobile in charge of his son to take it home, or in charge of his son and coachman together to take it home, or in charge of the coachman alone, and the coachman neglected his duty in that regard, and allowed the son to run the machine, and by the negligence of the son the accident occurred, without contributory negligence on the plaintiff's part, then, in either case, the defendant is responsible and liable for that negligence and its consequences.¹⁷

§ 946. Actions—Issues and proof.

The court instructs the jury that the court cannot tell you what is or what is not negligent, but the plaintiff before he can recover, if he recovers at all, it must be upon the acts of negligence as alleged in the petition.¹⁸

§ 947. Same—Evidence—Presumptions.¹⁹

The court instructs the jury that in an action brought to recover damages, either to the person or property, caused by running an automobile propelled by mechanical power in the public

16—Anderson v. Kinnear, 80 Wash. 638, 141 Pac. 1151.

17—Collard v. Beach, 81 App. Div. (N. Y.) 582.

18—Shore v. Ferguson, 142 Ga. 657.

19—Circumstantial evidence in action for wrongful death, see EVIDENCE, § 2977.

highway at a greater rate of speed than — miles per hour, the plaintiff is deemed to have made out a prima facie case by showing the fact that he or she has been injured, and that the person running such automobile, either by himself or his agent, was at the time of the injury running the same at a speed in excess of — miles per hour.²⁰

III. INJURIES TO OCCUPANT OF AUTOMOBILE OR TO AUTOMOBILE ITSELF.

§ 948. Contributory negligence—In general.

The court instructs the jury that if, upon the other hand, the plaintiff, in driving his car along the street in question, by the exercise of ordinary care on his part could have discovered the existence of the obstruction in the street, and failing to do so, ran his car into the obstruction and was injured, his injuries would be attributable to want of care, and he would not be authorized to recover; or if, in the exercise of ordinary care, he discovered the obstruction in the street, and, after making such discovery, he could have prevented the accident and injury to himself by the exercise of ordinary care for his own protection, and failed to do so, and was thereby injured, he could not recover for such injuries, and you should so find.²¹

§ 949. Same—Excessive speed.

The court instructs the jury that one in charge of an automobile driving upon a dark night over a straight stretch of strange country road at such speed that he is unable to stop within such distance as he may clearly see, under any circumstances and conditions, an obstacle in the highway, is negligent, and if the excessive speed contributed to his running into, or being injured by such obstacle, there can be no recovery.²²

§ 950. Same—Acts in emergencies.

I am asked by the plaintiff to charge you that some testimony has been offered by the defendant by which it is attempted to

²⁰—Ward v. Meredith, 220 Ill. 66, aff'g 122 Ill. App. 159.

²²—Super v. Modell Township, 88 Kan. 698, 129 Pac. 1162.

²¹—Holliday v. City of Athens, 10 Ga. App. 709.

show that the plaintiff might have stopped his automobile, or might have turned it to the right or left, before it went into the excavation. The plaintiff has told you what he did as soon as he discovered the excavation in front of him, and has told you the kind of automobile he was on at the time, and the year when it was made, and the distance in which it can be turned, the speed, going at the rate of — or — miles per hour. Upon this point I charge you that our Supreme Court has said that one suddenly put in danger is not required imperatively to do that which, after the peril is ended, it is seen might have been done, and escaped. The law makes allowance for the fright and lack of carefulness or judgment incident to the peril, and it would be absurd to require the plaintiff in this case, when he saw the excavation ahead of him, and was suddenly called upon to decide how he should escape, to exercise the same coolness and nerve that an uninterested bystander might manifest. There can be no question about that, gentlemen of the jury, but still he is bound to use that degree of diligence which the average prudent man would use on such an occasion as that, and, if he had a right to anticipate that there was any peril at that particular point, of course, gentlemen of the jury, he was bound, in approaching at a rate of speed which was inconsistent with a rate which would have been adopted by a reasonably prudent person.²³

§ 951. Proximate cause of injuries—Concurrent negligence.

The court instructs the jury that whatever the law required positively the defendant to do, a failure to do so is negligence, and in this case the law required the city to keep the streets in safe condition for travel in the ordinary modes, and, if you are satisfied from the evidence that it failed to do so, then I charge you that the defendant was guilty of negligence. The law also required the plaintiff to exercise ordinary care in using the street, and if you are satisfied from the evidence that he failed to do so, then I charge you that the plaintiff was also guilty of

²³—Karrer v. City of Detroit, 142 Mich. 331.

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negligence. Therefore, if you are satisfied, from the evidence, that the defendant was negligent, and such negligence resulted in injury to the plaintiff, and you are also satisfied, from the evidence, that the plaintiff was also negligent at the same time, and his negligence concurred with the negligence of the defendant, and concurring with the negligence of the defendant, contributed to this injury of the plaintiff, so that plaintiff's negligence would become a proximate cause of the injuries, and that the plaintiff would not have been injured if he had not been negligent, even though the defendant was also negligent, the plaintiff, under such circumstances, could not recover for his injuries.²⁴

24—Holliday v. City of Athens,
10 Ga. App. 709.

CHAPTER LXI.

BAIL.

§ 952. Actions on bonds—Questions for jury.

§ 952. Actions on bonds—Questions for jury.

The court instructs the jury that the only question for their consideration is, whether there has been an avoidance on the part of the debtor; and if he might have been taken, by the officer, by the use of common and ordinary diligence, there was in law no such avoidance and that the promise of A, as claimed by the plaintiff, furnished no excuse for the want of such diligence; but that the jury must determine from all the evidence before them, whether such diligence had been used.¹

1—Beebe v. Gardner, 11 Conn. 104.

CHAPTER LXII.

BAILMENT.

- § 953. Bailment distinguished from sale.
- § 954. Delivery to bailee—Symbolical delivery.
- § 955. Same—Admission on week day as to ownership and possession of property delivered on Sunday.
- § 956. Defects in property at time of delivery—Liability of bailor to bailee.
- § 957. Same—Liability of bailee to bailor.
- § 958. Negligence of bailor—In general.
- § 959. Same—Customer in store.
- § 960. Negligence of bailee—Care required—Bailment for benefit of bailor.
- § 961. — Illinois.
- § 962. — Tennessee.
- § 963. — United States.
- § 964. Same—Same—Bailment for benefit of bailee.
- § 965. — Alabama.
- § 966. — Illinois.
- § 967. — New York.
- § 968. Same—Same—Bailment for mutual benefit.
- § 969. — In general.
- § 970. — Illinois.
- § 971. — Indiana.
- § 972. — Maryland.
- § 973. — Massachusetts.
- § 974. Same—Limitation of liability.
- § 975. Conversion by bailee.
- § 976. — Alabama.
- § 977. — Georgia.
- § 978. Termination—Notice.
- § 979. Same—Tender of property.
- § 980. Redelivery—Excuses for failure to redeliver.
- § 981. Compensation and lien—In general.
- § 982. Same—Waiver or loss of lien.
- § 983. Actions—Evidence—Presumptions and burden of proof.

Cross-References.

Particular bailments, see BANKS AND BANKING; CARRIERS; DEPOSITARIES; FACTORS; INNKEEPERS; LIVERY STABLE KEEPERS; PLEDGES; WAREHOUSEMEN; embezzlement by bailee, see EMBEZZLEMENT, §§ 2845-2847.

§ 953. Bailment distinguished from sale.

The court instructs the jury that if the jury find from the evidence that the plaintiff was to furnish (a quantity of hides) to defendant, which defendant was to convert into (leather) and return to plaintiff for a compensation, and if they also find that the title to the (hides) was not to be changed by the transaction, but was to remain in plaintiffs; then the jury must find that the contract was one of bailment and not of sale, and that the ownership did remain in the plaintiff, notwithstanding the jury should also find from the evidence that the plaintiffs were to receive a commission for buying the (hides), and a further commission for selling the (leather), and that the defendant was to be compensated only out of the net proceeds remaining, if any, after deducting costs, expenses, commissions, insurance and interest.¹

The court instructs the jury that if the (state the identical thing, as lumber) which was delivered by the plaintiff to defendant was to be redelivered or restored, though in an altered form, it was a bailment, and the title to the property did not pass out of the plaintiff and plaintiff cannot recover its value from defendant, but if defendant was not to restore the (lumber) which was delivered to him but was at liberty to return other (lumber) of equal value, defendant becomes a debtor to make the return, and the title of the property is changed. In the latter case it is a sale and defendant is liable for the value of the (lumber).²

§ 954. Delivery to bailee—Symbolical delivery.

The court instructs the jury that though it is necessary that the property should have been delivered to (defendant, or plaintiff—the bailee) in order to constitute (state what undertaking was made), yet such delivery may be symbolical or of a part of the whole property which is the subject-matter of the undertaking. The delivery of a key where the goods are locked

1—Hyde v. Cookson, 21 Barb. (N. Y.) 92. Seld.) 433, 57 Am. Dec. 530; Hyde v. Cookson, 21 Barb. (N. Y.) 92.

2—Foster v. Pettibone, 7 N. Y. (3

up is so far a delivery of the goods that it will support (plaintiff's or defendant's—the bailee's) possession.³

§ 955. Same—Admission on week day as to ownership and possession of property delivered on Sunday.

The court instructs the jury that if they believe from the evidence that the defendant was intrusted with the safe-keeping of money belonging to the plaintiff and that part of said money was delivered to him on Sunday, and the defendant thereafter on a week day admitted the sum of \$—— to be in his hands belonging to the plaintiff and promised to apply the same in payment of the rent for the premises mentioned in and under the contract offered in evidence, but neglected and failed to apply said money in payment of said rent, then the jury must find for the plaintiff for said amount of money in the hands of the defendant, and in their discretion may allow interest thereon from the time the defendant failed to pay the same as promised by him.⁴

§ 956. Defects in property at time of delivery—Liability of bailor to bailee.

The court instructs the jury that if you find in this case that the injuries caused to the plaintiff [bailee] were caused by reason of faulty material or faulty construction of the bicycle in question, plaintiff will be entitled to a verdict.⁵

§ 957. Same—Liability of bailee to bailor.

The court instructs the jury that if you find from the evidence that the plaintiff hired his mare to the defendants for the purpose (of being used on the street railroad of the city of ——), the plaintiff thereby engaged and bound himself that the mare so hired was reasonably fit and suitable for such purposes and such uses. If, therefore, you find that the mare so hired was injured while in the use of the defendants in pulling their street cars, without their fault, and through the nervousness and fret-

3—Nevan v. Roup, 8 Iowa 207.

5—Moriarty v. Porter, 22 Misc.

4—Haacke v. Knights of Liberty (N. Y.) 536.
Social & Literary Club, 76 Md. 429.

fulness of said mare, or because of her diseased condition at the time the plaintiff hired her to the defendants, or because of her unfitness to pull said street cars, then you should find for the defendants.⁶

§ 958. Negligence of bailor—In general.

The court instructs the jury that a good defense is made out if the facts show that the plaintiff was himself negligent in any matter connected with the placing of the goods in the defendant's custody and if such negligence by the plaintiff contributed to or was part of the cause of the loss or injury complained of.⁷

§ 959. Same—Customer in store.

The court instructs the jury that though the defendant is liable for failure to exercise ordinary care in protecting clothing laid aside by plaintiff while trying on garments with a view to purchase, yet if you find that the defendant had provided a safe place for the keeping of such garments, and an attendant to care for them, but that instead of giving his coat to such attendant the plaintiff himself hung it upon a hook in another place from which it was stolen, then the loss is the result of the plaintiff's negligence, and your verdict will be for defendant.⁸

§ 960. Negligence of bailee—Care required—Bailment for benefit of bailor.

§ 961. — Illinois.

The court instructs the jury that one who undertakes, without reward, to take care of the chattels or properties of another or to perform any duty or labor, upon them is required to use in its performance such care as men of common prudence, however inattentive, ordinarily take of their own affairs, and he will be liable only for bad faith or gross negligence which is an omission of such a degree of care.⁹

6—Bass v. Cantor, 123 Ind. 444.

7—Parker v. Union Ice & Salt Co.,
59 Kan. 626, 68 Am. St. Rep. 383, 54
Pac. 672; McAllister v. Simon, 27
Misc. (N. Y.) 214.

8—Trowbridge v. Schiever, 5 Daly
(N. Y.) 11.

9—Skelley v. Kahn, 17 Ill. 170.

§ 962. — Tennessee.

The court instructs the jury, that although a gratuitous bailee is bound to exercise only slight care, yet it is his duty to follow the instructions given by the bailor, and if the jury find from the evidence that defendant gratuitously undertook to (here state what, e. g. carry the money of the plaintiff to a certain place and there deliver it), and (here state the violation e. g. that after receiving the money defendant gave it into the care of a third person who undertook to deliver it, but that it was stolen from the pocket of such third person while on the way), then defendant is liable to the plaintiff for the loss of the money.¹⁰

§ 963. — United States.

The court instructs the jury that persons who undertake, without reward, to care for personal property belonging to another are bound to exercise such reasonable care as men of common prudence usually bestow for the protection of their own property of a similar character. The exercise of reasonable care is in all cases such as is dictated by good faith, and is such care as is usually and generally deemed necessary in the community for the security of similar property under like conditions, but no more. In order to find negligence, the jury must find as a fact that such reasonable care as was required by the circumstances of the case, was omitted.¹¹

§ 964. Same—Same—Bailment for benefit of bailee.**§ 965. — Alabama.**

The court instructs the jury that if the defendant borrowed or hired the mare to do light work, and put her to heavy work, and while she was doing such heavy work she received an injury from which she died then the defendant is liable, although the injury to the mare occurred without any fault on the part of the defendant.¹²

10—Colyar v. Taylor, 41 Tenn. 372.

12—Cartlidge v. Sloan, 124 Ala. 596.

11—Preston v. Prathers, 137 U. S. 604, 34 L. Ed. 788.

The court instructs the jury that if the defendant used the mare at different work from that agreed upon, if any was agreed upon, and she received an injury while being so used from which she died, defendant is liable whether borrowed or hired.¹³

§ 966. — Illinois.

The court instructs the jury that although they believe from the evidence, that the defendant borrowed from the plaintiff the mare in question, yet if they further believe that the defendant used the same care and diligence, and prudence, in taking care of the mare, the most prudent, careful man would take of his own property, placed under similar circumstances, then the jury will find for the defendant.¹⁴

The court instructs the jury if they believe from the evidence that the mare in controversy was borrowed by the defendant of the plaintiff, and that during the time she was so borrowed she died from some unavoidable accident, and the defendant used such care as the most prudent take of theirs, without any carelessness on the part of the defendant, they will find for the defendant.¹⁵

The court instructs the jury that if they believe, from the evidence, that the mare in question in this case, died from inevitable casualty, or by causes or under circumstances over which the defendant had no control, and could not prevent, then they will find for the defendant, unless they further believe that the defendant was guilty of negligence or carelessness.¹⁶

§ 967. — New York.

The court instructs the jury that a borrower of a chattel without paying hire for its use is bound to exercise extraordinary diligence and is responsible for the slightest neglect. He is bound to exercise all the care and diligence that the most careful persons apply to their own affairs and the omission of the

13—*Cartlidge v. Sloan*, 124 Ala. 596.

14—*Howard v. Babcock*, 21 Ill. 259.

15—*Howard v. Babcock*, 21 Ill. 259.

16—*Howard v. Babcock*, 21 Ill. 259.

most exact and scrupulous caution is regarded by the law as a culpable neglect.¹⁷

§ 968. Same—Same—Bailment for mutual benefit.

§ 969. — In general.

The court instructs the jury that if the jury find from the evidence that plaintiff undertook (to do certain work for the defendant upon the chattel in question belonging to defendant or undertook to manufacture for defendant certain articles from materials to be furnished by defendant) and if they further find that plaintiff did the work unskillfully, and that it was so badly and improperly done that the thing produced totally failed of being of any use or value, or that it was wholly inadequate for the purposes for which it was designed, then plaintiff cannot recover any compensation for his work. If, however, the thing produced has some value, but the jury find that it was imperfectly and ineffectually done, then plaintiff may recover for his services such an amount as his work was reasonably and actually worth to the defendant under all the circumstances, but in no case can they allow the plaintiff's recovery to exceed the value of the services after deducting the amount of damage caused to the chattel (or materials) by being badly or unskillfully wrought upon by the plaintiff.¹⁸

§ 970. — Illinois.

The court instructs the jury that if the jury believe from the evidence, that the mares in controversy were hired by H, the plaintiff, to B, the defendant, to be used by him, and that they were mutually benefited by the arrangement, then B is only required to use such care as ordinary prudent men use with their property, in taking care of the mares; and if the jury further believe, from the evidence, one of the mares died, and that the defendant used such care and diligence in taking care of the mare, they will find for the defendant.¹⁹

17—*Seranton v. Baxter*, 6 N. Y. Super. Ct. (4 Sandf.) 5.

18—*Faxen v. Mansfield*, 2 Mass. 147; *Grant v. Button*, 14 Johns. (N. Y.) 377. If the pleadings pre-

sent an issue on defendant's counterclaim, an appropriate instruction should accompany the above.

19—*Howard v. Babcock*, 21 Ill. 259.

The court instructs the jury that if they believe from the evidence that after the mare in controversy had been sold and delivered by the defendant to the plaintiff, she was hired by the plaintiff to the defendant, and that the hiring was for the mutual benefit of the parties, then and in such case, the defendant is only required to use such care as ordinary prudent men take of their property, in taking care of the mare; and if the mare, while thus in the care and possession of the defendant, died, and that the defendant took such care of the mare, they will find for the defendant.²⁰

§ 971. — Indiana.

The court instructs the jury that, although it is true that, by hiring his mare to the defendants for (use on the street cars), the plaintiff impliedly engaged that she was reasonably fit for that purpose, this gave the defendants no right to use her after it became manifest to them that by reason of her nervousness, or fretfulness, or diseased condition, she was not fit for such work. They had no right to use her.²¹ If her board devolved upon them, it was their duty to supply her with plentiful food and water at the proper time. It was their duty, also, not to require her to do more work than it was manifest she could perform without injury, and if, during such use, it was plainly evident to the defendant's employees that she was exhausted, overheated, or suffering by reason of disease, and her continued use was dangerous to her health and life, it was their duty then to abstain from further use of her without obtaining the plaintiff's consent to the same; and if, without so doing, they negligently persisted in such use, and by reason of the same she was so injured that she died, the defendants are liable.²¹

The court instructs the jury that if the plaintiff put the chattel in question into the possession of defendant at the request of defendant, and that any benefit, howsoever slight, thereby resulted to the defendant, then the bailment would not be for the sole benefit of the plaintiff, but would be a bailment for

20—Howard v. Babcock, 21 Ill.
259.

21—Bass v. Cantor, 123 Ind. 444.

mutual benefit, and the duty of the defendant would not be discharged by the exercise of slight care, but it would be his duty to exercise ordinary care for the protection of the property.²²

§ 972. — Maryland.

The court instructs the jury that if the jury find from the evidence that the defendant undertook for a reward to deliver the team of horses and vehicles attached and described in the evidence, to a person designated by the plaintiff, and in the course of this undertaking, intrusted the driving of the team to one who by his negligence permitted the horses to run away, whereby the plaintiff suffered damage, then the plaintiff is entitled to recover, and the jury will allow such damages as they may find from the evidence the plaintiff suffered by reason of the defendant's fault in the premises.²³

§ 973. — Massachusetts.

The court instructs the jury that a workman who undertakes to do work upon chattels for hire, is bound to bring to his services a degree of skill commensurate with the nature of the work, and he must use such reasonable skill as the particular work reasonably requires, and if the jury find from the evidence that the plaintiff delivered to the defendant (state the particular thing, as cloth to be made into a dress) without any instructions to defendant as to the method of doing the work thereon, the defendant is bound to exercise that degree of skill and care which a (state name of class to which artisan belongs,—as, dressmaker) would ordinarily possess or need to do the work in a reasonable and proper manner, and if the jury find that by reason of the failure to exercise such skill defendant improperly and negligently (state the particular thing done which is complained of, e. g. made up the dress with the cloth wrong side out) then the defendant is liable, and the plaintiff may recover for the injury caused by such unskillfulness.²⁴

22—*Vigo Agr. Society v. Brumfiel*, 102 Ind. 146, 52 Am. Rep. 657.

23—*American Dist. Tel. Co. of Baltimore City v. Walker*, 72 Md. 454, 20 Am. St. Rep. 479.

24—*Lincoln v. Gay*, 164 Mass. 537, 49 Am. St. Rep. 480.

§ 974. Same—Limitation of liability.

The court instructs the jury that (plaintiff,—bailor) and the (defendant,—bailee)²⁵ had a legal right to fix, by the terms of their contract, the degree of liability which the defendant shall sustain, and to limit or reduce the degree of care or diligence which he should exercise in respect to the property delivered to him, except, however, that the defendant cannot be in this manner excused from loss resulting from his own fraud or gross negligence. If the jury shall find as a matter of fact that they did so contract, then the defendant will be liable only for (state the legal substance of the contract).²⁶

The court instructs the jury that if the jury find from the evidence that defendant was conducting an exhibition of animals, and if they further find that plaintiff delivered the animals in question to defendant's care and entered the animals under the rules of the association, and that such rules provided that the entry should be at the owner's risk, and that animals entered should be cared for and returned at the close of the exhibition, and that the defendant would exercise all reasonable vigilance in caring for animals exhibited, but would not be responsible for loss by fire or otherwise, then the duty of defendant was to exercise ordinary care, and if the jury finds that the loss of the animal in question occurred by reason of the want of such ordinary care, then the defendant will be liable notwithstanding the condition in its rules against responsibility for loss.²⁷

§ 975. Conversion by bailee.**§ 976. — Alabama.**

The court instructs the jury that if they believe from the evidence that A got the mare to do a particular kind of work,

25—If there is evidence offered tending to show that the bailment was one of the exceptional bailments, as that of an innkeeper or carrier, insert,—“unless you find from the evidence that the bailee was an innkeeper (or carrier), with- in the meaning of other instructions given by the court.” Then see that

requests are made defining those exceptional bailments.

26—*Wells v. Steam Nav. Co.*, 2 N. Y. (2 Comst.) 204; *Alexander v. Greene*, 7 Hill (N. Y.) 533; s. c. 3 Hill (N. Y.) 9.

27—*Moeran v. New York Poultry, Pigeon & Pet-Stock Ass'n*, 28 Misc. (N. Y.) 537.

and put her to a different kind of work, and she was injured while doing such work, this was a conversion, and would make the defendant liable.²⁸

§ 977. — Georgia.

The hirer of a horse is bound to put it to no other use than that for which it is hired; and if he does so it amounts to a conversion, and he becomes liable for any injury that occurs after the conversion and while the horse is in his possession.²⁹

The court instructs the jury that if you believe from the evidence that the defendant hired the horse from the plaintiff to go to one or more particular places specified in the contract and that he went to another and a different place in a different direction and over a different route from what was specified in the contract, that would amount to a conversion of the horse; and if the horse died while in his possession and after he had converted it to his own use, he would be liable for the value of the horse at the time of the conversion.³⁰

§ 978. Termination—Notice.

The court instructs the jury that (defendant) if you find that he received (plaintiff's) chattels without hire and for the (plaintiff's) benefit should, when he desired to terminate his liability, have notified the (plaintiff) to take the chattels away, and if after such notice the (plaintiff) neglected to take them away within a reasonable time, or if he could not be found by due inquiry, then the (defendant) should have stored the chattels at the (plaintiff's) risk and charge.³¹

§ 979. Same—Tender of property.

The court instructs the jury that if they find from the evidence that defendant (bailee) performed his services gratuitously, and if they further find that after offering to deliver back the

28—Cartlidge v. Sloan, 124 Ala. 596.

29—Malone v. Robinson, 77 Ga. 719.

30—Malone v. Robinson, 77 Ga. 719.

31—Change words in () to suit. Bale v. Brinckerhoff, 7 Daly (N. Y.) 45.

goods and making tender of them to the (plaintiff-bailor) that the (plaintiff) did not accept them, then defendant was not obliged to longer retain the custody of the goods, and is not liable for any loss which may have resulted from his placing them in the street.³²

§ 980. Redelivery—Excuses for failure to redeliver.

The court instructs the jury that (defendant, bailee) may excuse his failure to deliver the property back to the plaintiff on demand, by showing that the property was taken from defendant, and out of his custody by the authority of valid legal process, and that within a reasonable time he gave notice of the fact to the plaintiff, but if the property in custody of a defendant was demanded by third persons under color of process, it became the defendant's duty to ascertain whether the process was such as legally required him to surrender the property, and if it was not, then it was his right and duty to refuse to surrender the property and to offer such resistance to the taking of it, and to take such measures for the reclaiming of it, if taken despite his resistance, as a prudent and intelligent man would if the property had been demanded and taken under a claim of right to it by another person acting without legal process. It is not sufficient that defendant merely made a formal protest against the taking of the property under the process.³³

§ 981. Compensation and lien—In general.

The court instructs the jury that though there was no express agreement for a compensation or for lien to secure the same, yet if (defendant, the bailee) has bestowed any service upon the chattels bailed to him, and under such circumstances as would naturally give rise to an inference of an understanding that such services should be paid for, the law will presume in that case that there was a promise to pay what the services were reason-

32—*Raulston v. McClelland*, 2 E. D. Smith (N. Y.) 60; *Babcock v. Gill*, 10 Johns. (N. Y.) 287.

33—*Roberts v. Stiverson*, 123 N. Y. 65.

ably worth, and (defendant, the bailee) in such case may retain the goods in his custody until such compensation is paid.³⁴

§ 982. Same—Waiver or loss of lien.

The court instructs the jury that notwithstanding (plaintiff, the bailee) may have parted with the possession of the chattels, yet, unless he voluntarily surrendered them to (defendant, the bailor), the lien is not divested; and (if the plaintiff's possession was disturbed by a taking of the goods on execution process against a third person, the lien is not lost even though the plaintiff afterward, for hire, assisted in removing the goods).³⁵

§ 983. Actions—Evidence—Presumptions and burden of proof.

The court instructs you that the burden of proving facts sufficient to show negligence on the defendant's part is upon the plaintiff; but it is sufficient that the facts be such that from them you can infer negligence and if at the time when the bailment was to terminate the defendant inexcusably refused to return the goods or returned them in a damaged condition then defendant must disprove the inference of negligence thereupon arising or must show that by reason of an act of God or of the public enemy or of an inevitable accident the loss occurred despite the exercise of all due care by defendant.³⁶

34—Burdick v. Murray, 3 Vt. 302, 21 Am. Dec. 588.

35—Moore v. Hitchcock, 4 Wend. (N. Y.) 292. In this case the goods were levied on and taken from the bailee's possession and the bailee, for

hire as a servant of the levying creditor, assisted in removing the goods. It was claimed that he waived his lien.

36—Claffin v. Meyer, 75 N. Y. 262.

CHAPTER LXIII.

BANKRUPTCY.

§ 984. Involuntary proceedings—Insolvency of debtor—"Fair valuation" of property and assets.

§ 985. Preferences by debtor—Actions by trustee—Evidence—Presumptions.

§ 984. Involuntary proceedings—Insolvency of debtor—"Fair valuation" of property and assets.

The court instructs the jury that in determining the value of the property and assets of the respondent on the — day of —, 19—, you are required to fix such value at a fair valuation. This does not mean what the property would bring at a forced or auction sale. A fair valuation of the real estate is such sum as the property would reasonably have sold for to a purchaser desiring to buy, and the owner wishing to sell. A fair value of the merchandise, implements, and other personal property is the sum that could have been fairly realized from the sale of such property in bulk, or in parcels, in the usual and ordinary way of selling such classes of property for cash in this market. A fair valuation of the notes and accounts is the net sum that, in your judgment, from all the evidence before you, could have been, with reasonable diligence, realized from the collection of such notes and accounts, within a reasonable time after —, 19—, and not the amounts as shown by their face, unless their face value was in fact their fair value.¹

§ 985. Preferences by debtor—Actions by trustee—Evidence—Presumptions.

The court instructs the jury that the law presumes and it is your duty to presume, that the defendant had no reasonable

1—Plymouth Cordage Co. v. Smith, 18 Okla. 249, 11 Ann. Cas. 445, 90 Pac. 418.

cause to believe a preference would be created by the payment of the note and overdraft and you should act upon and enforce this presumption of the law, unless it has been overcome by a preponderance of the evidence.²

2—Chisholm v. First Nat. Bank
of Leroy, 176 Ill. App. 382.

CHAPTER LXIV.

BANKS AND BANKING.

I. BANKING CORPORATIONS AND ASSOCIATIONS.

A. OFFICERS AND AGENTS.

- § 986. Liability for debts of bank.

B. INSOLVENCY.

- § 987. Criminal offenses—In general.
§ 988. Same—Who is cashier of bank.
§ 989. Same—When bank insolvent.
§ 990. Same—When bank in failing circumstances.
§ 991. Same—Assets and liabilities of bank.
§ 992. Same—Evidence—Presumptions and burden of proof.
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II. FUNCTIONS AND DEALINGS.

A. REPRESENTATION OF BANK BY OFFICERS AND AGENTS.

- § 994. In general.
§ 995. President—Contracts in general.
§ 996. Same—Employment of attorney.
§ 997. Cashier—Personal use of bank funds.

B. CHECKS AND DRAFTS.

- § 998. In general.
§ 999. Payment of checks—Presentation.
§ 1000. Certification of checks—In general.
§ 1001. Same—Authority of paying teller.
§ 1002. Raised draft.
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C. COLLECTIONS.

- § 1004. Relation between bank and depositor for collection.
§ 1005. Failure to collect—Negligence.

D. LOANS AND DISCOUNTS.

- § 1006. Usury.

E. ACTIONS.

§ 1007. Evidence—Presumptions—Knowledge on part of managing director.

Cross-References.

See **BILLS AND NOTES**; embezzlement by officer, see **EMBEZZLEMENT**, § 2853.

I. BANKING CORPORATIONS AND ASSOCIATIONS.

A. OFFICERS AND AGENTS.

§ 986. Liability for debts of bank.

The court instructs the jury that if you believe from the evidence in this case that the defendants took charge of and carried on and operated said Bank of A, either by themselves, or through their officers or agents, and they, or their officers or agents, in the conduct of the business of said bank and in the usual course of banking business, drew the drafts or bills of exchange to and against plaintiff bank, offered in evidence before you, as alleged in its ————— amended petition, and that plaintiff paid the sums therein alleged, and if you further believe from the evidence that said Bank of A, during said time, received said items sent for collection, and collected the same and never remitted to or accounted to plaintiff for same, as alleged in said petition, then all said defendants, including defendant B, would be liable therefor.¹

The court instructs the jury that if at the meeting of defendants on or about the ——— day of —————, 19—, it was agreed by defendants that A should go with B to C county and secure the signature of B's father to said note with such other security as A should regard as sufficient, and A went to C county with B, and came back and reported to or told defendants that said note had been signed by B's father, and B had it to get one of the D's to sign it, and it would be forthcoming in a few days, and defendants acted upon this and organized the bank electing directors and officers, or by electing directors, who, in turn, elected

¹—Curtis v. First Nat. Bank of Ft. Worth, — Tex. Civ. App. —, 138 S. W. 795.

officers, and that defendants permitted said officers to carry on and operate said bank and the indebtedness herein sued upon was created by said officers in the conduct of said bank in the usual course of a banking business, then the defendants, including E, would be liable for the indebtedness herein sued upon.²

B. INSOLVENCY.

§ 987. Criminal offenses—In general.³

The court instructs the jury that if you shall believe from the evidence that defendant at the county of J and State of M, at any time within _____ years next before the _____ day of _____, 19—, was the president of the _____ Bank, and that the same was a corporation and doing business as a banking institution in said county and state, and did then and there unlawfully and feloniously assent to the taking and receiving on deposit in said banking institution the money of V, to the amount of \$ _____ or more and that said banking institution was then and there in failing circumstances and that the defendant was then and there the president of said banking institution doing business as such, and that the defendant had knowledge at the time when such deposit was received that said banking institution was in failing circumstances, you will find the defendant guilty and assess the punishment by imprisonment in the penitentiary for any time not less than _____ years and not more than _____ years.⁴

The court instructs the jury if the jury believe from the evidence that on _____, 19—, the witness, V, did deposit in the _____ Bank, a banking institution doing business in the state of _____, at the county of _____, \$ _____, or any part thereof to the value of \$30 or more, lawful money of the United States, of the money and property of the witness, V, and shall further believe, from the evidence that the said deposit

2—Curtis v. First Nat. Bank of Ft. Worth, — Tex. Civ. App. —, 138 S. W. 795.

3—Matters pertaining to law of crime in general, see CRIMINAL LAW.

4—State v. Darragh, 152 Mo. 522. "Feloniously" as used in these instructions means wickedly, and against the admonition of the law; unlawfully.

was not taken and received by the defendant himself, but was taken and received by some other person, but that such person was then and there in the employ of the said _____ Bank, and acting under the direction and control of the defendant in employment, but that such other person had general power and authority from the defendant to receive deposits of money into said bank and that said bank was then and there in failing circumstances, and the defendant had knowledge that said bank was then and there in failing circumstances, they will find the defendant guilty as charged.⁵

The court instructs the jury that it is not of itself a crime for the president of a bank to borrow money from the bank of which he is president, and you can consider the fact that the defendant borrowed money from the bank in question, if you find he was president of the bank and did borrow money from the bank, in determining the condition of the bank on the _____ day of _____, 19—, and for no other purpose.⁶

§ 988. Same—Who is cashier of bank.

The court instructs the jury that one who has been elected and made cashier of a bank and remains in the bank and holds himself out to the public as cashier of the bank, and is held out by the bank as its cashier for the purpose of receiving deposits, is under the law under which this defendant is being tried the cashier of the bank.⁷

§ 989. Same—When bank insolvent.

The court instructs the jury upon the question of insolvency that the bank was insolvent in the sense used in the indictment: First, if the bank at the time of the deposit referred to in the indictment by A did not have assets sufficient to pay its debts; second, if the bank was financially unable to pay its debts or obligations when they became due. Now, this inability to pay its debts does not mean a temporary inability to pay its debts such as might occur when there is a "run on the bank" or failure of the officers of the bank to have enough available cash on any

5—State v. Darragh, 152 Mo. 522.

7—Skarda v. State, — Ark. —,

6—State v. Darragh, 152 Mo. 522. 175 S. W. 1190.

particular day to run the bank that day, or because of any other emergency, but it means an inability to meet the bank's obligations or debts and pay depositors in the ordinary course of business when given such a reasonable time to get the money as might be expected or required by a bank in carrying on its banking business. In other words, if the bank, under ordinary and usual circumstances, was unable to get the money by putting up its collateral and credit to pay its debts or depositors as same became due and presented for payment in the ordinary course of its business, it was insolvent in the sense used in the indictment.⁸

§ 990. Same—When bank in failing circumstances.

The court instructs the jury that a banking institution is in failing circumstances, when it is unable to meet the demands of its depositors in the usual and ordinary course of business, and this is true even though you shall believe that there was at the time a stringency in the money market.⁹

§ 991. Same—Assets and liabilities of bank.

The court instructs the jury that in determining the question as to the condition of the bank on the _____ day of _____, 19—, you will consider the assets and their reasonable market value on that day, and without any reference to any indorsement of any of the notes made after the _____ day of _____, 19—. ¹⁰

The court instructs the jury that in determining the question of whether or not the _____ Bank, was in failing circumstances on the _____ day of _____, 19—, you should consider the liabilities of the bank and the reasonable market value of the assets of the bank on that day regardless of any change, if any, or additional security, if any, which may have been given, since that day. If you shall find from the evidence that any part of the assets of said bank have been proven to have a market value, then you should give such assets such intrinsic value as may have been shown by the evidence in the case, and if

8—Skarda v. State, — Ark. —,
175 S. W. 1190.

10—State v. Darragh, 152 Mo.
522.

9—State v. Darragh, 152 Mo. 522.

there be any of said assets, to wit: stocks, bonds or negotiable paper, that have not in your opinion, from the evidence, been shown to have a market value, nor an intrinsic value, then such assets are presumed to be worth their face value. This will have no application to such assets as may have been shown by the evidence to have no value at all, provided there is such evidence as to any of the assets of said bank.¹¹

The court instructs the jury that in considering the condition of the bank on the ——— day of ———, 19—, you will not take into account the \$—— of capital stock as a liability.¹²

The court instructs the jury that in determining the condition of the ——— Bank on the ——— day of ———, 19—, you should consider the reasonable market value of the assets of the bank on hand as compared to its liabilities on that day; all consideration of the condition of the bank is confined to the ——— day of ———, 19—, but you may consider any evidence that may be before you showing its condition immediately before that day, if there is any such, to aid you in determining its condition on that day.¹³

§ 992. Same—Evidence—Presumptions and burden of proof.

The court instructs the jury that the failure of the banking institution in question is prima facie evidence of knowledge on the part of its president that the same was in failing circumstances on ———, 19—. The court instructs the jury that prima facie evidence is such that raises such a degree of probability in its favor that it must prevail unless it be rebutted, or the contrary proved.¹⁴

The court instructs the jury that although by the statute the failure of the ——— Bank is made prima facie evidence of the knowledge on the part of the defendant that the same was in failing circumstances on the ——— day of ———, 19—, yet the burden of proving the state's case is not really changed. The law enables the state to make a prima facie case by proof of assenting to the creation of state indebtedness and the reception of the

11—State v. Darragh, 152 Mo. 522.

12—State v. Darragh, 152 Mo. 522.

13—State v. Darragh, 152 Mo. 522.

14—State v. Darragh, 152 Mo. 522.

money into the bank, but the defendant can show the condition of the bank and the circumstances attending the failure and any facts tending to exonerate him from criminal liability; then on the whole case, the burden rests on the state to establish defendant's guilt beyond a reasonable doubt. The presumption of innocence with which defendant is clothed and never shifts, rests with him throughout the case, notwithstanding a *prima facie* case may have been made out by the state.¹⁵

§ 993. Same—Same—Weight and sufficiency.

The court instructs the jury that it is no offense for an officer of a bank to assent to the receipt of a deposit by such bank, when the same is in failing circumstances, and if at the time of receiving such deposit, the officer did not at the time know it was in failing circumstances, but in taking into consideration the question as to whether or not the bank in question was in failing circumstances on the ——— day of ———, 19—, and as to whether or not the defendant had knowledge on that day of its condition, you may consider all the facts and circumstances in evidence before you.¹⁶

The court instructs the jury that in determining the value of any of the assets of the ——— Bank on the ——— day of ———, 19—, as shown on this trial, the testimony of expert witnesses who have testified before you, if deemed by you unreasonable, may be disregarded.¹⁷

II. FUNCTIONS AND DEALINGS.

A. REPRESENTATION OF BANK BY OFFICERS AND AGENTS.¹⁸

§ 994. In general.

The court instructs the jury that the testimony of the president that he had no notice of any defect in the note, or defense against the same, would not be conclusive, and that notice to any of the other officers of the bank of such infirmity, if any, would be notice to the bank.¹⁹

15—State v. Darragh, 152 Mo. 522.

16—State v. Darragh, 152 Mo. 522.

17—State v. Darragh, 152 Mo. 522.

18—Presumption as to knowledge

on part of managing director, see *post*, § 1007.

19—Bank of Bushnell v. Buck Bros., 161 Iowa 362.

§ 995. President—Contracts in general.

The court instructs the jury that proof has been introduced in this court—the probative force of which, however, I do not undertake to determine—tending to show that some time in the early part of 19—, prior to ———, A agreed with B that he would purchase the properties called the “abstract properties,” then advertised for sale ——— [date], and that he would resell the same to B for the price bid therefor. If you find this to be a fact, I charge you that this agreement would impose no liability upon the defendant bank, of which A was president, unless you are satisfied from the proof that A was authorized by the bank to make such an agreement. It is without the general scope of the general authority of a bank president to make such agreement, and unless the plaintiff show authorization by the bank to A to make the same, or the bank accepted the benefit of the agreement as made by A, the contract in this respect would not be binding on the bank, and would impose no liability upon it, except as before stated. The liability, if any, would be his personal liability, and not that of the bank. In the absence of authority the president of a bank cannot dispose of the cash or credits of the bank, and he cannot, by virtue of his office, surrender or release claims of the bank against any one. I charge you that, if you should find that such an agreement was had, it was without the general scope of the powers of the president of the bank, and, in order to make it valid and binding upon the bank the plaintiff must show authority therefor, or that the bank acted upon or got the benefit of the agreement as made by A.²⁰

§ 996. Same—Employment of attorney.

The court instructs the jury that if you find from the evidence in this case that A, while acting as president of the ——— Bank, employed the plaintiff, B, as its attorney, and that under such employment the said B performed services for the said bank or held himself in readiness at all times to advise, consult, or otherwise serve the bank, being its regular attorney, for which service

20—Memphis City Bank v. Smith,
110 Tenn. 337.

he had not been paid, you will be warranted in finding for the plaintiff in such an amount as the proof in the case shows his service to be reasonably worth. Provided, that you further find that the employment of the plaintiff and services rendered were known to the directors of the defendant bank, and were accepted by them and they acquiesced in said employment by A and ratified the same.²¹

The court instructs the jury that if you find from the evidence in this case that the plaintiff, A, as an attorney at law, performed services, such as giving advice about the business of the bank during the period of years as alleged in the complaint in this case, that he refrained from taking cases against the bank, and always held himself in readiness to serve the bank when called upon by its cashier or other officers, and that the services rendered were at the solicitation of the cashier and other officers of the bank, that such services have never been paid for, then in that event you will be warranted in finding the plaintiff in such an amount as the proof shows such services to be reasonably worth. Provided, that you further find that the employment of the plaintiff and services rendered were known to the directors of the defendant bank, and were accepted by them and they acquiesced in said employment by B and ratified the same.²²

§ 997. Cashier—Personal use of bank funds.

The court instructs the jury that the general authority of the cashier as general agent of the bank to draw drafts or checks on the bank in the conduct of its business, does not by itself permit him to draw such drafts or checks in payment of his personal debts or to raise money for the transaction of his personal business. When therefore, as in this case, he draws a draft or check on the bank, payable to his own order and for his individual debt, the party acting thereon takes the risk that the agent or cashier may act without authority to do so, and if it appears that the agent had repeatedly done such acts, on previous occasions and such acts had been ratified and not repudiated by the officers of

21—Dent v. People's Bank of Imboden, — Ark. —, 175 S. W. 1154.

22—Dent v. People's Bank of Imboden, — Ark. —, 175 S. W. 1154.

the corporation, then providing such acts have been done for a period of time sufficiently long to establish a settled course of business, it may be inferred from the general manner in which they have been done that such acts were known or ought to have been known by the directors and that the cashier had authority to do such acts, if that be shown, the bank is liable. Authority to make such personal use of funds of the bank may be shown therefore by long-continued doing of such acts under such circumstances as warrant the inference that the acts were known or authorized by said bank, that is, authority of the cashier may be inferred from the power he was accustomed to exercise without the dissent of the bank and with its acquiescence.²³

B. CHECKS AND DRAFTS.

§ 998. In general.

The court instructs the jury that if they believe from the evidence that the check for ——— dollars dated ——— day of ———, 19—, drawn on the ——— National Bank signed ———, and afterwards paid by the defendant was in fact signed by the plaintiff ——— or by one for her and with her consent or by her authority, they should find for the defendant.²⁴

§ 999. Payment of checks—Presentation.

The court instructs the jury that, where all the parties reside in the same place, the presentation of a check drawn on a bank and received in the usual course of business, is deemed within a reasonable time if made during banking hours of the next day after it was so received; and it is the same whether the check be certified by the bank to be good or not, so far as the drawer of the check is concerned. If the jury, therefore, believe from the evidence in this case that the checks in evidence in this cause were taken by plaintiffs in the usual course of business, and were sent to the bank on which they were drawn during banking hours of the next day after they were received; and the said bank had before then, and has since, been closed, and had, and has, stopped business; then the court instructs the jury that such effort to

23—Gale v. Chase Nat. Bank, 43
C. C. A. 496, 104 Fed. 214.

24—Phoenix Nat. Bank v. Taylor,
23 Ky. L. Rep. 2307.

present the checks is equivalent to a presentation of the checks, and is within reasonable time to charge the defendant upon the said checks.²⁵

The court instructs the jury that, if they believe from the evidence in this cause that the plaintiffs received of the defendant on the afternoon of the ——— day of ———, 19—, the two drafts or checks given in evidence, in order to take up two promissory notes of the defendant, of amounts corresponding with the respective amounts of said checks, and the plaintiffs then and there held said notes for an eastern bank for the mere purpose of collection, and, at the time of receiving said checks, plaintiffs delivered up to defendant his said notes, and on the same day remitted the amount thereof to the party from whom they received said notes; and if the jury further believe from the evidence that, immediately after the commencement of banking hours on the next day after receiving the said checks, and soon after — o'clock A. M. of the ——— day of ———, 19—, the plaintiffs' teller took said checks to the banking office and usual place of business of the ———, named as drawee in said respective checks, for the purpose of presenting the same at said bank for payment, but was unable to obtain payment of said checks, or either of them, by reason that said bank was closed and had stopped payment, and that plaintiffs immediately and on the same day last aforesaid, gave the said defendant notice of the said matters and the non-payment by said bank of said checks; then the defendant is liable to the plaintiffs for the amount specified in said checks, and the jury will find for the plaintiffs accordingly, with interest on the amount at the rate of — per centum per annum after the ——— day of ———, 19— (the day of presentment).²⁶

§ 1000. Certification of checks—In general.

The court instructs the jury that if they find from the evidence that the writing or paper sued upon by the plaintiff was marked

25—*Rounds v. Smith*, 42 Ill. 245.
But see *Metropolitan Nat. Bank of Chicago v. Jones*, 137 Ill. 634, 12 L. R. A. 492, 31 Am. St. Rep. 403.

26—*Rounds v. Smith*, 42 Ill. 245.

or certified "good" in the name of the defendant by an employee, and that the plaintiff obtained such marking or certification in pursuance of a design or plan to defraud the defendant by keeping or secreting said paper for such time as might be necessary to permit the money represented by such paper to be drawn out upon other orders, writings or checks, with the intention of then presenting the said writing, and demanding payment of the amount ordered therein to be paid, the jury will find for the defendant.²⁷

The court instructs the jury that if they find from the evidence that the check sued on was certified by the authority of the defendant company, and that at the time of said certification there was sufficient funds of the maker of said check on deposit with defendant to pay said check, then defendant had the right to retain out of the funds of said maker a sufficient amount to pay said check whenever same might be presented.²⁸

The court instructs the jury that if they find from the evidence that at the time the check sued on was presented to defendant for certification, there was sufficient funds of the drawer on deposit with the defendant to pay the same, that it became the duty of the defendant to retain the said funds to pay said check, provided the jury finds from the evidence that defendant's teller had authority to certify said check.²⁹

The court instructs the jury that if they find from the evidence that the plaintiff and one M, his brother, confederated or conspired together to defraud the defendant by placing it in such a position that it might be called upon to pay the amount of the writing or check sued upon by plaintiff, after having already paid out upon other orders or checks the money to the credit of the drawer or drawers of such order or check, and that the plaintiff is in possession of the instrument sued on, as a party to such confederacy or conspiracy, the jury will find for the defendant.³⁰

27—Muth v. St. Louis Trust Co.,
94 Mo. App. 94.

28—Muth v. St. Louis Trust Co.,
94 Mo. App. 94.

29—Muth v. St. Louis Trust Co.,
94 Mo. App. 94.

30—Muth v. St. Louis Trust Co.,
94 Mo. App. 94.

§ 1001. Same—Authority of paying teller.

The court instructs the jury that if they find from the evidence that the checks were certified by the paying teller of the defendant company and if they further find from the evidence that said certifications were made in the general course of the defendant's business, and if they further find that plaintiff, in good faith, dealt with said defendant company on the basis of said course of business, and if they further find from the evidence that the officers of defendant knew of said course of business, then defendant will be bound by the act of its paying teller in making the certification of the check sued on.³¹

The court instructs the jury that plaintiff is not required to prove that defendant's paying teller had actual authority conferred upon him by defendant to certify checks, but that plaintiff had the right in good faith to rely upon the apparent authority of said paying teller to certify checks. And the court further instructs you that whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in such capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent, authorized to act in that capacity, whether it be in a single transaction or in a series of transactions, his authority to such other to act for him in that capacity, will be conclusively presumed, so far as may be necessary to protect the rights of third persons who have relied in good faith, and in the exercise of reasonable prudence, and the principal will not be permitted to deny that such other was not his agent authorized to do the act that he assumed to do, provided that act was within the real or apparent scope of the presumed authority.³²

The court instructs the jury that the indorsement on the face of the check sued on is in proper form to constitute a certification thereof; and further instructs you that if you find from the evidence that J, defendant's paying teller at the time of making said indorsement had authority or apparent authority as defined in

31—Muth v. St. Louis Trust Co.,
94 Mo. App. 94.

32—Muth v. St. Louis Trust Co.,
94 Mo. App. 94.

these instructions to make the indorsement of certification upon said check, and if you find further from the evidence that plaintiff acted in good faith and without fraud as defined in another instruction herewith given then your verdict must be for the plaintiff.³³

The court instructs the jury that unless they find from the evidence that J, the person whose name appears on the face of the writing offered by the plaintiff, was authorized or held out to the public by the defendant company as being authorized to certify or mark "good" writings or checks of the character of the paper sued on by plaintiff, they will find for the defendant, and the court states to the jury that the fact that the said J signed himself as the "teller" or was designated or called "teller" or "paying teller" of the defendant company, is not of itself sufficient to justify the conclusion that the said J was clothed with any such authority.³⁴

§ 1002. Raised draft.³⁵

The court instructs the jury that if they find, from the evidence, that the B National Bank of ———, on or about the ——— day of ———, 19—, issued its draft upon the plaintiff for the sum of \$——, payable to the order of A, and delivered it to him for that sum, but afterwards the said draft was fraudulently altered and raised by said A, or some person unknown, so that it purported to be drawn for the sum of \$—— instead of for the sum of \$—— only, without the knowledge or consent of the said B National Bank, the drawer thereof, and that afterwards the said draft so fraudulently raised and altered, as aforesaid, was presented to the plaintiff for certification and acceptance, and that thereupon the said plaintiff, by its duly authorized agent in that behalf, without knowledge that said draft had been changed or altered, indorsed upon said draft the following words: "Accepted, payable through C clearing house, ———, 19—, when

33—Muth v. St. Louis Trust Co.,
94 Mo. App. 94.

34—Muth v. St. Louis Trust Co.,
94 Mo. App. 94.

35—Effect of alteration of bill or
note as between original parties, see
ALTERATION OF INSTRUMENTS.

properly indorsed.—D National Bank, by E, teller,” and that the said draft was by the said A deposited for credit in the F Trust and Savings Bank of G, and that the same was by said F Trust and Savings Bank indorsed and delivered to the defendant, and that afterwards said plaintiff paid to the defendant, in the usual course of business, the full sum of said \$——, being the amount of said draft after the same had been so fraudulently changed and raised as aforesaid, instead of the sum of \$——, being the sum for which said draft was actually drawn, without knowledge of the fact that it had been so raised and changed, and that subsequently, and within a reasonable time after the discovery of the fact by the plaintiff that said draft had been fraudulently changed and altered, as aforesaid, from \$—— to \$—— (if the jury find, from the evidence, that it had been so fraudulently changed and altered), demand was made by the plaintiff on said defendant for repayment of said amount so received and collected on said draft in excess of \$——, the sum for which it was originally drawn, and that payment thereof by said defendant was refused, then the jury are instructed that the plaintiff had a right to recover of the defendant in this action the sum of \$——.

The jury are further instructed that in case they find, from the evidence, the plaintiff is so entitled to recover from said defendant the sum of \$——, and if they further find, from the evidence that there has been unreasonable and vexatious delay in the payment of the same by the said defendant to the said plaintiff, they may allow interest thereon at the rate of — per cent. per annum.³⁶

§ 1003. Forged check—Ratification.

The court instructs the jury that if they believe from the evidence that the check for —— dollars dated —— day of ——, 19——, drawn on the —— National Bank signed —— was paid by the defendant and that plaintiff with knowledge thereof received the proceeds of said check or the same was deposited to

36—Metropolitan Nat. Bank v. 74 Am. St. Rep. 180, aff'g 77 Ill. Merchants' Nat. Bank, 182 Ill. 367, App. 136.

the plaintiff's credit in the ——— Bank and the same was drawn out of said bank by her or by her order or authority, then the jury should find for the defendant, even though they believe from the evidence that plaintiff did not actually sign such check or authorize another to sign the same for her.³⁷

C. COLLECTIONS.

§ 1004. Relation between bank and depositor for collection.

The court instructs the jury, that if they believe, from the evidence, that the plaintiffs sent the certificates of deposit, given in evidence, to the defendants for collection, which were collected by the defendants, and there was no express or implied agreement as to the relation which should exist between the parties—that no agency was created as to the funds collected, except to collect the certificates in the funds in which they were payable, and to hold the same subject to demand of the plaintiffs.³⁸

The court instructs the jury if the jury believe, from the evidence, that the ——— Bank received the proceeds of the certificates of deposit sent by plaintiffs, and credited the plaintiffs with the same, the relation of debtor and creditor is created between the defendants and the plaintiffs, so far as to require the payment to plaintiffs of the same funds in which the certificates were payable, on the demand of the plaintiffs.³⁹

§ 1005. Failure to collect—Negligence.

The court instructs the jury that, if they believe the facts stated in the agreed statement, and also from the evidence in the cause that the plaintiff transmitted to the defendant as its correspondent in B, for collection the bill of exchange for \$——, dated the —— of ——, 19——, which has been offered in evidence, and that the defendant, as such correspondent, received and undertook and assumed to collect the same on the morning of

37—Phoenix Nat. Bank v. Taylor, 113 Ky. 61, 23 Ky. L. Rep. 2307.

38—Marine Bank of Chicago v. Rushmore, 28 Ill. 463.

39—Marine Bank of Chicago v. Rushmore, 28 Ill. 463. See Comstock

v. Gage, 91 Ill. 328; Doppelt v. National Bank of Republic, 74 Ill. App. 429, aff'd 175 Ill. 432; Bowman v. First Nat. Bank, 9 Wash. 614, 43 Am. St. Rep. 870, 38 Pac. 211.

the — of —, 19—, and placed it in the hands of the witness H for that purpose, and that said H was an officer or agent of the defendant, and that said H presented said bill of exchange to the said J. L. & Co., about — o'clock in the afternoon of the — of —, 19—, and that the said J. L. & Co., on whom the same purports to have been drawn, were then in doubtful credit, and that the said H then received from the said J. L. & Co., for said bill of exchange and other claims also in the hands of the defendant, the check on the M Bank for \$—— which had been offered in evidence, and gave up said bill of exchange to J. L. & Co., and that the latter marked said bills as canceled, and that the said M Bank was at that time within the same square with the banking house of the said J. L. & Co., and that the banking house of the defendant is several squares off from the latter and that the said check would have been paid by the M Bank if it had been presented any time between — and — o'clock in the said afternoon of the — of —, 19—, and that said check was taken by the said H to the defendant, and the amount thereof placed by it to the credit of the plaintiff, and that the payment of said check was not demanded until a few minutes before or after — o'clock in the afternoon of the — of —, 19—, and if they shall also believe that at the time last mentioned there was a usage among the banks of the city of B as between them and their correspondents abroad to get checks received for sight bills of exchange, when said checks were drawn by houses or individuals of doubtful credit paid or indorsed "good" before taking them back to the banks holding them for collection, then the plaintiff is entitled to recover in this action the amount of said bill of exchange; provided that the jury find that the defendants in failing to have the said checks presented for payment or to be indorsed as good by the M Bank before — o'clock on the — of —, 19—, were guilty of a want of due care, skill, and diligence in their employment as collectors of the said bill of exchange, and that they also find that the said check if it had been presented for payment between the hours of — and —

o'clock on that day, would have been paid by the M Bank and the said draft collected.⁴⁰

D. LOANS AND DISCOUNTS.

§ 1006. Usury.

The court instructs the jury that in this state a bank is not permitted under the law to knowingly collect a greater rate of interest than — per cent per annum for the loan or use of money, and, in case a greater rate of interest has been knowingly charged by a bank, the person from whom same is collected is entitled to recover double the amount of interest so paid from the bank so knowingly collecting same, by suit brought within —— years after the said collection.⁴¹

E. ACTIONS.

§ 1007. Evidence—Presumptions—Knowledge on part of managing director.

The court instructs the jury that a presumption arises, in the absence of evidence to the contrary, that a managing director of a bank has knowledge of its doings and transactions, whenever by ordinary diligence he could have acquired the same, and whether or not such presumption is satisfactorily overcome in any case is for you.⁴²

40—Merchants' Bank of Balti- woka v. McCoy, 42 Okla. 420, 141
more v. Bank of Commerce, 24 Md. Pac. 791.

12. 42—Rattelmiller v. Stone, 28

41—Farmers' Nat. Bank of We- • Wash. 104, 68 Pac. 168.

CHAPTER LXV.

BASTARDS.

I. ILLEGITIMACY IN GENERAL.

§ 1008. Presumption of legitimacy.

II. PROCEEDINGS UNDER BASTARDY LAWS.

§ 1009. Nature and purpose.

§ 1010. — Kansas.

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§ 1025. Verdict—Form.

III. PROPERTY.

§ 1026. Capacity of bastard to inherit.

Cross-References.

See ABORTION; BREACH OF MARRIAGE PROMISE; SEDUCTION; concealing birth, see CONCEALING BIRTH.

I. ILLEGITIMACY IN GENERAL.

§ 1008. Presumption of legitimacy.

The court instructs the jury as to the legitimacy of a child, that it is simply a question of fact; but the law in this state is,

for the peace and repose of families, and for the good of society, that a child, the issue of a man and woman lawfully married to each other, are presumed to be legitimate children. And that presumption prevails. It may, however, be rebutted, where you bring positive proof to show that the child could not be the lawful child of a man and his wife.¹

II. PROCEEDINGS UNDER BASTARDY LAWS.

§ 1009. Nature and purpose.

§ 1010. — Kansas.

The court instructs the jury that the purpose of a proceeding in bastardy, such as this, is to compel the father of an illegitimate child to assist in supporting the fruits of his immoral act, and to indemnify the public against the burden of supporting the child.²

§ 1011. — Nebraska.

The court instructs the jury that a proceeding in bastardy is a civil, and not a criminal, action, and that its purpose is to establish the parentage of the child, and to provide that the father shall support it.³

§ 1012. Defenses—Want of chastity in prosecutrix.

§ 1013. — Illinois.

The court instructs the jury that even if the prosecuting witness had intercourse with other persons such fact would not warrant the jury in finding the defendant not guilty, if they believe from a preponderance of the evidence that defendant is the father of the child.⁴

§ 1014. — Indiana.

The court instructs the jury that if you find from a preponderance of all the evidence that the relatrix, A, has been delivered of a bastard child, and that said child is now living, and that the

1—Pooler v. Smith, 73 S. C. 102.

4—People v. Moore, 188 Ill. App.

2—Stahl v. State ex rel. Lorimer, 418.
67 Kan. 864, 74 Pac. 238.

3—McDonald v. Brown, 90 Neb.
676.

defendant, B, is the father of such bastard child, it would make no difference how immoral the relatrix has been, or what acts of intercourse she has had with other men, as the purpose of this suit is to determine the paternity of such bastard child, and provide for its maintenance and education.⁵

§ 1015. Same—Marriage of prosecutrix and defendant.

The court instructs the jury that, if they believe from the evidence that ——— and ——— entered into a marriage contract by and between themselves in good faith, and accepted each other as husband and wife, they should return a verdict of not guilty. The contract must have been made before the intercourse when the child was conceived, and both parties must have understood the agreement was in place of a marriage ceremony. If the prosecuting witness did not understand the agreement to be all that was necessary to constitute a valid marriage, then there was no valid marriage. There was no valid marriage unless both parties acted in good faith, and each intended thereby to become husband and wife.⁶

§ 1016. Issues and proof—Date of intercourse.

§ 1017. — Indiana.

The court instructs the jury that the prosecuting witness testifies that the bastard child was begotten on the ——— day of ——— last; that the defendant had sexual intercourse with her on that date, and on several other occasions subsequent to that time. If you should believe that she is mistaken as to the day, but believe from all the evidence in the case that the defendant is the father of said bastard child, you should find for the plaintiff.⁷

§ 1018. — Nebraska.

The court instructs the jury that, if they believe that all the material facts were proved against the defendant, they should find defendant guilty whether the sexual intercourse was had on either ———, —, or —, 19—.⁸

5—Rinehart v. State ex rel. Keith, 23 Ind. App. 419.

6—Baird v. People ex rel. Wenderlandt, 66 Ill. App. 671. Common-law marriages having been abolished in

Illinois, this instruction can no longer be used in that state.

7—Spivey v. State, 8 Ind. 405.

8—McDonald v. Brown, 90 Neb. 676.

§ 1019. Evidence—Weight and sufficiency—In general.

The court instructs the jury that in determining the question whether or not the defendant and relatrix had sexual intercourse, etc., you may consider their opportunities for so doing.⁹

The court instructs the jury that it may consider the declaration of plaintiff [made during travail], that defendant was the father of the child, in connection with all the other testimony in the case, and give it such weight, as they may deem proper.¹⁰

The court instructs the jury that evidence has been permitted to go to you of the relatrix's association with one A. The purpose of evidence of this character is to prove that at about the time the child in question was begotten the relatrix had intercourse with said A, and that the child was begotten by such intercourse; and it is competent only for this purpose. It is your province alone to determine the weight of the evidence, and it is for you to say whether or not the evidence on this point is sufficient to establish the fact that such intercourse did take place between the relatrix and A.¹¹

§ 1020. Same—Same—Degree of proof required.**§ 1021. — Alabama.**

The court instructs the jury that if they reasonably believe the weight of the evidence is on the side of the state, and that A, the defendant, is the father of the child, they should find that the defendant is the father of the child.¹²

§ 1022. — Indiana.

The court instructs the jury that the state must show by a preponderance of the evidence that the defendant is the father of the child, and if you should find from the evidence that about the time the child was begotten both the defendant and A had intercourse with the relatrix, and that you are unable to tell which of them is the father of the child then you must find for the defendant.¹³

9—Goodwine v. State ex rel. Dove, 5 Ind. App. 63.

10—Johnson v. Walker, 86 Miss. 757, 1 L. R. A. (N. S.) 470n, 109 Am. St. Rep. 733n.

11—Goodwine v. State ex rel. Dove, 5 Ind. App. 63.

12—Lusk v. State, 129 Ala. 1.

13—Goodwine v. State ex rel. Dove, 5 Ind. App. 63.

§ 1023. — Iowa.

The court instructs the jury that the presumption of legitimacy is so strong that it can only be overcome by distinct, strong, satisfactory, and conclusive evidence to the contrary.¹⁴

§ 1024. — Oklahoma.

The court instructs the jury that in a bastardy proceeding the most conclusive evidence of nonaccess on the part of the husband during the period within which the child might have been begotten is required, and that neither the husband nor wife is a competent witness to give evidence of nonaccess so as to bastardize a child, and that in this case, unless you find from the evidence, outside of the evidence of the prosecuting witness, A, conclusive evidence of nonaccess of the husband to her during the time within which, under the evidence in this case, the child might have been begotten, you should acquit the defendant.¹⁵

§ 1025. Verdict—Form.

The court instructs the jury that your verdict in this case must be either guilty of having sexual intercourse with ——— (the prosecutrix) and being the father of her bastard child as charged in the information, or not guilty of having sexual intercourse with ——— (the prosecutrix) and being the father of her bastard child, as charged in the information.¹⁶

III. PROPERTY.**§ 1026. Capacity of bastard to inherit.**

The court instructs the jury that a child born out of wedlock cannot inherit from its father, and, unless the jury should believe from the evidence that A and the mother of the plaintiff were married, as claimed by the plaintiff, to find for the defendants.¹⁷

14—State v. Romaine, 58 Iowa 46.

15—Bell v. Territory, 8 Okla. 75, 56 Pac. 853.

16—State v. Reese, 43 Utah 447, 135 Pac. 270. Not erroneous where

there has been but one act of intercourse. See State v. Hammond, — Utah —, 148 Pac. 420.

17—Lee v. Bolden (Tex. Civ. App.) 85 S. W. 1027.

CHAPTER LXVI.

BIGAMY.

- § 1027. Nature and elements of crime—Cohabitation with bigamous spouse.
- § 1028. Defenses—Invalidity of prior marriage.
- § 1029. Same—Mistake of fact—Divorce.
- § 1030. Same—Same—Death of spouse.
- § 1031. Issues and proof.
- § 1032. Evidence—Weight and sufficiency—In general.
- § 1033. Same—Same—Degree of proof required.

Cross-References.

See ADULTERY; LEWDNESS; matters pertaining to law of crime in general, see CRIMINAL LAW.

§ 1027. Nature and elements of crime—Cohabitation with bigamous spouse.

The jury are instructed that if they believe from the evidence that defendant having a lawful wife living contracted a marriage with C D the offense was complete when such marriage was solemnized and it is not essential that he should thereafter have cohabited with her.¹

§ 1028. Defenses—Invalidity of prior marriage.

The court instructs the jury that as matter of law, that if the jury find that the defendant, A, had a wife living, with whom he had contracted marriage, and to whom he was married in ———, and that wife was living at the time of the alleged marriage between the defendant and the woman called B in the indictment, then the People are not entitled to a verdict of guilty under this indictment.²

1—*Beggs v. State*, 55 Ala. 108.

2—*People v. Corbett*, 49 App. Div.
(N. Y.) 514, 14 N. Y. Cr. 532.

The court instructs the jury that under the laws of the state of — the defendant could not contract a legal marriage, or one for which or upon which a conviction for bigamy could be predicated, if at the time of such marriage he had a former wife living, and from whom he was not legally divorced.³

The court instructs the jury that if they find that the defendant was already lawfully married at the time the first marriage alleged in the indictment took place, such marriage is utterly void, and the second marriage alleged in the indictment cannot constitute the offense of bigamy.⁴

§ 1029. Same—Mistake of fact—Divorce.

The jury are instructed that if they believe from the evidence that defendant was informed that his wife had obtained a divorce from him, and that he used due care and made due inquiry to ascertain the truth, and had, considering all the circumstances, reason to believe and did believe at the time of his second marriage that his former wife had been divorced from him they will find him not guilty.⁵

§ 1030. Same—Same—Death of spouse.

The court instructs the jury that our statute provides that, if any person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal, he is guilty of no offense. The mistake as to fact which will excuse a person must be such that the person so acting under a mistake would have been excusable, had his conjecture as to the fact been correct, and it must also be such mistake as does not arise from a want of proper care on the part of the person committing the offense. Therefore, if you believe from the evidence that defendant has

3—*People v. Corbett*, 49 App. Div. (N. Y.) 514, 14 N. Y. Cr. 532.

4—*People v. Corbett*, 49 App. Div. (N. Y.) 514, 14 N. Y. Cr. 532.

5—*Squire v. State*, 46 Ind. 459.

Upon this proposition and the kindred one that a belief based on due inquiry into the death of the former wife is a defense the Amer-

ican cases are in conflict. That it is a defense, see *State v. Shank*, 10 Cinc. L. Bul. (Ohio) 16; *Watson v. State*, 13 Tex. App. 76. That it is not a defense, see *Com. v. Hayden*, 163 Mass. 453, 28 L. R. A. 318n, 47 Am. St. Rep. 468; *State v. Armington*, 25 Minn. 29.

been informed and believed at the time he married A that his first wife was dead, and if you believe he exercised proper care to ascertain whether she was in fact dead, then, in that event, you will acquit him. If you believe the defendant was laboring under a mistake of fact as to his first wife's death, but you believe such mistake arose from a want of proper care on his part, such mistake would not avail him.⁶

§ 1031. Issues and proof.

The jury are instructed that to constitute the offense charged it is necessary for the prosecution to establish beyond a reasonable doubt that defendant contracted a legal marriage with A B and that thereafter while she was living and undivorced from him he contracted a marriage with C D which would have been legal had it not been for the existence of such prior marriage.⁷

The court instructs the jury that there is no evidence in this case that A [the defendant] broke up the B family, and that that matter is not to be considered at all, that that question is not here, and there is no proof of any such thing.⁸

The court instructs the jury that the defendant cannot be convicted of bigamy, whether or not the jury find that the A family was broken up by the defendant.⁹

§ 1032. Evidence—Weight and sufficiency—In general.

The court instructs the jury that it was not necessary to prove the prior marriage by any record, or by a witness who saw the ceremony performed, but that the same might be proved by the admissions of the accused of the fact of such marriage.¹⁰

§ 1033. Same—Same—Degree of proof required.

The court instructs the jury that whatever be the form of the ceremony, or, if there be no ceremony, if the parties agree to take each other for husband and wife, and from that time on live confessedly in that relation, proof beyond a reasonable doubt of

6—Welch v. State, 46 Tex. Cr. App. 528.

7—Beggs v. State, 55 Ala. 108; Davis v. Com., 13 Bush (Ky.) 318.

8—People v. Corbett, 49 App. Div. (N. Y.) 514, 14 N. Y. Cr. 532.

9—People v. Corbett, 49 App. Div. (N. Y.) 514, 14 N. Y. Cr. 532.

10—Murphy v. State, 122 Ga. 149.

these facts would be sufficient proof of a marriage, binding on the parties.¹¹

The court instructs the jury that if you do not believe beyond a reasonable doubt that the defendant married a woman, known as "A," and that she was alive at the time of his marriage to said B, then you will find him not guilty.¹²

11—*Hearne v. State*, 50 Tex. Cr. App. 431. "There is no error in this charge. While we hardly deem it necessary under the facts of this case for the court to have given the charge, still it could not have injured appellant. The first marriage was proved by a marriage certificate, and, in addition, that appellant lived with his first wife and held her out as his wife. So, if there had been no marriage license, still appellant had contracted a common-law marriage."

12—*Hearne v. State*, 50 Tex. Cr. App. 431. "Appellant's objection to this charge is that the same places an extra unauthorized burden upon defendant. The very converse is true. It places a burden upon the state, and properly placed the same upon the state, since the jury had to believe that appellant had been previously married before he could be convicted of bigamy under the second marriage."

CHAPTER LXVII.

BILLS AND NOTES.

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I. REQUISITES AND VALIDITY.

A. FORM OF NOTES.

§ 1034. Accommodation notes—Liability of maker.**§ 1035. — Kentucky.**

The court instructs the jury that you shall find for the defendant, A, unless you shall believe from the evidence that the defendant, A, and B, as principals, and the plaintiffs, C & D, as sureties for the said A and B, executed the two notes named in the petition, and shall further believe from the evidence that said

C & D, as such sureties, if you shall from the evidence believe they were sureties, paid said notes, in which event you will find for the plaintiffs the sum of \$——, with interest from ———, 19—, subject to a credit of \$——, ———, 19—, and \$——, ———, 19—. ¹

The court instructs the jury that if, however, you shall believe from the evidence that the defendant, A, signed said notes as an accommodation maker for C & D, you will find for the defendant. ²

§ 1036. — Missouri.

The court instructs the jury that, under the pleadings and evidence, the defendant has admitted the execution of all the notes sued upon by plaintiff in this case, and has admitted that plaintiff is the legal owner and holder of said notes. It is, therefore, the duty of the jury to find for the plaintiff as to each or all of said notes, unless the jury believe from the evidence that some one or more of said notes was obtained by the bank as a matter of accommodation, as explained in other instructions. ³

The court instructs the jury that if they find from the evidence that B did, at the request of the officers in charge of the management of the ——— Bank, sign and deliver any of the notes in question in this case for an accommodation to the said bank, then as to such notes so signed by B, the plaintiff, cannot recover. ⁴

The court instructs the jury that, if you find from the evidence that B signed the notes sued upon in this case as an accom-

1—Asher & Hensley v. Howard, 33 Ky. L. Rep. 696. That the original payee of paper executed for his benefit and accommodation cannot recover thereon against the accommodation maker, see SELOVER on NEGOTIABLE INSTRUMENTS, page 103.

2—Asher & Hensley v. Howard, 33 Ky. L. Rep. 696. That the original payee of paper executed for his benefit and accommodation cannot recover thereon against the accommodation maker, see SELOVER on NEGOTIABLE INSTRUMENTS, page 103.

3—Chicago Title & Trust Co. v. Brady, 165 Mo. 197. That the original payee of paper executed for his benefit and accommodation cannot recover thereon against the accommodation maker, see SELOVER on NEGOTIABLE INSTRUMENTS, page 103.

4—Chicago Title & Trust Co. v. Brady, 165 Mo. 197. That the original payee of paper executed for his benefit and accommodation cannot recover thereon against the accommodation maker, see SELOVER on NEGOTIABLE INSTRUMENTS, page 103.

modation maker for the G. S. Bank, and delivered the notes to the bank, or one of its officers for the bank, he cannot be held liable thereon, no matter how the bank may have dealt with the notes, so long as it retained ownership and control thereof; and even though you find that the bank, after the notes were delivered to it, gave S the benefit of the whole or a part of the benefit thereof, this fact would not render B, the defendant, liable on the notes. And, in this connection you are instructed that the possession of the receiver, is the possession of the bank.⁵

The court instructs the jury that, as between the party accommodated and the party accommodating, the latter can be under no liability to the former whatever by the relation in which they are placed upon the paper; and in this case, if you find from the evidence that B was, in fact, an accommodation maker of the paper sued on, then he cannot be held liable, no matter in what form the transaction was put.⁶

B. EXECUTION AND DELIVERY.

§ 1037. Execution—Joint maker.

The court instructs the jury that it would make no difference with the liability of ————— as the maker of the note that it was not signed by him at the time it was originally made by ————. His liability would be the same if he subsequently signed it and sold and delivered it to the plaintiff for a valuable consideration, as if he had signed it when first made.⁷

5—Chicago Title & Trust Co. v. Brady, 165 Mo. 197. Accommodation paper has no validity until it has been discounted or has passed into the hands of a holder for value and therefore the original payee of paper executed for his benefit and accommodation cannot recover thereon against the accommodation maker. SELOVER on NEGOTIABLE INSTRUMENTS, page 103.

6—Chicago Title & Trust Co. v.

Brady, 165 Mo. 197. That the original payee of paper executed for his benefit and accommodation cannot recover thereon against the accommodation maker, see SELOVER on NEGOTIABLE INSTRUMENTS, page 103.

7—Cook v. Brown, 62 Mich. 473, 4 Am. St. Rep. 870. (Note payable to defendant or bearer and signed by defendant, after delivery, below signature of original maker.)

§ 1038. Delivery—Conditional delivery.**§ 1039. — Illinois.**

The court instructs the jury that although the defendant signed the note in question, yet such signing alone would not make such note valid, and that before such note would be valid it must further appear that the same was delivered to the payee with the intention that the same should become a valid and binding instrument, and that if the jury find from the evidence that it was understood between plaintiff and defendant that the note in question in this suit should be signed by the defendant's wife before the same should become valid, then the said note never became a valid and binding instrument.⁸

§ 1040. — Iowa.

The court instructs the jury that if you believe from the evidence that the defendant delivered the note in suit to plaintiff, under an agreement that he was signing the same as one of the stockholders of the ———— Driving Park Association, and that the same was to become binding only upon condition that other stockholders of said association should sign the same, then plaintiff cannot recover in this case. Or if you believe from the evidence that there was no consideration for said note, then the plaintiff cannot recover. The only claim of consideration in the pleadings is that said note was given for the purpose of securing an extension of time for the ———— Driving Park Association, and you are told that, if this was the consideration, it was sufficient. The note, being a written instrument, and in the possession of plaintiff, purports a delivery and a consideration, and the burden is upon the defendant to show, by a preponderance of the evidence, either that there was no delivery or no consideration. On the other hand, if you believe that the defendant was a stockholder and officer of the ———— Driving Park Association, the defendant delivered the note to the plaintiffs, intending the same as his obligation, but that it was understood

8—Gould v. Tilton, 161 Ill. App.

142. See SELOVER on NEGOTIABLE INSTRUMENTS, pages 34, 36.

and agreed that the defendant might have the privilege of securing other names to share the liability, then the note would be a binding obligation upon him, and the plaintiff would be entitled to recover. You are told that if the defendant delivered the note to the plaintiffs without an agreement that other names should be secured to the same before it should be binding, then the law presumes he intended it as his own obligation.⁹

§ 1041. Same—Ratification of delivery in violation of instructions.

The court instructs the jury that although the witness, T, delivered the note in suit to witness, Y, in violation of the instruction of defendants, and although he communicated his instructions to witness, Y, at the time of such delivery, yet, if the jury find and believe from the evidence that after said delivery, and after having knowledge that H had not signed said note, defendants approved and adopted as their own the act of said T in making said delivery to said Y, the verdict should be for the plaintiff.¹⁰

C. ACCEPTANCE.

§ 1042. Promise to accept—Estoppel of promisor.

The court instructs the jury that, if you find from the evidence that the defendants agreed to accept only one draft, and no more; then you are instructed that, if you find from the evidence that the draft sued on was given for the cost of cattle which were consigned to the defendants, and that the defendants were notified of said draft by the holders thereof, and were asked to pay the same before receiving the cattle against which they were told it was drawn; and that, thereafter, the defendants received and sold the cattle against which they understood said draft was drawn, and received the proceeds of said cattle; then you will find the issues in this case for the plaintiff.¹¹

9—Zimelman & Otis v. Finnegan, 141 Iowa 358. See SELOVER on NEGOTIABLE INSTRUMENTS, pages 34, 36.

10—Hurt v. Ford (Mo.) 36 S. W. 671.

11—Hall v. First Nat. Bank of Emporia, 133 Ill. 234, aff'g 35 Ill. App.

116. The prior promise to accept a bill which will, under the Uniform Negotiable Instruments Law, without reference to an estoppel such as was involved in the case from which the above instruction was taken, operate as an acceptance in favor of

D. CONSIDERATION.

§ 1043. Sufficiency—In general.

The court instructs the jury that the legal effect of the deed of trust (which has been read in evidence), and the said notes recited in said deed, is to indicate a transaction in which B issued the said notes as part payment of the purchase price of certain land in ————. The jury is further instructed, that by his answer in this case defendant admits that the title to the land (described in the deed of trust) was conveyed to defendant before said deed of trust was executed by defendant. The court instructs you that the right to possession of said land, which defendant acquired by the admitted conveyance of title to him by S, was, if so intended by him and the officers of the bank with whom he had the transaction, a valuable consideration for the notes mentioned in the deed of trust and sued upon in this case.¹²

The court instructs the jury that referring to the ——— count (or claim on the \$——— note), if they find and believe from all the evidence that said note was signed and delivered by B to the bank, (or to S as its president,) in order to raise funds for the benefit of the ——— Company, and that said company accordingly obtained a credit with the bank for \$——— by reason of the said giving of said note by B, then said note is, in law, based on a valuable consideration; and if the jury find the facts to be as above stated, they should find for the plaintiff as to the \$——— note, and interest to date at the rate mentioned in said note.¹³

§ 1044. Same—Surrender of notes.

The court instructs the jury that if the facts are found to be that A, the plaintiff's husband, before his death, held the valid

any person who, on the faith thereof, receives the bill for value, is an unconditional written one. SELOVER on NEGOTIABLE INSTRUMENTS, page 150.

12—Chicago Title & Trust Co. v. Brady, 165 Mo. 197. On question of sufficiency of consideration under Uniform Negotiable Instruments

Law, in general, see SELOVER on NEGOTIABLE INSTRUMENTS, page 95.

13—Chicago Title & Trust Co. v. Brady, 165 Mo. 197. On question of sufficiency of consideration under Uniform Negotiable Instruments Law, in general, see SELOVER on NEGOTIABLE INSTRUMENTS, page 95.

notes of B, and surrendered them to the latter upon the latter's promise to provide for A's wife and child after his death, and that subsequent to A's death B, in consideration of such surrender upon such promise and in fulfilment of such promise, gave to the plaintiff the notes in suit, then there was a sufficient consideration for them, and they constituted valid legal obligations of B.¹⁴

§ 1045. Same—Renewal of note without consideration.

The court instructs the jury that if you find from a preponderance of the evidence that the two \$—— notes were given without consideration, the mere fact, if it be a fact, that the note sued on was given as a renewal of one of the \$—— notes, would not by that fact alone impart a consideration to the note sued on in this case, and in such case your verdict should be in favor of the defendant.¹⁵

§ 1046. Same—Compromise and settlement.

The court instructs the jury that the abandonment and discontinuance of a suit or action brought to enforce a doubtful right or claim, is a sufficient consideration for a promise and so is the compromise of a disputed claim made bona fide even though it ultimately appears that the claim compromised was wholly unfounded. If therefore, you should believe and find from the evidence that the note sued on in this case was given in consideration of a compromise of the suit instituted by plaintiffs on the \$—— note, and that said suit was dismissed by plaintiffs, and that said agreement of compromise was carried out by the parties thereto, then you are instructed that said agreement forms a sufficient consideration for the note sued on.¹⁶

14—Root v. New Haven Trust Co., 82 Conn. 600. On question of sufficiency of consideration under Uniform Negotiable Instruments Law, in general, see SELOVER on NEGOTIABLE INSTRUMENTS, page 95.

15—Robinson v. Robinson, 147 Iowa 615. On question of sufficiency of consideration under Uniform

Negotiable Instruments Law, in general, see SELOVER on NEGOTIABLE INSTRUMENTS, page 95.

16—Hunter, Evans & Co. v. Lanius, 82 Tex. 677. On question of sufficiency of consideration under Uniform Negotiable Instruments Law, in general, see SELOVER on NEGOTIABLE INSTRUMENTS, page 95.

The court instructs the jury that, if you believe and find from the evidence that L, defendant herein, in 19—, executed and delivered to plaintiffs, H, E & Co., the \$—— note introduced in evidence, and that plaintiffs had brought suit on said note in the ——— court of ——— County, ———, and had in such suit attached certain property of said defendant and that L, defendant, after the institution of said suit and while the same was still pending and undisposed of, agreed with plaintiff on the amount that was still due on said note for \$——, and that in order to and for the purpose of procuring the dismissal of the suit then pending and a release from the attachment of property which had been levied on, or in order to and for the purpose of procuring an extension of the time of payment of the amount still claimed to be due by plaintiffs on said \$—— note, agreed with plaintiffs or with their attorneys on a settlement of the differences existing between them as to the amount still due on said note, and in pursuance of said agreement the defendant in this suit, executed and delivered to the plaintiffs the note herein sued on, and the plaintiffs thereupon in consideration of the execution of said note, did in fact dismiss their suit on said \$—— note and released the property which had been levied on in that case, and accepted in lieu of said note, the note herein sued on, then you are instructed that said agreement and the subsequent compliance therewith by the parties thereto, is a sufficient consideration for the note sued on, and you will find for plaintiffs.¹⁷

§ 1047. Same—Satisfaction of debt of another.

The court instructs the jury that if H owed to the plaintiff the amount of the note sued upon, and if the property of H was under the control of the defendant; and if, at the request of H, the defendant gave to the plaintiff the note sued upon in satisfaction of the debt of H, to the plaintiff, and the plaintiff accepted the note as such satisfaction; then the note was given upon sufficient consideration, and the plaintiff is entitled to recover the

17—Hunter, Evans & Co. v. Lanius, 82 Tex. 677. On question of sufficiency of consideration under

Uniform Negotiable Instruments Law, in general, see SELOVER on NEGOTIABLE INSTRUMENTS, page 95.

amount due upon the note. What are the facts the jury must determine from the evidence, and from that alone; and nothing in any instruction is to be taken as any intimation by the court as to what any of the facts are.¹⁸

§ 1048. Want or failure.

§ 1049. — Illinois.

The court instructs the jury that unless the defendants have shown, by a preponderance of the evidence, that the consideration has wholly failed, as alleged in their plea, your verdict should be for the plaintiff.¹⁹

§ 1050. — Indiana.

The court instructs the jury that as a rule, where there is no fraud, and a party receives all the consideration he contracted for, the contract will not be set aside for want or failure of consideration; and where the value of the consideration is indefinite and uncertain, the parties have a right to determine it for themselves, and courts and juries ought not to overturn their decisions upon its sufficiency; and whether one contracts for the performance of an act, or several acts, which will afford him pleasure, gratify his ambition, or please his fancy, his estimate of the value should be left undisturbed. And the fact that love and affection or kinship may have been a part of the consideration, cannot defeat the plaintiff's right of recovery.²⁰

§ 1051. — Michigan.

The court instructs the jury that if this note was made out and signed by S, or S and either of the next two defendants, and

18—Harris v. Harris, 180 Ill. 157, aff'g 80 Ill. App. 310. On question of sufficiency of consideration under Uniform Negotiable Instruments Law, in general, see SELOVER ON NEGOTIABLE INSTRUMENTS, page 95.

19—Stocks v. Scott, 188 Ill. 266, aff'g 89 Ill. App. 615. Under the Uniform Negotiable Instruments Law, as well as under the law merchant, failure of consideration may be shown as between the original par-

ties or against one not a bona fide holder. SELOVER ON NEGOTIABLE INSTRUMENTS, page 99.

20—Ray v. Moore, 24 Ind. App. 480. That mere inadequacy of consideration, without fraud, is no defense under the Uniform Negotiable Instruments Law, unless the inadequacy is so great as to be itself a badge of fraud, see SELOVER ON NEGOTIABLE INSTRUMENTS, page 101.

passed over to A as a fully-executed note; and he thereupon delivered over the personal property which this note was given for to S, and he took possession of it; and then afterwards A carried this note to H, and he signed his name to it; that signature was utterly void. It was without consideration, and it would be of no consequence; and your verdict should be for the defendant.²¹

The court instructs the jury that, if you find—to make it more specific—that when this note was drawn and signed by S there was no understanding and agreement on the part of H with the other defendants that he was to sign the note with them, and that the payee did not accept the note as signed, but merely took it into his possession temporarily in order to procure the other signers, and that he did not turn over this personal property to S until after all the others had signed it, then your verdict should be for the plaintiff.²²

§ 1052. — Missouri.

The jury are instructed that the letters patent are *prima facie* evidence that the plaintiffs are the joint inventors of the so-called improved composition, yet, if that fact may be disproved, and if the jury should be satisfied from the testimony that said composition was invented by the plaintiff K alone, and not by K and E jointly, the letters patent are void; there was no consideration for the note sued on, and the verdict must be for the defendants.²³

The jury are instructed that if they believe from the evidence that the alleged improved ——— is worthless and cannot be beneficially used for the purpose of ———, or if the jury

21—*Steers v. Holmes*, 79 Mich. 430. Under the Uniform Negotiable Instruments Law, as well as under the law merchant, want of consideration may be shown as between the original parties or against one not a bona fide holder. *SELOVER on NEGOTIABLE INSTRUMENTS*, page 99.

22—*Steers v. Holmes*, 79 Mich. 430. Under the Uniform Negotiable Instruments Law, as well as under the law merchant, want of consideration

may be shown as between the original parties or against one not a bona fide holder. *SELOVER on NEGOTIABLE INSTRUMENTS*, page 99.

23—*Keith v. Hobbs*, 69 Mo. 84. Under the Uniform Negotiable Instruments Law, as well as under the law merchant, want of consideration may be shown as between the original parties or against one not a bona fide holder. *SELOVER on NEGOTIABLE INSTRUMENTS*, page 99.

should be satisfied from the testimony that any one or more of the ingredients mentioned in the specification as essential, is either disadvantageous or utterly useless, then, and in either of said cases, the letters patent are void and the verdict should be for the defendants.²⁴

The jury are instructed that the inventor should confine his specifications to substances which he knows will answer the purpose for which they are used; that the specification accompanying the letters patent read in evidence makes use of the general term "water;" and if the jury believe from the evidence that the waters of the ——— in general use will not accomplish the end for which water is used in the said composition, either by reason of ——— or otherwise, then the specification is not sufficient and the letters are void; there was no consideration for the note sued on and the verdict must be for the defendants.²⁵

The court instructs the jury that the specification accompanying the letters patent read in evidence, must in, and of itself, contain a full, clear and exact description of the invention, and if the object of the alleged patent ——— for ——— cannot be obtained when the specification is clearly followed out by competent workmen of ordinary skill and proficiency in the art of ———, without invention or addition of their own, or if in order to attain the object of the patent, information must be derived from other sources than the specification, as by experiments or from using other ingredients to make the thing described; or if it requires the solution of a problem; then and in either of said cases the letters patent are void, and the note sued on is without consideration and the jury must find for the defendants.²⁶

24—Keith v. Hobbs, 69 Mo. 84. Under the Uniform Negotiable Instruments Law, as well as under the law merchant, want of consideration may be shown as between the original parties or against one not a bona fide holder. SELOVER on NEGOTIABLE INSTRUMENTS, page 99.

25—Keith v. Hobbs, 69 Mo. 84.

Under the Uniform Negotiable Instruments Law, as well as under the law merchant, want of consideration may be shown as between the original parties or against one not a bona fide holder. SELOVER on NEGOTIABLE INSTRUMENTS, page 99.

26—Keith v. Hobbs, 69 Mo. 84. Under the Uniform Negotiable In-

E. VALIDITY.

§ 1053. Validity of assent—Mistake of law.

The court instructs the jury that it is no defense to this note that the defendant when he signed the same did not understand the legal effect of signing it as he did or that he supposed his liability would be that of an indorser merely. His mistake of law, if there was such a mistake, would be no defense.²⁷

§ 1054. Same—Duress.

The court instructs the jury that if the plaintiffs swore out the warrant, and arrested A, and without returning the writ to the justice, took the prisoner to a foreign county, and that this was done for the purpose of procuring the execution of the note in question, and that thereby the plaintiffs succeeded in obtaining the execution of the note, and thereupon let A go without attempting to bring him before the justice, then such use of the process was illegal and a fraud upon the law, and the note so procured cannot be enforced by the plaintiffs.²⁸

The court instructs the jury that if they believe from the evidence that the criminal prosecution was commenced by the plaintiffs against A for the purpose of enabling them to collect their debt, and that they made use of it to get the note in evidence from the defendant, that is a fraud upon the law, and in such case the plaintiff cannot recover.²⁹

§ 1055. Same—Ratification.

The court instructs the jury that it is claimed by the defendant that the plaintiff after the execution of said note, ratified the execution of same in the summer of 19—. A contract that is

struments Law, as well as under the law merchant, want of consideration may be shown as between the original parties or against one not a bona fide holder. SELOVER on NEGOTIABLE INSTRUMENTS, page 99.

27—Cook v. Brown, 62 Mich. 473, 4 Am. St. Rep. 870. Mistake is not ordinarily available as a defense against a bona fide holder. SELOVER on NEGOTIABLE INSTRUMENTS, page 233.

28—Shenk v. Phelps, 6 Ill. App. 612. The general law of contracts governs in a case such as the one from which the above instruction was taken. See SELOVER on NEGOTIABLE INSTRUMENTS, page 17.

29—Shenk v. Phelps, 6 Ill. App. 612. The general law of contracts governs in a case such as the one from which the above instruction was taken. See SELOVER on NEGOTIABLE INSTRUMENTS, page 17.

fraudulent by reason of same having been procured by means of duress may be ratified and confirmed by the maker thereof if his subsequent acts, with knowledge of all of the facts, are such as to fully indicate that he intends to then agree to and confirm said contract. If it appears from the evidence, by the letter by plaintiff to his daughter concerning the note in question after same was executed, and by plaintiff's statements concerning the note and its payment by him to the officers of the ——— National Bank, that the plaintiff intended at the time of making said statements to assent to and confirm the contract made in said note, and pay the defendant, then such state of fact would amount to a ratification of said note by plaintiff, and would prevent plaintiff from subsequently claiming that said note was obtained from him by duress. But, to amount to a ratification of said note, the plaintiff's acts must have been such as to fully indicate an intention on his part at that time to assent to and confirm the contract contained in said note. If the plaintiff's purpose in writing to his daughter and in making statements to the officers of said bank was to get and keep the note within the jurisdiction of this court, so that he could replevin same from defendant, and not to confirm the contract contained in said note, then said acts and statement, would not, in any event, amount to a ratification of the note. If said note was obtained by duress, to overcome such duress the burden rests with the defendant to show that plaintiff ratified said note, by a preponderance of the evidence. This is challenged by appellant. She argues that ratification, estoppel, or waiver is a legal result, operating upon a certain state of facts, independent of all question of intent. This does not appear to be true. "Waiver" has been defined to be the intentional relinquishment of a known right.³⁰

§ 1056. Consideration—Compromise and settlement.

§ 1057. — Illinois.

The court instructs the jury for the plaintiff, that if they believe from the evidence, that the plaintiff, in the month of

30—Kennedy v. Roberts, 105 Iowa 521. The general law of contracts governs in a case such as the one from

which the above instruction was taken. See SELOVER on NEGOTIABLE INSTRUMENTS, page 17.

_____, 19—, in good faith supposed he had a cause of action against the defendant, on account of personal injuries which he believed resulted from the conduct of the defendant, and thereupon threatened to sue the defendant on account thereof, and thereupon the difference between them was compromised, and the defendant executed the note sued on in consideration that the plaintiff would not sue him for such injuries, and the plaintiff accepted such note in settlement of such claim, such compromise and settlement is a good and lawful consideration for such note.³¹

§ 1058. — Iowa.

The court instructs the jury that if you find from a preponderance of the evidence that at the time the \$_____ were paid on the \$_____ note the validity of the \$_____ note was in the minds of the parties either as a valid claim, or it was a question in their minds whether or not it was a valid claim, and in order to get an extension of time to avoid litigation, and in order to settle the supposed or claimed rights of the parties in the \$_____ note, the defendant executed and delivered the note in suit, then in such case you would be warranted in finding that the note sued on is supported by a valid consideration.³²

§ 1059. Same—Promise not to resist granting of divorce.

The court instructs the jury that if you find from a preponderance of the evidence that the sole consideration for the original \$_____ note was the promise of the plaintiff not to resist the granting of the divorce which defendant was seeking to obtain from him, you are instructed that such consideration was what is termed an incompetent consideration, which in law is no consideration at all.³³

31—Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588n. It is a general rule that any consideration which will support any other simple contract will sustain a negotiable instrument. SELOVER on NEGOTIABLE INSTRUMENTS, page 95.

32—Robinson v. Robinson, 147 Iowa 615. It is a general rule that any consideration which will support any other simple contract will sustain a negotiable instrument. SELOVER on NEGOTIABLE INSTRUMENTS, page 95.

33—Robinson v. Robinson, 147 Iowa

The court instructs the jury that if you find from a preponderance of the evidence that defendant obtained a divorce from the plaintiff, it will be presumed that the same was obtained on adequate and sufficient evidence, and that she was in law entitled to a divorce, and that the plaintiff's promise, if any he made, that he would not resist the defendant's application for a divorce, was of no value, and could not form a consideration for the making of the \$——— note executed by the defendant to the plaintiff.³⁴

§ 1060. Same—Settlement of embezzlement.

The court instructs the jury that a note to settle an embezzlement or a shortage of an agent is valid and good, if it was given to settle the indebtedness or shortage, and if there is no agreement to stifle the prosecution for the embezzlement.³⁵

§ 1061. Same—Compounding felony.

§ 1062. — Massachusetts.

The court instructs the jury that to entitle the defendant to a verdict, you must believe from the evidence that there was a mutual understanding between C and the defendant that the criminal prosecution should be suppressed. It will not be sufficient that defendant was induced to give said note by understanding the prosecution would be suppressed, unless C also so understood; defendant will not be enabled to avoid the note on the ground that C was induced to abstain from prosecuting K by the giving of this note, unless there was a mutual understanding as aforesaid.³⁶

615. The consideration for a negotiable instrument is presumed to be legal, and the maker has the burden of proving that it is illegal. *SELOVER* on *NEGOTIABLE INSTRUMENTS*, page 94.

34—*Robinson v. Robinson*, 147 Iowa 615. The consideration for a negotiable instrument is presumed to be legal and the maker has the burden of

proving that it is illegal. *SELOVER* on *NEGOTIABLE INSTRUMENTS*, page 94.

35—*Wolf v. Troxell's Estate*, 94 Mich. 575. The consideration for a negotiable instrument is presumed to be legal and the maker has the burden of proving that it is illegal. *SELOVER* on *NEGOTIABLE INSTRUMENTS*, page 94.

36—*Clark v. Pomeroy*, 94 Mass. 557. The consideration for a negotiable in-

§ 1063. — Michigan.

The court instructs the jury that a promissory note given in consideration of an agreement on the part of the one to whom it is given that he will obstruct the course of public justice or suppress proceedings under a criminal complaint is void and cannot be enforced by the one to whom it is given. This, however, is not because the law seeks to favor the defendants in such a transaction, the law looks upon the parties as entirely at fault and refuses to lend its aid to either in a case where both are guilty of trying to impede the course of public justice. It is therefore not sufficient to defeat the plaintiff's action for the defendants to show that they gave the note in question upon their understanding that by so doing, the party complained of as having committed a criminal offense would be discharged from custody and the prosecution against him dropped. The defendant must show also that this understanding and arrangement was participated in by the plaintiff.³⁷

II. CONSTRUCTION AND OPERATION.**§ 1064. Parties.**

The court instructs the jury for the plaintiff, that where a note is signed by two persons, both are equally liable, and either one or both may be sued thereon; and it makes no difference whether the note read, "I promise to pay," or "we promise to pay," or "we or either of us promise to pay."³⁸

§ 1065. Interest.

The court instructs the jury that a note in which no rate of interest is expressed draws interest after maturity in virtue of the statute at the rate of — per cent per annum.³⁹

strument is presumed to be legal and the maker has the burden of proving that it is illegal. SELOVER on NEGOTIABLE INSTRUMENTS, page 94.

37—Fosdick v. Van Arsdale, 74 Mich. 302. The consideration for a negotiable instrument is presumed to be legal and the maker has the burden of proving that it is illegal. SELOVER

on NEGOTIABLE INSTRUMENTS, page 94.

38—Broadwell v. Sanderson, 29 Ill. App. 384. See SELOVER on NEGOTIABLE INSTRUMENTS, page 111.

39—New York Life Ins. Co. v. Martindale, 75 Kan. 142, 21 L. R. A. (N. S.) 1045n, 121 Am. St. Rep. 362, 12 Ann. Cas. 677, 88 Pac. 559.

III. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

A. INDORSEMENT FOR TRANSFER.

§ 1066. Nature of liability—As indorser.

The court instructs the jury that it is immaterial, in this case, what idea the defendant had as to his liability as the indorser of the note in question; such liability is fixed by the law, and if the jury believe from the evidence that the defendant sold or traded and indorsed the note to the plaintiff by writing his name thereon, then he is liable, in law, as the indorser, whatever may have been his intention or understanding at the time.⁴⁰

The court instructs the jury that it is immaterial in this case as to what idea the defendant had, or what his opinion was, as to his liability as indorser of the note. If the jury are satisfied, from the evidence, that the defendant sold the note to plaintiff and indorsed the same to him, and nothing was said at the time as to whether he should be liable or not, in law he is liable as indorser.⁴¹

§ 1067. Indorsement in blank.

The court instructs the jury that, where a note has been indorsed in blank, the holder of the same may fill the blank with the name of the indorsee; that the indorsement of the note is said to be in blank when the name of the indorser is simply written on the back of the note, leaving a blank over it for the insertion of the name of the indorsee or of any subsequent holder; and in such a case, while the indorsement continues blank, the note may be passed by mere delivery, and the indorsee or other holder

40—*Snow v. Wiggin*, 19 Ill. App. 542. Under the Uniform Negotiable Instruments Law, a person who places his signature on an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. His status being thus fixed, parol evidence is not admissible to alter it. *SELOVER ON NEGOTIABLE INSTRUMENTS*, page 196.

41—*Hawkinson v. Olson*, 48 Ill. 277. Under the Uniform Negotiable Instruments Law, a person who places his signature on an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. His status being thus fixed, parol evidence is not admissible to alter it. *SELOVER ON NEGOTIABLE INSTRUMENTS*, page 196.

is understood to have full authority personally to demand payment of it, or make it payable at his pleasure to himself or to another person.⁴²

§ 1068. Discharge of indorser—Waiver.

The court instructs the jury that if the defendant, knowing all the facts which released him from liability, and knowing or believing himself to be discharged from liability as indorser, promised to pay the note, they would be warranted in finding for the plaintiff.⁴³

B. ASSIGNMENT.

§ 1069. Rights of assignee in general.

The court instructs the jury that if you believe from a preponderance of the evidence that defendant A issued these checks redeemable in money to customers of his, received money for them, placed them in circulation, and they were assigned to the plaintiff in this case for a valuable consideration, then the plaintiff would be entitled to recover the amount of his checks. If, however, you find from the evidence that the defendant A loaned these checks to one B and that A received no consideration for them, but merely loaned them as a matter of accommodation to B, and B put them in circulation and they came into the hands of the plaintiff C, then your verdict will be for the defendant.⁴⁴

C. BONA FIDE PURCHASERS.

§ 1070. In general.

The court instructs the jury that if they believe, from the evidence, that the note in question was put in the hands of A & Co. for collection, by B, indorsed in blank, and that C bought said

42—Palmer v. Marshall, 60 Ill. 289. See SELOVER on NEGOTIABLE INSTRUMENTS, page 172.

43—Hobbs v. Straine, 149 Mass. 212.

44—Buckley v. Collins, — Ark. —, 177 S. W. 920. That an assignee of a non-negotiable chose in action ac-

quires only the title and rights of his assignor, and takes at least subject to all equities and defenses available between the original parties, and in many jurisdictions to all equities and defenses, see SELOVER on NEGOTIABLE INSTRUMENTS, page 159.

note in good faith, and it was transferred to him in blank, and he sold and transferred it in good faith, then the plaintiff can recover, unless the note was past due when C bought it, and it had been paid.⁴⁵

§ 1071. Knowledge.

§ 1072. — Kansas.

The court instructs the jury that if the plaintiff purchased the note before due, and for a valuable consideration, then before he would be chargeable with notice of any infirmity in the instrument he must have actual knowledge of the defect or defects as claimed by the defendant, or knowledge of such facts that his action in taking the instrument amounted to bad faith upon his part.⁴⁶

§ 1073. — Kentucky.

The court instructs the jury that A was the agent for the plaintiff, B, in the purchase of said note sued on herein, and if the jury believes he, at the time he purchased said note had actual knowledge of infirmity in said note, or defect in same or its title by reason of false representations or statements of said C or D, or knowledge of such facts in relation thereto as that his act in taking said note amounted to bad faith on his part, in that case they shall find for the defendant.⁴⁷

The court instructs the jury to constitute notice of an infirmity in said note, or defect in the title of said A, the plaintiff, or his agent, must have had actual knowledge of the infirmity or defect in same, or knowledge of such facts in relation thereto that his action in taking said note amounted to bad faith upon his part.⁴⁸

The court instructs the jury that, although they shall believe from the evidence in this case that said A and B did procure

45—Palmer v. Marshall, 60 Ill. 289. That a holder in due course takes free from all equities existing between prior parties, see SELOVER on NEGOTIABLE INSTRUMENTS, page 232.

46—Leavens v. Hoover, 93 Kan. 661, 145 Pac. 877. See SELOVER on

NEGOTIABLE INSTRUMENTS, page 225.

47—Childers v. Billiter, 144 Ky. 53. See SELOVER on NEGOTIABLE INSTRUMENTS, pages 225, 240.

48—Childers v. Billiter, 144 Ky. 53. See SELOVER on NEGOTIABLE INSTRUMENTS, pages 225, 227.

from the defendant the note declared on herein, by fraud and misrepresentation of the value of the stock of said company, or that they agreed with the defendant to purchase of him the same amount of stock in said company at the expiration of one year, that he had bought in said company, for the sum of \$——, they cannot find for the defendant unless they shall further believe from the evidence that the plaintiff, C, before or at the time he purchased said note, had knowledge or notice of the said fraud or misrepresentation, if any, of said A or B in regard to the value of said stock or the conditions, if any, upon which said note was executed.⁴⁹

The court instructs the jury that the defendant, A, admits the execution of the note declared on herein, and that they must find for the plaintiff, B, the sum of \$——, unless they shall further believe from the evidence that said note was procured from defendant by fraud and misrepresentations of the value of the stock of the C Railway Company, by D or E, his agent, or that it was agreed by said D and E that the defendant should be permitted to renew said note at its maturity, or that said D or E, his agent, agreed with defendant to purchase from him the same amount of stock in said company at the expiration of one year for the sum of \$——; and they shall further believe from the evidence that the plaintiff, B, or his agent, before or at the time he purchased said note, had knowledge or notice of the said fraud or misrepresentations, if any, of said D, or E, his agent, in regard to the value of said stock or the conditions, if any, upon which said note was executed—then the law is for the defendant, and they should so find.⁵⁰

§ 1074. — Michigan.

The court instructs the jury that the plaintiff was the holder of these notes in due course of business. That, however, is not conclusive of the action upon which you are to render a decision. Why not? For this reason: Gentlemen of the jury, it appears

49—Childers v. Billiter, 144 Ky. 53.
See SELOVER on NEGOTIABLE INSTRUMENTS, page 225.

50—Childers v. Billiter, 144 Ky. 53.
See SELOVER on NEGOTIABLE INSTRUMENTS, pages 225, 227.

that A in making the purchase signed a written contract for the purpose for the register in question, so that back of the notes which he gave there stood this written contract. Now, there arises for your consideration, first and foremost, this question: Did the ——— Building & Loan Association know of the existence of that contract? If they did not, then without any further inquiry in the case they are entitled to a verdict at your hands for the full amount due. Your first question should be: Does the evidence in this case satisfy me that the plaintiff here knew of the contract which stood behind these notes? If it did not, then and in that event your labors would be ended, because if the association had no knowledge of the contract, since it is a bona fide holder of the notes, it would be entitled to a verdict for its face value. If, on the other hand, you are satisfied from the evidence that the building and loan association, in advancing the money, and in acquiring the notes which are the basis of this case, did know of the contract which stood behind the notes, then a further question arises; and what is that question? In making a sale of an article of this kind, gentlemen of the jury, there goes with a sale what is called an implied warranty of the article sold. In this case the manufacturing company, when it sold to the defendant this cash register, by the very fact of making the sale impliedly warranted to the defendant that this instrument was reasonably adapted to the uses for which it was sold. There was not a warranty that it was an absolutely perfect instrument, but the law implies, and therefore requires, the seller in making such sale to deliver to the purchaser a machine, which is fairly and reasonably adapted to the uses for the purposes for which the buyer purchased it, so that in making the sale the manufacturing company carried with the sale such an implied warranty. If the plaintiff here, the building and loan association, had knowledge of the contract which stood behind these notes, then the question arises for your consideration: Was the cash register which the manufacturing company sold to this defendant reasonably adapted to the purposes for which the seller represents it to be adapted? If it was so reasonably adapted, then, and in that

event, the seller, the manufacturing company, fulfilled the obligation which was resting upon it, and, if it fulfilled the obligations by delivering a machine reasonably adapted to the purposes for which the buyer was to use it, then, of course, the obligation resting upon the manufacturing company was discharged, and the plaintiff would be entitled to a verdict.⁵¹

§ 1075. — Missouri.

The court instructs the jury that if the payee of the note, A, for a valuable consideration, sold and delivered to the plaintiff said note, before maturity, and without knowledge on the part of the plaintiff of any act of fraud or misrepresentation on the part of the original holder thereof, and without knowledge of any failure of consideration of said note, you will find the issues for the plaintiff, and assess its damages at the sum of \$———. ⁵²

§ 1076. Defenses—Want or failure of consideration.

§ 1077. — Illinois.

The court instructs the jury, for the plaintiff, that in the hands of an assignee, before maturity, the question of consideration does not arise until it is shown by evidence that the assignee purchased the note with actual knowledge of the want of consideration.⁵³

§ 1078. — Texas.

The court instructs the jury that if you believe from the evidence that the notes sued on, or any of them, were transferred and assigned to A, the plaintiff, before maturity, for a valuable

51—*People's Building & Loan Ass'n Co. v. Rutz*, 158 Mich. 440. Since, under the Uniform Negotiable Instruments Law, a holder is not a holder in due course unless he has taken the instrument without notice of any infirmity in the instrument or defect in the title of the person negotiating it, it must be that the notes in this case which was decided by the Supreme Court some four years after the adoption of the Uniform Nego-

tiable Instruments Law were given prior thereto. See SELOVER on NEGOTIABLE INSTRUMENTS, page 211.

52—*Newburg State Bank v. Heflin*, 189 Mo. App. 292. The form of this instruction would undoubtedly be improved if the plaintiff was hypothesized as having taken rather than the payee as having sold. See SELOVER on NEGOTIABLE INSTRUMENTS, page 211.

53—*Cisne v. Chidester*, 85 Ill. 523 (non-negotiable note).

consideration, then you shall find for the plaintiff, and assess his damages at such amount as may be due on said notes, unless you believe that the consideration for said notes has failed, and that the plaintiff had notice of such failure prior to such transfer.⁵⁴

§ 1079. Same—Fraud in execution.

The court instructs the jury that if you believe that the consideration for the notes sued on was the purchase by defendant of the right to sell the safety sash lock in the county of _____, state of _____, and also the right on the part of defendant to appoint other agents with the same power which he possessed, as shown by the power of attorney offered in evidence, then the question as to whether or not the transaction was fraudulent would depend upon what was the real consideration for the execution of the notes. If the right to sell the safety sash locks in the county of _____, state of _____, constituted any substantial part of the consideration, then the transaction was not fraudulent, and your verdict should be for the plaintiff. The power of attorney in evidence which was given defendant at the time of the execution of the notes by him is void as against public policy, and if you believe that such power of attorney was the real consideration for the execution of the notes, and the right to sell the sash locks in _____ county, _____, was only an incident, and given only for the purpose of giving the transaction the color of legality, and not as a substantial part of the consideration, then the entire transaction in the execution of the notes was fraudulent, and whether plaintiff can recover or not in this case will depend upon whether or not it purchased the notes [in good faith,] for value, before maturity, [without notice that they had been previously dishonored,] and without notice of the fraud in their execution.⁵⁵

54—Kampmann v. McCormick, 24 Tex. Civ. App. 462 (non-negotiable notes).

55—Bank of Ozark v. Hanks, 142

Mo. App. 110. Fraud is not ordinarily available as a defense against a holder in due course. SELOVER on NEGOTIABLE INSTRUMENTS, page 233.

IV. DEMAND AND NOTICE.

§ 1080. Demand for payment—Necessity.

The court further instructs the jury that, if they find from the evidence that the said notary did not use reasonable diligence to ascertain the residence or place of business of the makers of said note, if residents of the said city at its maturity; then no legal demand in this case has been made on the makers of said note, and the plaintiffs are not entitled to recover, unless they shall further find from the evidence that subsequently to the protest of said note, the defendant, the indorser, promised the plaintiffs or their attorney to pay the amount of said note, with a knowledge of the fact that no legal demand had been made on the drawers for payment.⁵⁶

§ 1081. Notice of nonpayment—Necessity.

The court instructs the jury that, if they believe from the evidence in this case that the defendant, at the time he indorsed his name on the back of the note offered in evidence, or during the time the plaintiff and defendant were negotiating about the same, or even after the defendant handed said note to the plaintiff and while they were yet negotiating about the same, that the defendant, W, agreed to pay said note if C, the maker of said note, did not, or words to that effect; then he is liable to pay said notes if C did not, and it was not necessary for the plaintiff to notify the defendant of such nonpayment; and the jury should find a verdict for the plaintiff and assess his damages at the amount due on said note.⁵⁷

§ 1082. Same—Sufficiency.

The court instructs the jury that, if they shall find from the evidence that the said notary did use reasonable diligence to ascertain the residence or place of business of the makers of said note as set out in its first instruction, but did not use reasonable diligence to ascertain the dwelling or place of business of the defendant; that then the notice deposited in the postoffice, as aforesaid,

⁵⁶—*Staylor v. Ball*, 24 Md. 183.
See SELOVER on NEGOTIABLE INSTRUMENTS, pages 243, 265.

⁵⁷—*Worden v. Salter*, 90 Ill. 160.
See SELOVER on NEGOTIABLE INSTRUMENTS, page 282.

is not sufficient to hold the defendant, and the plaintiffs are not entitled to recover, unless the jury shall further find from the evidence that the notice so deposited in the postoffice, as aforesaid, did actually reach the defendant on that or the succeeding day; or unless they shall find from the evidence that subsequently to the day of the protest of said note, said defendant promised the plaintiffs or their attorney to pay the amount of said note, with a knowledge of the fact that notice of nonpayment had not been regularly given to him.⁵⁸

The court instructs the jury in this case that, if they shall find from the evidence that the promissory note offered in evidence was drawn by —— & ——, copartners, and that they were residents of the city of —— at its maturity, and that said note was indorsed by the defendant, also a resident of the city at its maturity; and that upon the maturity of said note it was not paid, and that it was delivered by the cashier of the —— Bank to ——, notary public, for protest; and that the said notary used reasonable diligence to ascertain the residence or place of business of the drawers of said note, and could not ascertain the same; and if they shall also further find from the evidence that the said notary did, also, use reasonable diligence to ascertain the residence or place of business of the defendant, the indorser, and could not ascertain the same; and that on the same day he addressed a written notice to the defendant informing him of a demand on the said drawers and of the non-payment of said note; and that said defendant was held responsible for the payment of the same, and directed said notice to the defendant and deposited the same in the —— postoffice on the same day as set out in the protest offered in evidence; that, then, the plaintiffs are entitled to recover.⁵⁹

V. PAYMENT AND DISCHARGE.

§ 1083. In general.

The court instructs the jury, for the defendant, A, that if you believe, from the evidence, that the plaintiff, B, about the — of

58—Staylor v. Ball, 24 Md. 183.
See SELOVER on NEGOTIABLE INSTRUMENTS, pages 293, 299, 302, 303.

59—Staylor v. Ball, 24 Md. 183.
See SELOVER on NEGOTIABLE INSTRUMENTS, pages 293, 299.

—, 19—, paid the amount of the note in controversy to the holder of the same, as the agent of C & D or either of them, and that the holder of the said note surrendered the same then to the said B, as such agent, then and in that case that would be a payment of said note, and you will find for the defendant, A.⁶⁰

§ 1084. Application of payments—Agreement as to change.

The court instructs the jury that if they believe, from the evidence, that the note was satisfied in full by payments and receipt, then they are instructed that any afterward arrangement made by A, by which such payments were to be differently applied, and the indebtedness of the note revived, is not binding on the defendant, B, if the jury further believe that the plaintiff knew that B signed the note as security, unless the jury believe that A had authority for the other defendants to so change the application of the payments if any were made.⁶¹

The court instructs the jury that if they believe, from the evidence, that the receipt offered in evidence was by the plaintiff and defendant, A, to apply on the note in question, then that it was so applied, and that such receipt satisfied in full the balance remaining due on the note, then the plaintiff cannot recover even though the jury believe that the defendant, A, afterwards agreed that such receipt, or any part of it, should apply on any other deal existing between B and A.⁶²

§ 1084a. Discharge—Surrender of note.

The court instructs the jury that if the payee of the note surrendered it to the makers voluntarily, in liquidation of a just debt then due from him to them, the note was fully canceled by the surrender; but if the note was obtained from A wrongfully and unlawfully by threats and duress, it was not canceled by the

60—Johnson v. Glover, 121 Ill. 283, rev'g 19 Ill. App. 585. That a negotiable instrument is discharged when the principal debtor becomes the holder thereof, at or after maturity in his own right, see SELOVER on NEGOTIABLE INSTRUMENTS, page 324.

61—Miller v. Montgomery, 31 Ill. 350.

62—Miller v. Montgomery, 31 Ill. 350.

surrender, and the plaintiff can maintain an action for the amount due thereon, if she is the owner thereof.^{62a}

VI. ACTIONS.

§ 1085. Right of action—Payee.⁶³

The court instructs the jury that if they believe, from the evidence, that the defendant was indebted to the plaintiff for land, in any sum less than \$—— and gave plaintiff his notes therefor, and has since himself got possession of said notes, and has not paid said indebtedness,—then they will find for plaintiff the amount shown by the evidence due for such land.⁶⁴

The court instructs the jury that if they believe, from the evidence, that the defendant was indebted to the plaintiff on the —— notes in the declaration described, and has not paid said notes, and himself now wrongfully has possession of said notes, then they will find for the plaintiff the amount due on said notes.⁶⁵

§ 1086. Defenses—In general.

The court instructs the jury that one who purchases a bill or note from the payee, with knowledge of circumstances amounting to a valid defense, stands in precisely the same position of the payee, and in such a case the defendant is entitled to all the defenses he would have as against the original holder of the note.⁶⁶

§ 1087. Same—Fraud.

The court instructs the jury that if you find from the evidence that the plaintiff secured the execution of the trust deed introduced in evidence through and by representations that it was to defendant's interest to execute the same and that she would be relieved the same as if she was adjudged a bankrupt, or if it

62a—Koehler v. Wilson, 40 Iowa 183. That a negotiable instrument is discharged when the principal debtor becomes the holder thereof at or after maturity in his own right, see SELOVER on NEGOTIABLE INSTRUMENTS, pages 320, 324.

63—Receiver, see RECEIVERS.

64—Young v. Foute, 43 Ill. 33.

65—Young v. Foute, 43 Ill. 33.

66—Jackson v. Jones, 94 Ark. 426. That a negotiable instrument in the hands of a holder not in due course is subject as against him to the same defenses as if it were non-negotiable, see SELOVER on NEGOTIABLE INSTRUMENTS, page 240.

was agreed between plaintiff and defendant that she should execute the said trust deed and that the same should be taken as payment of defendant's indebtedness, then your verdict should be for the defendant.⁶⁷

§ 1088. Same—Diversion of accommodation note from intended purpose.

The court instructs the jury that where an accommodation note is diverted from the purpose for which it was given, one who takes it with knowledge cannot recover from the accommodation party; and in this case, the receiver possesses as a matter of law all the knowledge that the G. S. Bank possessed upon the subject of this note.⁶⁸

§ 1089. Issues and proof—In general.

The court instructs the jury that, if the plaintiff is entitled to recover in this action, such recovery must be by virtue of the notes sued on, and not by virtue of any contract that might be implied from the application of the proceeds of the said notes.⁶⁹

§ 1090. Same—Lost note.

The jury are instructed that in an action on a promissory note which is not produced, if the note is alleged to have been lost, and if the note was indorsed when it is alleged to have been lost, so that the note was actionable in the hands of any holder, then there can be no recovery on said note without proof of the note being lost or destroyed. So in this case, if you believe that the note in evidence was indorsed by the payee, then, the note not being produced, it must be shown to your satisfaction that the note is actually lost or destroyed before there can be any recovery on such note.⁷⁰

67—*Arapahoe State Bank v. McKenna*, 94 Neb. 50. That the general law of contracts governs in the matter of defenses available against the original payee, see *SELOVER ON NEGOTIABLE INSTRUMENTS*, page 18.

68—*Chicago Title & Trust Co. v. Brady*, 165 Mo. 197. That the fact

that there has been a diversion will not avail as a defense against a holder in due course, see *SELOVER ON NEGOTIABLE INSTRUMENTS*, page 105.

69—*Pettyjohn v. National Exch. Bank*, 101 Va. 111.

70—*Heartt v. Rhodes*, 66 Ill. 351.

§ 1091. Evidence—Presumptions and burden of proof—Consideration.

The court instructs the jury that the burden of proof was on the plaintiff to show that the note was given upon a valuable consideration, and that, if that was doubtful upon the whole evidence, he could not recover; that proof of the execution of the note and its production in evidence made a *prima facie* case for the plaintiff, upon which they might find a verdict for him, unless the defendant introduced evidence which showed either that it was not given for a valuable consideration, or that the consideration had failed, or evidence to render it doubtful in their minds whether it was given on a valuable consideration; and that if not so given, or if it was doubtful whether it was given for a valuable consideration, either for want of consideration or for failure of consideration, the plaintiff could not recover.⁷¹

§ 1092. Same—Same—Accommodation character of note.

The court instructs the jury that the burden of proof is upon this defendant in this case, and unless the jury believe from the evidence that defendant has established, by a preponderance of the testimony, his allegation in the answer that said notes (or some of them) were given for the accommodation of said bank (as explained in other instructions), then your verdict should be for the plaintiff as to all of the notes sued upon in this case.⁷²

§ 1093. Same—Same—Mistake in execution.

The court instructs the jury that, the note being fair on its face, makes a *prima facie* case in favor of the plaintiff. To overcome this, or to make out a defense the burden of proof is on the defendant. In any disputed question of fact as to anything which is necessary to make out the defense, the jury should not find the defense established, unless they are satisfied by a preponderance of evidence that the fact is as claimed by the defendant.⁷³

71—Burnham v. Allen, 67 Mass. (1 Gray) 496. See SELOVER on NEGOTIABLE INSTRUMENTS, pages 92, 99.

72—Chicago Title & Trust Co. v. Brady, 165 Mo. 197. See SELOVER on

NEGOTIABLE INSTRUMENTS, pages 92, 102.

73—Cook v. Brown, 62 Mich. 473, 4 Am. St. Rep. 870 (note payable to defendant or bearer and signed by

§ 1094. Same—Same—Character in which person signed note.

The court instructs the jury that, it is claimed by the defendant that though the name of the defendant appears on the note in the place of a maker, it was understood and agreed that it was only to stand as indorser, and that only until the note became due. The burden of proving such an agreement is on the defendant, who sets it up, and to prove it by a preponderance of testimony. It is not enough that one party so understood and intended it. It must appear that both concurred in it and so agreed. To make a contract required the meeting of the two minds. Without this, it was no contract.⁷⁴

The court instructs the jury that, the note being by these terms payable to ——— or bearer, would make it payable to any lawful holder without any indorsement by ———. No such indorsement would be necessary to enable such holder to collect it or maintain a suit thereon in his own name. He being named as payee in the note, therefore, offers no presumption that his signature at the bottom of the note was made as indorser, and not as maker.⁷⁵

§ 1095. Same—Same—Character of purchase.

The court instructs the jury that if they believe and find from the evidence that the notes in suit were obtained by fraud on the part of A and his agents, then the burden is on the plaintiff, and it must show by greater weight of the testimony that it bought said notes in good faith, in due course of business, without notice of the fraud by which A obtained said notes, and if the plaintiff has not made such proof, then your verdict must be for the defendant.⁷⁶

defendant, after delivery, below signature of original maker).

74—Cook v. Brown, 62 Mich. 473, 4 Am. St. Rep. 870 (note payable to defendant or bearer and signed by defendant, after delivery, below signature of original maker).

75—Cook v. Brown, 62 Mich. 473,

4 Am. St. Rep. 870 (note payable to defendant or bearer and signed by defendant, after delivery, below signature of original maker).

76—Bank of Ozark v. Hanks, 142 Mo. App. 110. See SELOVER on NEGOTIABLE INSTRUMENTS, page 228.

§ 1096. Payment.**§ 1097. — Idaho.**

The court instructs the jury that the possession by the plaintiff of an uncanceled promissory note is prima facie evidence that such note remains unpaid, and the burden of proving the payment thereof is upon the defendant.⁷⁷

§ 1098. — Illinois.

The court instructs the jury that the burden of proof is upon the defendant [maker of accommodation note in suit] to prove, by evidence preponderating in his favor, that the money mentioned in the promissory note in suit has been paid to plaintiff [indorsee].⁷⁸

The court instructs the jury that the fact that F did not present the check in question to the bank for payment until two or three days had elapsed after it was drawn, can not affect the plaintiff's right to recover, if the jury shall believe from the evidence that D, the drawer of the check, had not sufficient funds in bank to meet the check.⁷⁹

§ 1099. Same—Degree of proof required.

The court instructs the jury that before you would be warranted in finding a verdict for the plaintiff you must believe and find, from the weight or preponderance of the evidence, that defendant A actually signed or authorized the signing of the note in question. If the evidence on that question is equally balanced, your verdict should be for the defendant, and on that question the note itself should not be considered.⁸⁰

§ 1100. Same—Weight and sufficiency—In general.

The court instructs the jury that the notes themselves make a prima facie case, and entitle the plaintiff to recover, unless the evidence shows they were given without any valid consideration.⁸¹

77—*Sheffield v. Cleland*, 19 Idaho 612, 115 Pac. 20 (note given after adoption of Uniform Negotiable Instruments Law).

78—*Heartt v. Rhodes*, 66 Ill. 351 (note was surrendered to payee on giving of check by him).

79—*Heartt v. Rhodes*, 66 Ill. 351.

80—*Ingram v. Reiman*, 81 Ill. App. 123.

81—*Heimann v. Hainz*, 65 Ill. App. 316. See *SELOVER ON NEGOTIABLE INSTRUMENTS*, page 92.

§ 1101. Same—Same—Execution of note.

The court instructs the jury as a matter of law that no legal obligation arises out of an acknowledgment or a ratification of an indebtedness, unless such acknowledgment or ratification is made with knowledge of all the facts bearing upon the question of liability; and in this case, although you may believe from the evidence that the defendant, A, acknowledged having signed certain notes, yet if you further believe from the evidence that she had reference to other notes or other indebtedness, and that she did not, at that time, know of the existence of the notes now in controversy, such acknowledgment would not render her liable on the notes in controversy.⁸²

§ 1102. Same—Same—Consideration.**§ 1103. — Iowa.**

The court instructs the jury that the mere fact, if it be a fact, that the defendant paid \$—— on the \$—— note, would not alone in and of itself prove that the note in suit was supported by any valid consideration.⁸³

§ 1104. — Missouri.

The court instructs the jury that as between the maker and the payee of a promissory note, oral evidence touching the consideration thereof may be considered by you; and if you find from the evidence in this case that the defendant B received no consideration for the signing of the notes sued on, and that the same were made for the accommodation of the G. S. Bank, then your verdict should be for the defendant.⁸⁴

§ 1105. Same—Same—Character in which person signed note.

The court instructs the jury that it is not competent for the defendant to show by parol or verbal testimony, as against the

82—Kripner v. Lincoln, 66 Ill. App. 532. See SELOVER on NEGOTIABLE INSTRUMENTS, pages 309, 310.

83—Robinson v. Robinson, 147 Iowa 615 (note given after adoption of Uniform Negotiable Instruments Law). That a consideration for a

negotiable instrument is presumed, see SELOVER on NEGOTIABLE INSTRUMENTS, page 92.

84—Chicago Title & Trust Co. v. Brady, 165 Mo. 197. See SELOVER on NEGOTIABLE INSTRUMENTS, pages 99, 102.

terms of the written instrument, that the agreement or understanding of the parties was that his liability should be that of an indorser only, nor that he was to be an indorser or liable as such only until the note should become due, and no longer; and all such testimony must be disregarded by the jury.⁸⁵

§ 1106. Same—Same—Character of purchase.

The court instructs the jury that the positive statement of the plaintiff as to his actions in purchasing the note in question are not necessarily to be taken as conclusive by the jury, but you should consider all of the facts and circumstances surrounding the alleged purchase, together with statements of the plaintiff, as to whether or not the plaintiff is such bona fide purchaser.⁸⁶

The court instructs the jury that, in considering the question whether or not the plaintiff is a holder of the instrument sued on in good faith, you may consider the fact, if shown in evidence before you, as to whether or not the plaintiff has attempted to recover on the promissory note from the indorsers—that is, A Bros.—as he has a right to proceed against A Bros. as the indorsers of the said promissory note to recover the amount due thereon from the indorsers. You may also consider as to whether or not, if given in evidence before you, the plaintiff knew or was acquainted with the defendants, or any of them.⁸⁷

§ 1107. Amount of recovery.

§ 1108. — Colorado.

The court instructs the jury that if they find for the plaintiff the amount of the verdict should be the face value of the note, with the interest as therein called for.⁸⁸

§ 1109. — Texas.

The court instructs the jury, at the request of the plaintiff, as a part of the law of the case, that if you find from a preponder-

85—Cook v. Brown, 62 Mich. 473, 4 Am. St. Rep. 870 (note payable to defendant or bearer and signed by defendant, after delivery, below signature of original maker).

86—Park v. Brandt, 20 Idaho 660, 119 Pac. 877.

87—Park v. Brandt, 20 Idaho 660, 119 Pac. 877.

88—First Nat. Bank of Ouray v. Shank, 53 Colo. 446, 128 Pac. 56 (plaintiff purchased note after maturity of same).

ance of the evidence that the contract of ———, 19—, conveyed from the plaintiff all the rights, titles and interest which plaintiff claimed to have owned in the ——— survey on the — day of ———, 19—; and you further find that said contract contained all that plaintiff was to do in the performance of said sale—then you will find for the plaintiff the amount sued upon, less the reasonable market value of hogs undelivered, if you find they were not delivered.⁸⁹

§ 1110. Verdict.

The court instructs the jury that the plaintiff has sued upon six different notes, each of which constitutes a separate and distinct claim or cause of action in plaintiff's petition. Those claims are called "counts" in the instructions to you by the court. Your verdict should state your finding or decision as to each count or cause of action separately. And if your finding is for the plaintiff, as to any one or more counts, you should also state in your verdict the exact amount which you find from the evidence to be still due and unpaid at the present time (including principal and interest to date) on each particular note mentioned in the count or counts of the petition on which you may so decide to find for plaintiff.⁹⁰

89—Taylor v. McFatter (Tex. Civ. App.), 109 S. W. 395 (non-negotiable note). 90—Chicago Title & Trust Co. v. Brady, 165 Mo. 197.

CHAPTER LXVIII.

BOARDS OF TRADE.

§ 1111. Rules, regulations and customs—Operation and effect—Nonmembers.

Cross-References.

See BROKERS; gambling contracts, see GAMING.

§ 1111. Rules, regulations and customs—Operation and effect—Nonmembers.

The court instructs the jury that, if they believe from the evidence that the plaintiff went upon the board of trade and made contracts and traded with the members, he is bound by the rules, regulations and customs of said board, the same as if he had been a member thereof; and in that case, will not be permitted to plead his ignorance of said rules, regulations and customs as a reason for not being bound by them.¹

¹—Chicago Pack'g & Prov. Co. v. Tilton, 87 Ill. 547.

CHAPTER LXIX.

BONDS.

§ 1112. Consideration—Sufficiency—Extension of time.

§ 1113. Actions—Evidence—Burden of proof.

Cross-References.

See BAIL; FIDELITY BONDS.

§ 1112. Consideration—Sufficiency—Extension of time.

The court instructs the jury that the misappropriation by A of the proceeds of the check drawn by plaintiff to the order of B and wife created an obligation on A to pay to plaintiff the equivalent of said property on demand, and any extension of time given by plaintiff to A in the bond sued on for payment of said equivalent is sufficient consideration to hold up said bond; and if the jury believe from the evidence that defendant subscribed his name to said bond, and it was delivered to and accepted by plaintiff in satisfaction of A's obligation to it, and A did not, in _____ months after the execution of said bond, pay off to plaintiff a sum or sums in the aggregate equal to the proceeds of the check aforesaid, they should find for the plaintiff, unless they further believe from the evidence that, after said bond was accepted, the plaintiff repudiated it because C or other solvent surety or sureties had not or did not sign it, or that defendant signed said bond and delivered it to A with the condition or undertaking that the names of C, or other named person or persons, were also to be signed to said bond as sureties thereon before the same became binding on defendant; and that plaintiff had notice of said condition or understanding before it accepted said bond.¹

1—National Building & Loan
Ass'n v. Day, 23 Ky. L. Rep. 599.

§ 1113. Actions—Evidence—Burden of proof.

The court instructs the jury that if they believe from the evidence that A did not sign the bonds in the notice mentioned, but that his name was signed thereto without his authority, then they must find for the defendant A, and in coming to a conclusion in this issue the jury must bear in mind that the burden of proof is on the defendant.²

²--Rocky Mount Loan & Trust Co.
v. Price, 103 Va. 298.

CHAPTER LXX.

BOUNDARIES.

I. DESCRIPTION.

- § 1114. In general.
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- § 1133. Evidence—Burden of proof—In general.
- § 1134. Same—Same—Official and designated character of stakes and monuments.
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- § 1136. Same—Same—Agreement between owners.
§ 1137. Same—Same—Erection of fence in pursuance of agreement.
§ 1138. Same—Same—Degree of proof required.
§ 1139. Questions for jury.

Cross-References.

Matters pertaining to partition fences in general, see FENCES; statements or declarations of deceased persons, see EVIDENCE, § 2957.

I. DESCRIPTION.

§ 1114. In general.

The court instructs the jury that the south line of the A survey and the north line of the B survey are coincident, that is, they are the same lines, and it is your duty, as far as you can from the testimony adduced before you (of the weight of which and the credibility of the witnesses you are the sole and exclusive judges), to follow the footsteps of the original surveyor, who put the south line of the A on the ground when it was first surveyed for the purpose of being patented by the state. And in determining this question you are authorized to follow the calls in the way in which they are set forth in the written instruments offered in evidence, or if you deem it necessary, in order to harmonize the various calls and lines, you are authorized to reverse the calls, and to trace them in any way they were permitted to be traced by the witnesses on the stand before you.¹

§ 1115. Controlling force of various elements.

§ 1116. — North Carolina.

The court instructs the jury that the plaintiffs in their complaint claim title to a large tract of land, about _____ acres; but they have not introduced any testimony tending to show title to any land except that embraced in the calls of the A grant of _____, 19—. The plaintiffs must recover, if at all, upon the strength of their own title. For the purpose of showing title out of the state, they introduced a grant dated _____, 19—, to A, and then a deed from B to C, father of plaintiff, dated

¹—Hermann v. McIver (Tex. Civ. App.), 140 S. W. 798.

———, 19—, containing the same metes and bounds as those of the A grant, and they claim that under said deed they or their ancestor entered into possession of said land, and since then, (he and they) have been in the open and notorious possession of said land by known and visible metes and bounds adversely to all the world. Before plaintiffs can recover, they must satisfy you by the greater weight of the evidence of the following facts: (1) That they have located the A grant, and that it is included in the lands described in the complaint. (2) That they and those under who they claim have been in the open, notorious, adverse possession of the land embraced in the A grant for more than ——— years next preceding the commencement of this action under the deed from B to C. The possession of a part of the land embraced in the B deed would extend to the whole, in the absence of evidence tending to show that some one else possessed any part of said land adversely to the plaintiffs or their ancestor C. It is admitted that the A grant and the B deed cover the same land. In locating the land described in said grant and deed, the natural boundaries called for must, when they can be ascertained and located to your satisfaction, control course and distance. If plaintiffs have failed to satisfy you of the location of any of the natural boundaries called for in said grant or deed, then you should answer the first issue, “No.” If you are satisfied by the greater weight of the evidence that at figure ——— on the map a white oak was marked for a corner, and, further, that said white oak is the white oak in the D line called for in the grant and B deed, said grant and said deed being silent as to the distance between the white oak called for and the beginning point, you can consider the distance between these two points as shown by the plat made at the time of the grant. If you find by the greater weight of the evidence that the beginning corner of the A grant is at ———, on the map, and that the calls of the grant go from there west to ———, thence south to ———, and to ———, thence west to ———, thence south to ———, thence east to ———, thence north to ———, thence west to ———, thence north to ———, you will answer the first issue, “Yes,” the lands

covered by the A grant beginning at —, provided you further find that the plaintiffs were, or their ancestor C was, in the actual, open, and notorious possession for more than — years next before this action was commenced of any part of said land. It is true, as claimed by defendants, that the calls, courses, and distances laid down on a plat at the same time a grant is made cannot control or vary the calls, courses, and distances given in the grant; but where the grant is silent as to the distance between any two natural boundaries called for in the grant, and the distance is laid down on the plat, and you have located one of said natural boundaries, you can consider the distance given on the plat in locating the other natural boundary called for, if it aids you in locating the other natural boundary. The effect of the burnt or lost record proceeding is to estop plaintiffs from saying that the deeds or records established in the proceeding are not true copies of the lost or burnt deeds and records mentioned therein. These copies have the same force and effect as the lost or destroyed deeds and records would have were they not lost or destroyed. They do not estop or prevent the plaintiffs from showing, if they can, that they have a better title to any of the lands embraced in said lost deeds than E and those claiming under her. If you locate the beginning of the A grant at —, you will answer the first issue, "Yes," the lands embraced in the A grant beginning at — on the map. If you locate the beginning corner of the A grant at — and you further find that plaintiffs are the owners of the lands covered by the A grant, then you answer, "Yes," to the issue, "Did F enter upon said land and commit a trespass thereon?" Said F on cross-examination said that he had cut and carried away timber trees from said land. If you locate the beginning point of the A grant at —, then you should answer this issue, "No," because the land F said he cut timber trees on is not included in the A grant, if its beginning corner is at —.²

2—McNeely v. Laxton, 149 N. C.

§ 1117. — Texas.

The court instructs the jury that in your deliberations to determine the location of the land described in the M patent, and whether or not it is included in the D survey, you will search for the footsteps of the surveyor in locating the D survey, and in this search you will be guided first by natural objects, second artificial objects, and then by course and distance; yet in this case you will investigate all the evidence and follow the actual survey of said D as it was made, if in fact made by the surveyor, to decide said location of said land described in said M patent with reference to the said D survey.³

§ 1118. — Virginia.

The court instructs the jury that, in questions of boundary, natural objects called for, marked lines and reputed boundaries, well established should be preferred in ascertaining the identity of a tract of land to the courses and distances of the calls of the grant.⁴

§ 1119. Corners.

The court instructs the jury that in determining the true line in question, the jury must give effect to the location of the corners as originally and first fixed by the public government surveyor, and, in order to determine the correctness of any corner in question, it is competent for the jury to consider the testimony of witnesses as to facts within their observation and knowledge; but calls in the field notes and surveys for fixed stones or witness trees, by which the original corners were designated by the surveyor, must prevail over calls for distances, if the two be inconsistent.⁵

The court instructs the jury that the quarter-section corner on the south side of section —, as located and called for by the government field notes, maps, and survey in evidence, must be taken as having been unalterably fixed before the surveys made

3—Mayfield v. Williams, 73 Tex. 508.

4—Reusens v. Lawson, 91 Va. 226.

5—Granby Mining & Smelting Co. v. Davis, 156 Mo. 422.

by A, and he had no power to change it or make it agree with new measurements, and the only authority or power he had or could lawfully exercise was in the way of attempting to find the true original location of the line and corners in question; and, if the results of his efforts were different from the results of previous survey or location, neither party is bound thereby, but both are free to show the truth in this case; and the burden is upon plaintiff to prove by the greater weight of the evidence that defendant occupies land over the true line on the east, for, if the weight of the evidence be equal, the verdict must be for defendant.⁶

The court instructs the jury that if they find that A, the former county surveyor, had found and fixed the center of the section as the statute of this state directs, the point of intersection found by him was the true and legal center corner of the section.⁷

§ 1120. Fences.

The court instructs the jury that unless you find by the preponderance of evidence that the line located by A is on the line located by the original government survey, then the plaintiff cannot recover in any event. It will not do to permit boundaries to be disturbed and moved upon a survey made from an assumed starting point, without some proof of its being a true line, located and fixed by the original government survey. The only practical way of ascertaining the true line is by a survey made from some fixed starting point,—some monument placed under the original government survey; and, if such monuments are no longer discoverable, the question is, Where were they located? And fences of long standing, erected upon what parties have called the true line, and up to which they have improved and cultivated, are better evidence of the true line than surveys made after the monuments have disappeared.⁸

6—Granby Mining & Smelting Co. v. Davis, 156 Mo. 422.

8—Pugh v. Schindler, 127 Mich. 191.

7—Granby Mining & Smelting Co. v. Davis, 156 Mo. 422.

§ 1121. Meander lines.

The court instructs the jury that if they find from the evidence offered in this case that there existed at the time of the government survey and plat of the meander line of the reservation a quantity of upland between the meander line and the channel of ——— creek, covered with a natural growth of vegetation, and such tract of land was equal to or greater in area than the adjacent lots lying north of meander line and claimed by the plaintiff, then you may consider this fact as a circumstance tending to show that the meander line was intended as the south boundary of the lots claimed by plaintiff, regardless of the location of the creek.⁹

II. ASCERTAINMENT AND ESTABLISHMENT.**A. AGREEMENT BETWEEN OWNERS.****§ 1122. In general.****§ 1123. — Alabama.**

The court instructs the jury that if they believe from the evidence that the boundary line in question was in dispute, and that the adjoining owners caused said line to be established, and that they acquiesced in said line, then the plaintiff would be deemed to be the owner of all lands north of the line so established, lying in section —, township —, range — west.¹⁰

§ 1124. — Kentucky.

The court instructs the jury that the line — was the true division line between the two patents, according to their respective calls, and that they must find for the plaintiff unless they believe from the evidence that the respective owners being in doubt as to where the true line was situated had established it by agreement at —, and that A and his vendor had occupied the disputed territory continuously, openly and notoriously, claiming it as their own, up to a well defined and marked boundary, in such a way as to give notice of their adverse holding for ———

9—Barnhart v. Ehrhart, 33 Ore. 274, 54 Pac. 195.

10—Cooper v. Slaughter, 175 Ala. 211.

years next before the institution of this action, in which event they are to find for the defendant.¹¹

§ 1125. — Missouri.

The court instructs the jury that if they find from the evidence that the survey designated by the witnesses as the "A Survey" establishes the correct line between the lands of the plaintiff and defendants, then, before plaintiff can be divested of his title thereto, and the defendants hold the same, under the statute of limitations or agreement pleaded in their answer, the jury must find and believe from the evidence that the previous owners of the lands and defendants agreed upon a line as the true line, and this, too, regardless of where the true line might in fact be, or might thereafter be determined upon, and that the owners of said premises built fence upon said agreed line, or that defendants, more than ——— years prior to the institution of this suit, on the ——— day of ———, 19—, took possession of said lands, claiming and intending the line to which he so took possession to be the true line, against the world, without regard to where the true line might in fact be, and without any conditions whatsoever as to subsequent developments; and, although the defendant may have taken possession of a portion of plaintiff's lands ——— or more years since, claiming the line upon which he so erected the fence to be the true boundary, yet, if he held the same subject to correction, then, no matter how long he thus held said land, he acquired no title beyond the true line.¹²

The court instructs the jury that, if they believe and find from the evidence that one A and one B were the adjoining owners of the lands in dispute in this case about the year 19— or 19—, and that they about that time procured one Surveyor C to run a line between said adjoining tracts of land for the purpose of erecting a fence for their convenience between their said tracts of land, and that on said C line a rail fence was erected, then the line marked by the rail fence will not be regarded by the jury as establishing an agreed boundary line between their said

11—Berry v. Evans, 28 Ky. L. Rep. 22.

12—Brummell v. Harris, 162 Mo. 397.

tracts of land, unless you further find from the evidence that said A and B agreed that said line marked by said rail fence should be thereafter the boundary line between their land, and that each of them thereafter claimed to own to the said line marked by the said rail fence and no farther.¹³

§ 1126. Conclusiveness.

The jury are instructed that it is perfectly competent for parties owning adjoining tracts of land to settle by agreement, where the division line shall be; and if the jury shall believe from the evidence that the plaintiff and defendant owned adjoining tracts of land, and any question or dispute had arisen as to where the line now in controversy was, and the plaintiff and defendant agreed upon the line and established it, as between themselves, then in that case it is wholly immaterial where a survey would put the line. Each party is bound by his agreement, and in determining whether there was such agreement and fixing of the line, it is competent for the jury to take into consideration acts and statements of the parties at the time, the acts done by each and the fixing and adjustment of fences and improvements by them, under such agreement, if any are proven.¹⁴

B. ACQUIESCENCE.

§ 1127. In general.

The court instructs the jury that acquiescence in a line without an agreement as to its correctness does not bind a party unless such acquiescence extends for more than ——— years.¹⁵

C. ESTOPPEL.

§ 1128. In general.

§ 1129. — Missouri.

The court instructs the jury that defendant might lawfully request to have the resurvey made by A, without estopping him-

13—Hilgedick v. Gruebbel, 246 Mo.
140.

15—Henderson v. Dennis, 177 Ill.
547.

14—Cutler v. Callison, 72 Ill. 113.

self from insisting on the original corners if dissatisfied with the resurvey.¹⁶

§ 1130. — New York.

The court instructs the jury that if they believe from the evidence that the defendant before he made any erection or improvements upon the strip of land in controversy in this case, entered into an agreement with the plaintiff by which he procured ——— the surveyor to come and mark out the land and fix the boundaries between the land of the plaintiff and the land of defendant and that ——— came and laid out the line in the presence of plaintiff and defendant and with plaintiff's assent and concurrence, then the jury are instructed that this only does not change the rights of the parties because land cannot be conveyed by parol and nothing short of an acquiescence in the line thus located for ——— would have any effect to change the true line, but if the jury believe from the evidence that plaintiff and defendant got together and procured ——— to survey the line between the lands of plaintiff and defendant so as to determine where the defendant might safely build and the defendant did, in pursuance of such agreement and with knowledge and assent of the plaintiff locate his building and make valuable improvements, then the jury are instructed that plaintiff would be estopped from thereafter questioning the line so surveyed by ———.¹⁷

§ 1131. — Virginia.

The court instructs the jury that the opinion, or supposition, or verbal declarations of ——— as to where his true corner or lines were, cannot estop those claiming under him from claiming to the true boundaries of the grant described in the declaration, yet the jury may consider any such declaration as evidence tending to show what was the true boundary of the land described in the declaration.¹⁸

16—Granby Mining & Smelting Co. v. Davis, 156 Mo. 422.

(N. Y.) 218, mem. Exceptions to this instruction were overruled.

17—Corkhill v. Landers, 44 Barb.

18—Reusens v. Lawson, 91 Va. 226.

D. PRACTICAL LOCATION BY OWNERS.

§ 1132. In general.

The court instructs the jury that, in the absence of all controlling evidence, the true boundary would be a direct line from the end of one wall to the opposite wall; but that if the jury should be satisfied that, at the date of the deed, there was in fact a fence passing from wall to wall around the "jog," and should also be satisfied, from the acts of the parties to the deed, at the time of its execution and afterwards, that they understood and intended said fence as the true boundary between their lands, then the "jog" would not pass by the deed.¹⁹

E. ACTIONS.

§ 1133. Evidence—Burden of proof—In general.

The court instructs the jury that if you believe from the evidence, that the line claimed by plaintiffs, as surveyed by _____ is the correct line, then you will find for the plaintiffs, unless you further find that the land line as claimed by defendants was agreed upon as the land line by B and R, and upon this latter proposition the defendants are required to produce the preponderance of the evidence before you can find for them on the alleged agreement.²⁰

§ 1134. Same—Same—Official and designated character of stakes and monuments.

The court instructs the jury that if they find from the evidence, that stakes or monuments have been found which are claimed by plaintiff to indicate and fix the location of the boundaries of the land in question, or of sectional or quarter corners of the original official government survey of said land, or of land in the vicinity, or surrounding territory, then you are instructed that the burden is upon the plaintiff to show by a preponderance of evidence, that such stakes or monuments are those of the original, official government survey, and, also, that such original stakes

19—Davis v. Sherman, 73 Mass. (7 Gray) 291.

20—Henderson v. Dennis, 177 Ill.

547. The objection that, "land line"

and "boundary line" used in this instruction were not synonymous was not seriously considered.

or monuments establish and locate particular and designated boundaries, section, or quarter corner of such original survey; and unless such stakes or monuments are of such official and designated character as above specified, and shown to be such by a preponderance of evidence, then they should be disregarded by you as evidence of the boundaries of the land in question, or of section or quarter corners of said official government survey.²¹

§ 1135. Same—Weight and sufficiency—In general.

The court instructs the jury that, if there is any excess in quantity of land in the W survey, such excess is not to be considered by the jury, whether the same be great or small, unless it enables or assists you to determine the true location of the south boundary line of the W. survey. You are required to find the true location of the line of the survey as originally run and located on the ground, retracing the footsteps of the original surveyor; and it does not matter whether a greater or less quantity of land than called for in the grant be included within the lines as originally run.²²

§ 1136. Same—Same—Agreement between owners.

The court instructs the jury that, before you can find for defendant, on the issue that the survey in the lane dividing plaintiff's and defendant's field has been agreed upon as the division or boundary line between (the southeast quarter of the southeast quarter of section — and the northeast quarter of the northeast quarter of section —) you must be satisfied from the evidence, that there was a mutual agreement between the owners of the land to that effect. The fact that F, the former owner in section —, erected the south line of fence along the lane and cultivated the lands on the south side of such lane, will not of itself alone, be sufficient to prove such consent and agreement. You are further instructed that in determining whether the land which divides the plaintiff's and defendant's property has or has not been agreed upon between the former owners of adjacent property as the division or boundary line, it is proper that you

21—Pauly v. Broadnax, 157 Cal. 386, 108 Pac. 271.

22—Branch v. Simons (Tex. Civ. App.) 48 S. W. 40.

take into consideration the long acquiescence of adjoining owners to such line of division.²³

§ 1137. Same—Same—Erection of fence in pursuance of agreement.

The court instructs the jury that if it be true that the fences erected by defendants and the owners of the lands of the plaintiff have shifted and from time to time been changed, these facts, together with all other facts and circumstances in evidence, are proper for the consideration of the jury in determining whether or not said fence or any of said fences were built in pursuance of an agreement, as well as upon the question as to whether or not defendants claimed said line where said fence or any of said fences were so erected to be the true line, regardless of where it (such true line) in fact might be.²⁴

§ 1138. Same—Same—Degree of proof required.

The court instructs the jury that while the owners of adjoining tracts of land may by parol agreement, settle and establish permanently a boundary line between their lands, which, when followed by possession and the making of improvements, will be binding and conclusive and cannot afterwards be disputed, such agreements must be proven by a preponderance of the evidence, and the agreement must be such as to operate as a settlement of what was unsettled.²⁵

§ 1139. Questions for jury.

The court instructs the jury that if you find from the evidence that such original government monuments, commonly known as the initial point, can be definitely ascertained, then in this case you will ascertain from the evidence as to whether or not the measurements as testified to by the witnesses for the plaintiff are correct, and if you so find then your verdict will be for the plaintiff.²⁶

23—*Coleman v. Drane*, 116 Mo. 387.

24—*Brummell v. Harris*, 162 Mo. 397.

25—*Henderson v. Dennis*, 177 Ill. 547.

26—*Independent Asphalt Paving Co. v. Hein*, 73 Wash. 127, 134 Pac. 521, 131 Pac. 471.

CHAPTER LXXI.

BREACH OF MARRIAGE PROMISE.

- § 1140. Contract to marry—Necessity.
- § 1141. Same—Requisites and validity—Offer and acceptance.
- § 1142. Same—Same—Meeting of minds.
- § 1143. Same—Same—Consideration.
- § 1144. Same—Breach—In general.
- § 1145. Same—Same—Postponement of marriage.
- § 1146. Same—Same—Request for performance.
- § 1147. Defenses—Withdrawal of affections by defendant.
- § 1148. Same—Want of chastity.
- § 1149. Same—Illicit relations between parties after making of promise.
- § 1150. Same—Syphilitic condition of plaintiff.
- § 1151. — Illinois.
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- § 1154. Issues and proof.
- § 1155. Evidence—Burden of proof.
- § 1156. Same—Weight and sufficiency—In general.
- § 1157. Same—Same—Contract to marry.
- § 1158. — Missouri.
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- § 1160. Same—Same—Sexual intercourse.
- § 1161. Questions for jury.
- § 1162. Damages—Actual damages—In general.
- § 1163. — Michigan.
- § 1164. — Missouri.
- § 1165. Same—Same—Pecuniary loss.
- § 1166. Same—Same—Injury to affections.
- § 1167. Same—Aggravation of damages—Rape.
- § 1168. Same—Same—Seduction.
- § 1169. Same—Same—Failure to sustain defense of unchastity.
- § 1170. Same—Mitigation of damages—Character and reputation of plaintiff.
- § 1171. — Illinois.
- § 1172. — Oregon.
- § 1173. — United States.
- § 1174. Same—Exemplary damages—Failure to sustain defense of unchastity.

Cross-Reference.

See SEDUCTION.

§ 1140. Contract to marry—Necessity.

The court instructs the jury that if they find from the evidence that the attentions, if any, which defendant showed plaintiff, were merely such attentions as might be expected in a case of illicit intercourse between a man and a woman, where one or both wished a prolongation of the same, and were seeking opportunities for sexual gratification, and were not prompted by those feelings of affection which usually follow a marriage engagement, then they must find the issues for the defendant.¹

§ 1141. Same—Requisites and validity—Offer and acceptance.

The court instructs the jury that unless they can first find from the evidence that the defendant actually promised to marry the plaintiff, and that she, in earnest, accepted said promise, and that the plaintiff actually and in earnest promised to marry the defendant, and he received her promise in earnest, and unless the jury first find that such mutual promises were so given and received, then the jury must find the issues for the defendant; and in such case it makes no difference whether or not plaintiff and defendant had sexual intercourse with each other.²

§ 1142. Same—Same—Meeting of minds.

The court instructs the jury that to constitute a contract to marry there must be a meeting of the minds of the contracting parties—that is, there must be an offer on the part of one and an acceptance on the part of the other. Such contract may be unspoken or unwritten, but enough must appear to show that the minds of the parties met, and fix the fact that the parties are to marry as clearly as if put in formal words of offer and acceptance.³

1—Broyhill v. Norton, 175 Mo. 190.

See Horner v. Webendorfer, 141 App.

2—Broyhill v. Norton, 175 Mo. 190.

Div. (N. Y.) 759.

3—Hinckley v. Jewett, 86 Neb. 464.

§ 1143. Same—Same—Consideration.

The court instructs the jury that if you find from the evidence that the defendant promised to marry the plaintiff solely on consideration that she should permit him to have sexual intercourse with her (solely on the consideration that she would permit him to have intercourse with her), and as a result of such intercourse she became pregnant, is illegal and cannot be enforced in law; and in this case if you find from the evidence that the defendant did promise to marry the plaintiff upon the consideration that she allow him to have sexual intercourse with her, and that there was no other consideration for such promise then your verdict will be for the defendant.⁴

§ 1144. Same—Breach—In general.

The court instructs the jury that if they find from the evidence that on or about the — day of —, 19—, plaintiff was single and unmarried, and that at such time defendant proposed marriage to plaintiff, and that plaintiff accepted such proposal, no definite time having been fixed for such marriage; that thereafter defendant failed and refused to marry plaintiff, abandoned her, and declared to her that he did not intend to marry her, and denied, and still denies, that he made such proposal—then you shall find for the plaintiff.⁵

§ 1145. Same—Same—Postponement of marriage.

The court instructs the jury that if the plaintiff and the defendant entered into a contract of marriage in —, 19—, and the date for such marriage was afterwards fixed for the — of —, 19—, and such marriage was not consummated at such time through the fault of the defendant or on account of circumstances over which he had no control, the plaintiff cannot continue after said date to treat said marriage contract as still in existence and negotiate with the defendant for the setting of a future date, and then afterwards elect to treat said contract

4—*Davie v. Padgett*, — Ark. —, 176 S. W. 333. Although the court held that under the issues in this case, the refusal of the above instruction was proper, it stated that

the instruction announced a correct principle of law and should have been given had the evidence warranted it.

5—*Broyhill v. Norton*, 175 Mo. 190.

as having been broken by the postponement of the marriage on the original date.⁶

§ 1146. Same—Same—Request for performance.

The court instructs the jury that under a declaration charging a promise to marry upon request, or within a reasonable time, such request need not necessarily be made by the plaintiff herself; and in this case, if you find, from the evidence, that there was a valid, subsisting contract of marriage between the plaintiff and defendant, and that no definite time was fixed by the parties in the contract, then the law would presume a contract to marry within a reasonable time; if you further believe, from the evidence, that after a reasonable time from the making of said contract, and before the commencement of this suit, the plaintiff herself, or any one authorized by her for that purpose, called upon the defendant and requested him to marry the plaintiff, and that he refused and neglected to do so, then you should find the issues for the plaintiff.⁷

§ 1147. Defenses—Withdrawal of affections by defendant.

The court instructs the jury that if they find from the evidence defendant withdrew his affections from plaintiff and refused to marry her, such withdrawal on his part is no defense to the action and affords no justification to the defendant for such refusal to marry the plaintiff, if proven, and does not mitigate or lessen the damages to which plaintiff would be entitled for such breach of promise.⁸

§ 1148. Same—Want of chastity.

The court instructs the jury that, if plaintiff led an impure life prior to the alleged promise of marriage, it would not be a defense, but could be considered only as bearing on the credibility of her evidence and in mitigation of damages.⁹

6—Falk v. Burke, 93 Kan. 93, Ann. Cas. 1915 B 279n, 143 Pac. 498.

7—Judy v. Sterrett, 153 Ill. 94, aff'g 52 Ill. App. 265. It was not necessary in this instruction to tell the jury what constituted "a valid,

subsisting contract of marriage" when this point was sufficiently covered in other of the instructions.

8—Richmond v. Roberts, 98 Ill. 472.

9—Cox v. Edwards, 120 Minn. 512.

§ 1149. Same—Illicit relations between parties after making of promise.

The court instructs the jury that if you find that such proposal of marriage was made by defendant and accepted by plaintiff, then any illicit relations that may thereafter have occurred between plaintiff and defendant, induced by such promise, cannot justify defendant in refusing to consummate such marriage.¹⁰

§ 1150. Same—Syphilitic condition of plaintiff.

§ 1151. — Illinois.

The court instructs the jury that although they shall believe, from the evidence, that defendant promised to marry plaintiff, yet if the jury further believe from the evidence that at the time such promise was made the plaintiff was apparently in good health, and defendant had no reason to believe and did not know that plaintiff was subject to venereal disease, but that the defendant afterwards discovered that the plaintiff was subject to a venereal disease commonly called the syphilis, then the jury are instructed that under such circumstances the defendant might lawfully refuse to marry the plaintiff.¹¹

§ 1152. — Iowa.

The court instructs the jury that a person is always excusable for declining to carry out his promise of marriage to one afflicted with syphilis, unless made with knowledge of this condition.¹²

§ 1153. Limitations.

The court instructs the jury that if there was an agreement to marry and the time for its consummation postponed from time to time by defendant until a period less than (statutory term) years prior to the commencement of this suit when defendant refused to marry plaintiff, and plaintiff was ready and willing to marry him, then this suit would not be barred by the statute of limitations.¹³

10—Broyhill v. Norton, 175 Mo. 190.

12—Beans v. Denny, 141 Iowa 52.

13—Chamness v. Cox, 131 Ind. 118.

11—Kantzler v. Grant, 2 Ill. App. 236.

§ 1154. Issues and proof.

The court instructs the jury that the plaintiff in this case claims that there was a contract entered into by and between the plaintiff and the defendant, by which the defendant unconditionally promised and agreed to marry the plaintiff. To recover in this case, the plaintiff must prove by a preponderance of evidence that the defendant did unconditionally agree and promise the plaintiff to marry her.¹⁴

§ 1155. Evidence—Burden of proof.

The court instructs the jury that the burden of proof is on the plaintiff, and she must prove her case, as charged in her petition, by a preponderance of the evidence; and, if the jury find from the evidence that she failed to do so, they must find the issues for the defendant.¹⁵

§ 1156. Same—Weight and sufficiency—In general.

The court instructs the jury that they, in arriving at a conclusion on the issues made by the pleadings, must look at all the evidence in the case, and are entitled to draw from the facts proven by a preponderance of the evidence all just, proper and logical inferences.¹⁶

§ 1157. Same—Same—Contract to marry.**§ 1158. — Missouri.**

The court instructs the jury that the mere fact that an unmarried man is gallant to women, and shows to unmarried women courtesies and attentions, is, taken alone, no sufficient proof that he has marriage in his purpose, nor that he is engaged to be married. If, therefore, the jury find from the evidence that defendant was gallant in his conduct to plaintiff, and showed her courtesies and attentions, whether from a spirit of gallantry, or from the motive indicated in instruction No. — in defendant's series of instructions, but not for the purpose of marriage,

14—Richmond v. Roberts, 98 Ill. 472.

16—Broyhill v. Norton, 175 Mo. 190.

15—Broyhill v. Norton, 175 Mo. 190.

nor from the feelings of marriage engagement, then they must find the issues for the defendant.¹⁷

§ 1159. — United States.

The court instructs the jury that some testimony has been offered here by way of defense (whether it appeals to you or not is for you to say) suggesting that before the time of this alleged engagement the plaintiff was of unchaste character. If you find that fact to be established by a preponderance of the evidence, if that be the fact, and it is your judgment that her character in that respect was known to the defendant before the night on which this alleged contract was entered into, then you may consider that situation as bearing upon the probability of the defendant's proposing to make a woman of that character his wife.¹⁸

The court instructs the jury that the character of the defendant in this case is not directly at issue. The character of the defendant is known to this jury because it is in evidence. The jury is not here to impose any penalty or bring in any verdict against the defendant on account of his character, but you have a right to consider and should consider his character, as you know it from this evidence, in connection with the question of the probability of this contract and as having possibly some bearing in deciding whether or not he was likely to make such a contract as is charged against him.¹⁹

§ 1160. Same—Same—Sexual intercourse.

The court instructs the jury that mere opportunity to have sexual intercourse would not warrant a finding that it occurred, nor would it be enough as corroborative evidence to establish the same if the parties were equally credible as witnesses, but that it might be considered, in connection with all the other evidence, in determining whether the parties had indulged in illicit intercourse.²⁰

17—Broyhill v. Norton, 175 Mo. 190.

18—Young v. Corrigan, 208 Fed. 431.

19—Young v. Corrigan, 208 Fed. 431.

20—Beans v. Denny, 141 Iowa 52.

§ 1161. Questions for jury.

Is it likely or probable, as the defendant claims, that the plaintiff conceived and planned this contract of marriage she testified to, with all of its detail, in her own and her daughter's imagination, without its having any foundation of truth to rest upon? And is her entire statement upon the witness stand in these particulars inexcusable perjury or not? These are considerations for your solution, if you deem them pertinent in the proper determination of this case. Is it likely or not that all of this conduct of the defendant, these many details which she has testified to, were done by him because she requested it? It is for you to say if you deem them pertinent to your determination of the truth. Is it likely or not that the defendant registered twice at the hotel "A and wife" at her suggestion, or are his conduct and acts attributable to the facts of his affection for her? It is for you to say if you deem these considerations pertinent to the case. The facts, gentlemen, are for you; not for the court. The inferences to be drawn are for you, not for the court. The search for the truth is for you.²¹

§ 1162. Damages—Actual damages—In general.**§ 1163. — Michigan.**

The court instructs the jury that this is an action brought by the plaintiff, against the defendant, to recover damages which she claims resulted to her, by reason of a breach of promise of marriage by the defendant.

The plaintiff claims that some time during the spring of 19—, the defendant entered into a contract, or agreement of marriage with the plaintiff, that engagement was broken by the defendant, whereby she sustained damages which she seeks to here recover.

In order to entitle the plaintiff to a verdict in this case, she must satisfy you by a preponderance of evidence, first: that a contract or engagement of marriage was made and entered into by herself and the defendant, and that the defendant broke off that engagement and refused to carry out the contract, without just cause.

21—Gorman v. Fitts, 80 Conn. 531.

The contract of promise of marriage, in order to be binding, must have been mutual, that is, they must have both assented or agreed to it at the same time.

If you believe from the evidence, that the defendant and the plaintiff did mutually promise and agree to marry, and that such promise and agreement was made in the spring of 19—; and that the defendant afterwards refused to carry out such agreement, and fulfill his promise without the consent, and against the will of the said plaintiff, then she is entitled to recover.

If you find the plaintiff is entitled to recover in this action, then it will be your duty to say how much or how large a sum you will allow her, and upon this point the matter rests almost entirely with you; as in this class of cases it is almost impossible to measure the damages as we would in ordinary cases of contract, as no money standard can be fixed by which to measure the value of the injury sustained, and every case must rest as to the amount to be awarded as damages, upon its own peculiar circumstances.

In measuring the damages in this case, if you arrive at that point, you will apply the rules I shall give you to the facts and circumstances, as developed by the evidence, and render a verdict for such an amount as in your judgment is warranted by the facts of the case, and as will compensate her, so far as she can be compensated by simple dollars and cents, for the injury and damage she has sustained by reason of this breach of contract.

If you find that on or about the month of ———, 19— (I think where I said 19—, I should have said 19—, and if the defendant and plaintiff mutually agreed to be married to each other in the fall next following, and that in ——— following the plaintiff requested defendant to fulfill his contract, and that he refused so to do, then the plaintiff is entitled to recover.

A promise to marry may be inferred, and an engagement to marry may be proved, by the conduct of the parties, and by those circumstances which usually accompany such a connection; and if the behavior of the parties is such as to countenance the belief that an engagement has taken place, that is evidence tending to prove the promise.

If you find for the plaintiff then she is entitled to recover not merely an indemnity for her pecuniary loss, and the disappointment of her reasonable expectations of material and worldly advantages resulting from the intended marriage, but also compensation for wounded feelings and the mortification and pain she has wrongfully been compelled to undergo, and for the harm that has been done to her prospects in life.

If you find for the plaintiff, in estimating the plaintiff's damages, you may take into consideration the length of time the engagement had subsisted between the parties.

If you find for the plaintiff and also find that the defendant wantonly, willfully and causelessly broke his engagement to marry the plaintiff, you may in your estimation of damages consider the injury to the plaintiff's feelings and reputation, and any circumstances of indignity under which the wrong was done, and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act and tending to the plaintiff's discomfort.

If you find for the plaintiff, and find that the defendant commenced paying his attentions to the plaintiff in ———, 19—, that the parties became engaged in or about ———, 19—; that the defendant shortly after broke this engagement in ——— or ——— following; that at his instance the engagement was again renewed in or about the month of ———, 19—, and that he, in ———, 19—, again refused to fulfill his contract; all these facts may be considered by the jury in determining the amount of damages to be awarded to the plaintiff.

The actual circumstances of the defendant may be considered by the jury so far as it shows the condition in life the plaintiff would have secured by the consummation of the marriage.

In the estimation of damages, you may also take into consideration the age of the plaintiff; the probability of her forming a similar connection; or the fact as to whether she has a home of her own, or is comparatively alone in the world, and is compelled to reside with her friends.

You may also consider her anguish of mind, and if the engagement was renewed more than once, you may take into account

the added insult and indignity to her feelings, the mortification occasioned by the publicity of the affair, and the plaintiff's wounded pride as well as the loss of marriage.

You may also consider, in estimating the damages, whether the engagement was generally known among the friends and families of the parties; whether the defendant, as the promised husband of the plaintiff, was treated by herself and by her friends in a manner tending to show their expectation of marriage.

You may consider whether in company with plaintiff he frequently visited her relatives and friends, and was by them treated as one of the family, and any other fact tending to show the constancy of the plaintiff, her firm faith in the defendant, and the consequent torture of her feelings by his failure to perform his contract and live up to his promises.

The question whether the defendant will, in view of his pecuniary circumstances, be able to pay the damages awarded, should have no influence with the jury in estimating their amount.

If you find that the plaintiff did propose to marry the defendant, not through affection, but made the contract or promise of marriage for the purpose of getting money by this prosecution, then the plaintiff should not recover more than nominal damages, at least should recover nothing for wounded feelings and injured affections.

If the jury find the plaintiff consented to the breaking of the engagement, then she cannot recover on said contract.

That if the jury find that in ———, 19—, the defendant offered himself in marriage, and was declined, then plaintiff cannot recover on said contract, though it should appear that she afterwards proposed to accept the offer, unless defendant assented to such subsequent acceptance.

I suppose that, is true, gentlemen, that the contract must have been mutual between the parties. The law recognizes the right of a party to bring and prosecute an action for a breach of promise of marriage; that is a legal right, and as such, should be treated by all courts and jurors, and no prejudice, either for or against this kind of an action, should be allowed to sway your judgment or influence your verdict, but you should deal

with this case as you would with any other. Apply, then, gentlemen, the principles of law already given you, and render such a verdict as shall accord with your judgment. Pass upon the evidence in the case. Take the case and deal with it candidly, and render such verdict as shall satisfy your consciences.²²

§ 1164. — Missouri.

The court instructs the jury that if they find for the plaintiff, in determining the amount of damages she has sustained, they may take into consideration, as may appear from the evidence in the case, her mortification, injured feelings and affections; wounded pride; length of the engagement; the depth of her devotion; her lack of independent means; the defendant's wealth and the consequent loss of the marriage to plaintiff and her altered social position caused by defendant's conduct.²³

§ 1165. Same—Same—Pecuniary loss.

The court instructs the jury that they may consider the pecuniary advantage to the plaintiff of the marriage; the money value or worldly advantage that the marriage would have given to the plaintiff; the advantage of such a domestic establishment as would be suitable to plaintiff as the wife of a person of the defendant's estate and station in life, and in considering such matters it should consider the wealth of the defendant as shown by the evidence.²⁴

§ 1166. Same—Same—Injury to affections.

The court instructs the jury that if plaintiff's affections were in fact implicated, and she had become attached to the defendant, the wound and injury to her affections should be compensated for.²⁵

§ 1167. Same—Aggravation of damages—Rape.

The court instructs the jury that testimony has been offered and admitted in evidence tending to show that some time after ———, 19—, and within ——— weeks after said date, the

22—Miller v. Rosier, 31 Mich. 475.
See Mahiat v. Codde, 106 Mich. 387.

23—Fisher v. Oliver, 172 Mo. App.
18.

24—McKenzie v. Gray, 143 Iowa
112.

25—Stewart v. Anderson, 111 Iowa
329.

defendant, by force and against the will of the plaintiff did carnally know and debauch her. As to this evidence, you are instructed that the same cannot be considered by you in aggravation of damages, if you find she is entitled to recover; neither can you consider the same in determining as to whether or not the plaintiff did make and enter into the verbal contract alleged by the plaintiff in her petition.²⁶

§ 1168. Same—Same—Seduction.

The court instructs the jury that it is not instructed as to what course the federal courts would pursue upon the question of whether or not seduction should be considered in aggravation of damages by any precedent that has come to my attention. In some states that question is not to be considered at all, but I think the current of authority is, and I shall adopt it for your instruction here, that in a case where a breach of promise of marriage is at issue, in which seduction has followed the making of the contract, that fact is proper to be considered by the jury by way of enhancing or enlarging damages. So, as there is something of that sort claimed in this case, I want this jury to go out of the box with a very clear understanding of what seduction is. It is not sexual intercourse merely between a woman theretofore chaste and a man. It is not merely the despoiling of a woman's virginity, not merely the dragging the woman down from a life of chastity to unchastity, but it is the despoiling of a woman's virtue against her will, yielding to seductive influences on the part of the man which she cannot fairly withstand. A girl theretofore pure in act, then unspoiled in act, but coming to the sexual act willingly, consciously and in that mind participating, is not seduced. So you may go to the circumstances which preceded the going of the plaintiff to ———; you may consider the degree of intimacy between the parties prior to her going there, the brief association they had together, and the places in which and the circumstances under which they associated in ——— before she went to ———, whatever those places and circum-

²⁶—Lauer v. Banning, 140 Iowa

stances you find to have been; you may consider the manner in which she was procured to go to ———; you may consider her confessed deception of her mother, the distance she had to go, the knowledge of conditions when she got there, where she was and how she was surrounded by these men who were (one of them at least) a total stranger and the other of brief acquaintance, and then, gentlemen of the jury, you are permitted to draw from these circumstances and any other circumstances that in your judgment illuminate her mind and disposition such inferences as appeal to your judgment and determine whether the first act of sexual intercourse which she had with the defendant was an act of seduction or was an act which she could reasonably have anticipated would be one of the fruits of her trip to ———, and if you find it was the latter, if you find it was one which she could have and should have reasonably anticipated, with what knowledge of the defendant she had as you find it in this testimony, I say to you that that was not a seduction, no matter whether she had theretofore been pure or not.²⁷

§ 1169. Same—Same—Failure to sustain defense of unchastity.

The court instructs the jury that if they find for the plaintiff, they shall take in consideration, as may appear by the evidence, the length of the engagement; the depth of plaintiff's devotion, if any; her loss of marriage; her altered social condition, if any, caused by defendant's conduct; and if you believe from the evidence that defendant's attempt to prove unchaste or improper conduct with others on the part of the plaintiff was made without reasonable cause to believe that such charge could be proven, and you are satisfied that plaintiff is innocent of such charge, that fact shall be taken into consideration by the jury in aggravation of plaintiff's damages; and you shall assess her damages at such amount as you believe she should recover, not exceeding ——— dollars.²⁸

27—Young v. Corrigan, 208 Fed. 431.

28—Broyhill v. Norton, 175 Mo. 190.

§ 1170. Same—Mitigation of damages—Character and reputation of plaintiff.

§ 1171. — Illinois.

The court instructs the jury that even if they believe, from the evidence, that the alleged contract of marriage is subsisting, yet the jury will take into consideration the character and habits of the plaintiff, and if they believe, from the evidence, that she was addicted to lewdness, this circumstance should be considered in estimating the damages, and no person guilty of such practices ought to recover as much damages as a pure-minded and virtuous person.²⁹

§ 1172. — Oregon.

The court instructs the jury that, if you find the contract was made, and has been broken, and consider the question of damages you may take into consideration the character of the plaintiff. If it is subject to any criticism on your part, and if she is a woman of coarse manners, coarse in her associations, and imprudent, careless and reckless in regard to her conduct and demeanor, these circumstances you may take into consideration in assessing damages; such a woman is not injured to the same extent by a breach of promise of marriage that one more confiding, retiring, and modest would be. Understand that I am passing no judgment upon the plaintiff or suggesting that you shall pass any judgment upon her, but I wish you to understand that if you think she deserves consideration of that kind, it is your privilege and duty to give such consideration to that phase of the matter as you think it deserves.³⁰

§ 1173. — United States.

The court instructs the jury that to some extent, as you have already seen, the character of the plaintiff is proper for you to know in determining whether or not there was a contract. It is also essential in meting out justice between the parties to this case, if you get to the point where you think you should award

²⁹—Kantzler v. Grant, 2 Ill. App. 236.

³⁰—Kelley v. Highfield, 15 Ore. 277, 14 Pac. 744.

damages to the plaintiff against the defendant, that you should know both the character and reputation of the plaintiff, the woman, at or about the time of the alleged breach of contract, because damages in a case of this kind depend in some measure upon the relation which the plaintiff sustained in the community in which she lived and depend in some measure upon her capacity to suffer from the affront which a breach would bring to her. You will observe that character is what a person actually is. Reputation is what the community in which that person lives thinks such a person is—the estimate that the community places upon such a person. In a breach of promise case the woman may be damaged in her character by the breach and she may be damaged in her reputation, and you cannot know the extent of damage to either character or reputation until you know what they were before the breach.³¹

§ 1174. Same—Exemplary damages—Failure to sustain defense of unchastity.

The court instructs the jury that in cases of this kind the damages are always in the discretion of the jury and in fixing the amount they have a right to take into consideration the nature of the defense set up by the defendant, and if the jury believe from the evidence that the defendant promised marriage to the plaintiff and then refused to carry out his promise, and if the defense set up by the defendant in this case is not sustained by the evidence (the defense being injurious to the reputation of the plaintiff) then the jury will be justified in giving exemplary damages.³²

31—Young v. Corrigan, 208 Fed. 431.

32—Southard v. Rexford, 6 Cow. (N. Y.) 254.

CHAPTER LXXII.

BREACH OF THE PEACE.

§ 1175. What constitutes crime—Vile epithets.

§ 1176. Defenses—Threatening, abusive or discourteous language of third person.

§ 1177. Bond to keep the peace—Breach—Defenses—Insanity.

Cross-References.

See ASSAULT AND BATTERY; DISTURBANCE OF PUBLIC ASSEMBLAGE; matters pertaining to law of crime in general, see CRIMINAL LAW.

§ 1175. What constitutes crime—Vile epithets.

The court instructs the jury as a matter of law, that a person who, on the public streets of a city, in the presence of several persons, applied to another vile epithets, with the intention of annoying, offending and disturbing such person, commits a breach of the peace.¹

§ 1176. Defenses—Threatening, abusive or discourteous language of third person.

The court instructs the jury that if A was at the time road overseer, and defendant and others were hands working on the public road, defendant was bound to perform all reasonable duties required of him by such road overseer, and, if defendant failed or refused to perform any reasonable duty as directed by said overseer, said overseer had the right to discharge him, and that the defendant could not justify himself by cursing or abusing said overseer for discharging him, but if, in that connection, the jury should find that A used threatening, abusive, or discourteous language to the defendant, or otherwise treated him in an unreasonable manner, they may take such words and conduct on

¹—State v. Appleton, 70 Kan. 217,
78 Pac. 445.

his part in mitigation of the penalty of the offense, if they find defendant guilty.²

§ 1177. Bond to keep the peace—Breach—Defenses—Insanity.

The court instructs the jury that if the act of _____ in assaulting the party, which is admitted to constitute a breach of the bond, was caused by mental disease or unsoundness which dethroned his reason and judgment with respect to that act,—which destroyed his power rationally to comprehend the nature and consequence of that act, and which overpowering his will irresistibly forced him to its commission, then he is not legally answerable therefor. But if you believe from all the evidence and circumstances that he was in possession of a rational intellect and sound mind, and allowed his passions to escape control, then though passion may for the time being have driven reason from her seat and usurped it, and have urged him with a force at the moment irresistible to desperate acts, he cannot claim for such acts the protection of insanity.³

2—Watkins v. State (Tex. Cr. App.), 44 S. W. 507; Christmas v. State (Tex. Cr. App.), 44 S. W. 175.

3—State v. Geddis, 42 Iowa 264. Court holds that there is no distinction between civil and criminal causes.

CHAPTER LXXIII.

BRIBERY.

§ 1178. Evidence—Weight and sufficiency—Receipt of money by defendant.

Cross-References.

See EXTORTION; matters pertaining to law of crime in general, see CRIMINAL LAW.

§ 1178. Evidence—Weight and sufficiency—Receipt of money by defendant.

The court instructs the jury that it is the law generally that any act by an assumed agent; and a recognition of his authority by the alleged principal, may, in a proper case, prove the agency to do other similar acts. And if you find in this case that A was authorized or directed by defendant to collect in his behalf money from one or more of these women, other than B, such fact is proper to be considered in determining whether or not defendant authorized A to collect money from her. Indeed, if you find that A had general authority to collect protection money from abandoned women, or from a certain class of them, which included B, if in fact he received it, he received the same for the defendant, and in that event will find that he himself received the money.¹

1—State v. Ames, 90 Minn. 183.

CHAPTER LXXIV.

BRIDGES.

I. CONSTRUCTION AND MAINTENANCE.

- § 1179. Liability for cost—Bridge on town line.
- § 1180. Defective construction—Damage to mill property caused by washing away of bridge.
- § 1181. Unlawful destruction of bridge—Criminal liability.

II. INJURIES TO PERSON OR PROPERTY OF TRAVELER.

- § 1182. Rights of, and restrictions upon travelers in general—Bicyclists.
- § 1183. Uses of bridge for which provision to be made.
- § 1184. — Michigan.
- § 1185. — Vermont.
- § 1186. Guard rails—Necessity.
- § 1187. Keeping bridge in repair—Duty—Municipal corporations.
- § 1188. Same—Care required in general.
- § 1189. — Indiana.
- § 1190. — Iowa.
- § 1191. — Michigan.
- § 1192. — Texas.
- § 1193. — Vermont.
- § 1194. Same—Notice of defects.
- § 1195. — Georgia.
- § 1196. — Indiana.
- § 1197. Contributory negligence.
- § 1198. — Michigan.
- § 1199. — Nebraska.
- § 1200. — Pennsylvania.
- § 1201. Actions for injuries—Questions for jury—Necessity of guard rails.
- § 1202. Same—Same—Character of use to which bridge put.

Cross-Reference.

Acceptance of dedication, see DEDICATION, § 2705.

I. CONSTRUCTION AND MAINTENANCE.

§ 1179. Liability for cost—Bridge on town line.

The court instructs the jury that the statute of this state does not confer authority upon the commissioners of highways of one

town to compel the commissioners of an adjoining town to repair or erect a bridge upon the town line or pay one half of the cost of such bridge, after it has been constructed or repaired.¹

§ 1180. Defective construction—Damage to mill property caused by washing away of bridge.

The court instructs the jury that if they find that on the _____ day of _____, 19—, the plaintiffs were the owners of the property situated on _____ Creek, described in _____ offered in evidence, with buildings and mill-dam as part thereof, and which has existed for over _____ years, and that up to the year _____ the stream was crossed by the county road at a ford below the dam, and that about that year the defendants changed the location of the county road so as to cross the stream by an iron bridge set upon abutments connected by wing walls with the banks on either side of the stream, and if the jury shall believe from the evidence that said abutments or either of them were improperly and insecurely erected for the purposes for which they were designed, and that in building said abutments they were not built as high, or with such space between as was reasonably necessary in times of freshet, and that owing to such defective construction (if they find such) or insufficient space provided for venting the water one of said abutments gave way and the bridge was carried off on the _____ of _____, 19—, and was lodged upon the plaintiffs' mill-dam, and that thereby said mill-dam was washed out and injuries sustained by the said mill and by the washing away of their buildings, then the plaintiffs are entitled to recover the losses occasioned thereby and sustained by them in the destruction of their property and business, notwithstanding the jury may be of the opinion that the water, at the time was higher than usual in times of freshet.²

The court instructs the jury that even if they find that the flood which carried away the bridge was of unusual or unprecedented height, still if they further find that but for the improper and

1—Highway Com'rs Tonti Tp. v. Highway Com'rs Foster Tp., 152 Ill. App. 536.

2—County Com'rs Hartford Co. v. Wise, 71 Md. 43.

negligent construction or condition of the bridge, if they so find, the disaster would not have occurred, then the unusual or unprecedented height of the flood is no defense.³

The court instructs the jury that if they find that the bridge above _____ was carried away by a flood on the _____ day of _____, 19—, and in passing down the stream carried away plaintiffs' dam, then plaintiffs are entitled to recover such sum as will compensate them for the injury sustained and loss suffered, provided the jury also find that the location, construction or condition of the bridge was negligent, and that the carrying away of the bridge was in consequence of such location, construction or condition.⁴

§ 1181. Unlawful destruction of bridge—Criminal liability.

The court instructs the jury that before you can convict you must be satisfied from the evidence beyond a reasonable doubt of the truth of the following propositions:

1. That the bridge in question was a public bridge.
2. That the road upon which it was placed was a public road at the time of the alleged destruction.
3. That the said road was properly established by the proper legal authorities, or was a public road by user, and was such public road at the time of the alleged destruction.
4. That the defendant, _____, willfully and unlawfully and maliciously did cut and destroy the said bridge with intent to injure the same.⁵

The court instructs the jury that you may, in endeavoring to learn whether or not the defendant knew the bridge was a public one and located upon a properly established public road, consider that the defendant received damages from the county of W. for the land taken to constitute the part of the road upon which the bridge was located.⁶

3—County Com'rs Hartford Co. v. Wise, 71 Md. 43.

4—County Com'rs Hartford Co. v. Wise, 71 Md. 43.

5—O'Dea v. State, 16 Neb. 241.

6—O'Dea v. State, 16 Neb. 241.

II. INJURIES TO PERSON OR PROPERTY OF TRAVELER.

**§ 1182. Rights of, and restrictions upon travelers in general—
Bicyclists.**

The court instructs the jury that it is the law of ——— that persons using bicycles on the public highways and bridges of the state are entitled to the same rights and subject to the same restrictions in the use thereof as are prescribed by law in the case of persons using carriages drawn by horses.⁷

The court instructs the jury that the plaintiff in the use of her bicycle on the bridge in question was not bound to use the carriage drive, but had the right to go over any part of the bridge open for travel.⁸

§ 1183. Uses of bridge for which provision to be made.**§ 1184. — Michigan.**

The court instructs the jury that if they find that the bridge in question was reasonably safe, and fit for ordinary travel,—for the ordinary modes of travel in use at the time of its construction,—the city cannot be held liable for any injury occasioned by an unanticipated and extraordinary use of the same.⁹

§ 1185. — Vermont.

The court instructs the jury that the town was bound to provide a bridge sufficient only for the travel that passed over it, or might be expected to pass over it, and that the greater the travel, the better it should have been kept, but whether the travel was much or little, it was the duty of the town to keep it in good and sufficient repair for the amount and kind of travel that did pass over it, or that might fairly be expected to pass over it.¹⁰

§ 1186. Guard rails—Necessity.

The court instructs the jury that the county commissioners were bound to foresee and reasonably provide against a common danger to ordinary travel on the bridge. It may be taken as a

7—Strader v. Monroe, 202 Pa. 626.

10—Graves v. Town of Waitsfield,

8—Strader v. Monroe, 202 Pa. 626.

81 Vt. 84.

9—Woodbury v. City of Owosso, 64

Mich. 239.

well-known fact that bicycles when they strike obstructions in their path, even in the control of expert riders, are apt to deviate from their course and take a sudden and erratic direction, unexpected by the riders; just as no one can foretell the conduct of a frightened horse. The presence of guard rails or barriers at the point of the accident would have been a protection from the danger of going over the bridge, no matter what the movements of a bicycle would be. The aptness of bicycles to deviate from their course and to take sudden and unexpected directions when meeting obstructions in their path was ordinary knowledge and to be expected. If it were otherwise it would be extraordinary, because contrary to common observation and experience. The county commissioners should have guarded against that which was to be expected, and it will not excuse the negligence of the commissioners, or make that negligence the remote cause to assert that they could not foresee the peculiar aptness or freak of a bicycle to take sudden and unexpected courses when meeting obstacles in its path. The injury in the case must be the natural and probable consequence of the neglect to have had up guards or barriers, and the consequence is such as, under the surrounding circumstances of this case, might and ought to have been foreseen by the county commissioners.¹¹

The court instructs the jury that should they believe from the evidence that the plaintiff was not expert, or was inexperienced in the use of the wheel, yet, she had a legal right to use the bridge in question, with her wheel, and it was the duty of the county commissioners to have anticipated such use and provided for the same; and their failure to do so was negligence and the plaintiff is entitled to recover, provided she was not guilty of contributory negligence.¹²

§ 1187. Keeping bridge in repair—Duty—Municipal corporations.

The court instructs the jury that even if such bridge was in a public street, it must be conceded that it was built by private individuals and was maintained by private individuals, in connection with their mill, and that the city had refused to consider the

11—Strader v. Monroe, 202 Pa. 626.

12—Strader v. Monroe, 202 Pa. 626.

bridge a public structure, and although built in the public street, if it was simply and solely an appendage to ——— and only useful as connected with the mill of ———, to the public only as dealing with ——— mills, and was not, during the time it has stood there and up to the time of the accident, useful to the public generally and used by them generally, in the course of ordinary travel along said street to and from places other than ——— mills, then the city would not be liable for the injuries suffered by the plaintiff through the falling of said bridge. But on the other hand, if said bridge stood in the public highway and appeared to be a part thereof, and the approaches from the traveled part of the street led directly thereto and it appeared to any one traveling along the highway to be a part of the street in ordinary use, and if it had been and was in actual use and utility generally to the traveling public and used by the general traveling public, then the city, if it had erected at or near the bridge no visible sign or monument warning the public that such bridge was not a part of the street, was under a duty so long as it permitted the bridge to remain in and as a part of the street, subject to general use and utility, to keep the same or see that the same was kept, in reasonable repair, so that it would be reasonably safe and convenient for public travel.¹³

§ 1188. Same—Care required in general.

§ 1189. — Indiana.

The court instructs the jury that the board of commissioners of the defendant county are chargeable with knowledge of the tendency of timbers to decay and it is incumbent upon the commissioners to use ordinary care in providing against the timbers in a bridge becoming unsafe because of the decay incident to age and long use. They are not bound, however, to do more than use ordinary care and diligence; and if they act with ordinary care and diligence there is no liability.¹⁴

¹³—Detwiler v. City of Lansing, 95 Mich. 484.

¹⁴—Apple v. Board Com'rs Marion Co., 127 Ind. 555.

§ 1190. — Iowa.

The court instructs the jury that the board of supervisors is charged by law with the duty of supervising and keeping the county bridges in repair. If the members of the board did not possess the requisite skill to discharge the duty of inspection, then it was the duty of the board to appoint or provide some one possessing such skill, and to have all county bridges under their care examined as frequently as men of ordinary prudence and care would deem necessary for the safety of the traveling public, and as experience demonstrated the necessity of examination, and if the board failed to do this, such failure would be negligence.¹⁵

§ 1191. — Michigan.

The court instructs the jury that if you find the fact to be that when plaintiff's horse was being driven across the bridge on the day in question, the passage from the ——— to the approach was so steep that it was not reasonably safe,—whether the steepness was caused by the ——— or by the ——— as shown by the evidence,—but on account thereof the horse was overcome by the load, when he would not have been overcome if the incline had been more gradual, and shall also find that such incline might have been made easier, on the part of the city, by the exercise of reasonable care and skill, and that this steepness and condition caused the loss of the horse, then the city would be liable, provided the plaintiff and the driver were not guilty of want of ordinary care in the management of the horse and reasonable time and opportunity to put the bridge in a safe condition occurred, as I have stated.¹⁶

The court instructs the jury that a municipality, like the city of ———, must know what is going on and must act through its officers and agents, and through them it may know of the existence of a defect in a highway or bridge. And when such knowledge is gained by its officers or agents, the corporation may become liable for negligence in not making repairs where repairs

15—Ferguson v. Davis County, 57 Ltd., v. City of St. Clair, 96 Mich.
Iowa 611. 463.

16—St. Clair Mineral Springs Co.,

are needed. On the other hand, though they may not have notice and knowledge, a defect may exist and be unknown, and the corporation still be liable on the ground that the prime fault consists in being ignorant of the existence of the defect; for a want of knowledge may, under given circumstances, imply want of due care. The duty of a city is to exercise, through its officers and its agents acting for it, a reasonable and supervisory care over its highways and its bridges, and, within reasonable limits, be watchful of their condition and safety, and to see that they are kept in a reasonably safe condition for public work. A corporation is not bound to extraordinary care or extraordinary diligence, but only ordinary care and ordinary diligence. It is not an insurer of safety. It does not warrant or undertake against accidents and injuries. It only undertakes that the bridge which is to be crossed is reasonably or ordinarily safe for public travel.

This question of want of reasonable care, or negligence, must be determined by the circumstances of each case. What circumstances would be considered a want of ordinary care when applied to one bridge in one locality would not be so considered in the case of another bridge in a different locality. A bridge of long standing would require closer and more frequent examination than a new bridge. A bridge in a densely-populated community, upon a main thoroughfare, with daily heavy travel, would require more vigilance in its supervision and care than would a like bridge in a thinly-settled part of a township, or in a city with only a light or occasional travel. A difference, also, in the material out of which the bridge is constructed, or on which rests the flooring of the bridge,—whether the timbers used were suitable or otherwise, were of full length or shorter than they should be,—and the permanency of the construction, would all have to be considered by the jury in determining the question of ordinary care, or want of ordinary care.

I charge you that if you find that the bridge was defectively maintained, in the manner mentioned, and on that account the injury occurred, and the plaintiff was without fault on his part, and the jury find further that this defect in the bridge had

remained and been in the condition complained of such a length of time that defendant should have known of it, then the plaintiff is entitled to recover. If you find the defects complained of,—that is to say, the liability of the planks and joists to move and drop off their supports by the jolting of passing teams and loads,—and this rendered the bridge unsafe for travel, and might have been discovered by an examination of the position of the planks and joists, then the city could not refuse to see what others could see, and they would be chargeable with negligence for not knowing these facts; and, if the plaintiff was injured without fault on his part, he ought to recover.

If the jury find that the bridge in question was not in good repair and in a condition reasonably safe for public travel at the time of the accident, on which account the injury occurred, and the plaintiff was not in fault in going or driving his engine upon it, and the defendant ought to have known of the unsafe condition of the bridge, then the plaintiff would be entitled to recover just damages.

Before the passage of Act —, Laws of 19—, there was no legal duty requiring a township, city, or village to keep in repair its highways and bridges, and no action could be maintained for an injury suffered by reason of a defect in such bridge or highway; but by the act of 19— a duty was created on their part to maintain in a reasonably safe condition their highways and their bridges. But this act does not impose the duty to build new bridges of any kind. A municipal corporation is vested with certain legislative powers confined to the territorial limits of the city or corporation; and, when it has acted in determining the kind of bridge it will construct, the wisdom or correctness of such legislative determination cannot be considered or become a subject of review by a court or jury. Such determination is final. I therefore charge you, in this case, that the plaintiff cannot recover in this case upon the ground that the plan or method of constructing the bridge was not as good and durable as some other method or plan may have been.

The bridge was built in 19—, when the municipality owed no

duty to the public or individuals to build bridges, and its action cannot be reviewed in this action. But the act of 19— made it the duty of townships, villages, cities, and corporations to keep in good repair, so that they will be safe and convenient for public travel at all times, all public highways, streets, bridges, cross-walks, and culverts that are within their jurisdiction, and under their care and control, and which are open to public travel. But the statute also provides that, when an action is brought under this act, it must be shown that such township, village, city, or corporation has had reasonable time and opportunity, after such highway, street, cross-walk, or culvert became unsafe or unfit for travel, to put the same in a proper condition for use, and has not used reasonable diligence therein. That is the language of the statute which creates the duty and gives the right action to the party injured, and this proviso is as important as any part of the act.

Before the plaintiff can recover in this case, gentlemen, you must be satisfied, by a preponderance of evidence,—

1. That the plaintiff has sustained an injury.

2. That the injury was caused by the bridge being out of repair by reason of the defendant's neglect to keep such bridge in good repair, and in a condition reasonably safe and fit for travel; and, also, that a reasonable time and opportunity, after such bridge became out of order and unsafe and unfit for travel, if you find it out of repair, had elapsed and expired, and that the defendant did not use reasonable diligence to repair and put the same in proper condition.

This negligence urged against a township or city, and its liability, can only arise after it has had notice of the unsafe condition of the bridge, or where the want of repair or bad condition of the bridge by reasonable diligence could have been discovered, and where it continued for such a length of time that the want of knowledge on the part of the city would be regarded as negligence on its part.¹⁷

17—Woodbury v. City of Owosso,
64 Mich. 239.

§ 1192. — Texas.

The court instructs the jury that from the testimony they will determine whether the city authorities used that care and skill which a prudent man would ordinarily use in like circumstances in making and keeping the bridge as shown to have been on _____, 19—, with the surrounding facts; and if they find such care and prudence to have been taken and used in keeping said bridge in the dimensions shown, looking to all the circumstances,—that is, if they find that the bridge was reasonably safe and sufficient for the public,—then they will find for the defendant.¹⁸

§ 1193. — Vermont.

The court instructs the jury that it was the duty of the town to keep this bridge reasonably safe for the amount and kind of travel that might fairly be expected to pass over it, and so that travelers might be reasonably safe from the consequences of such accidents as might justly be expected occasionally to happen there. This duty, as affecting the town's liability to pay damages for injuries occasioned by defects in the bridge, is not measured by the exercise of ordinary care and diligence on the part of the town in respect of keeping the bridge in repair; nor, on the other hand, is the town liable absolutely as an insurer for damages resulting by reason of its insufficiency and want of repair. The statute imposed the duty of keeping this bridge in good and sufficient repair. If the town is chargeable with any fault in respect of this duty, the liability attaches, if the plaintiff's case is otherwise made out, and the town is liable for accidents and injuries caused by reason of defects existing therein through the fault of the town, for against such accidents and injuries the town is an insurer, and this, without notice to it, or regardless of the question of neglect. If the plaintiff, being free from fault on her part that contributed thereto, or if her husband was free from fault on his part that the law will impute

18—Keating Implement & Machine
Co. v. Marshall Elec. Light & Power
Co., 74 Tex. 605.

to the plaintiff, if, in the absence of any such fault, the plaintiff received injury that was the combined result of such an accident as might justly be expected to happen there, and the insufficiency or want of repair of the bridge, the town is liable.¹⁹

§ 1194. Same—Notice of defects.

§ 1195. — Georgia.

The court instructs the jury that if there was a defect in this bridge because of a beam placed there by authority of the county authorities, and it was suffered to decay and become rotten, and on that account it became dangerous, then if the county authorities, the county commissioners, had notice of it, or either of them, or if that condition remained for a sufficient length of time for them to discover it in the exercise of ordinary care, which would be notice to them, and if the plaintiff was injured on account of the defect, she would be entitled to recover.²⁰

§ 1196. — Indiana.

The court instructs the jury that, if the defects in the bridge had existed for such a length of time that the defendant, by the exercise of reasonable diligence, could have known of its defective condition, they would be justified in finding that the defendant had notice.²¹

§ 1197. Contributory negligence.

§ 1198. — Michigan.

The court instructs the jury that it was the duty of the plaintiff, as a matter of law, to provide herself with a reasonably safe conveyance when going upon the public highway, and that she should have a reasonably gentle and safe horse, and the duty was upon her to exercise reasonable care and prudence in driving along this highway and over this bridge; and, if she failed or neglected to observe any of these precautions, she is, in law, guilty of what is known as "contributory negligence," and she

19—Graves v. Town of Waitsfield,
81 Vt. 84.

20—Butts County v. Hixon, 135 Ga.
26.

21—Board Com'rs LaPorte Co. v.
Ellsworth, 9 Ind. App. 566.

cannot recover in this case. "Contributory negligence" means that by her own carelessness or negligence she has contributed to her own injury. And, if she has done that, under the law she is not entitled to recover at all, as you cannot apportion the negligence.

Now, the mere fact that the plaintiff might have seen this hole in the board when she drove over it in the forenoon of that day would not, of itself, constitute her guilty of contributory negligence in endeavoring to pass over that bridge again that evening. You have a right to consider the fact, to say whether, under the evidence, a reasonably careful and prudent person would have endeavored to cross that bridge, as she did, in the evening, knowing of the existence of the hole (if you find there was one, and she knew of its existence). And if you find that a reasonably careful and prudent person would not, having the knowledge she had, have offered to pass over that bridge, as she did on her return, then that would amount to contributory negligence on her part. Having a knowledge (if you find she had) of the fact that there was a hole in the bridge, then it became incumbent upon her to exercise more care and caution in crossing the bridge the second time than she would have otherwise been called upon to do. In other words, if she knew there was some danger in crossing the bridge,—if she realized that,—with the hole in it, then she would be expected to exercise care and caution proportionate to the risk she ran.²²

§ 1199. — Nebraska.

The court instructs the jury that if you find from the evidence that the bridge in question was in an unsafe condition, and if you further find that the deceased, A, knew of such unsafe condition or had reason to know that the stringers on said bridge were cracked or broken by a previous strain, then you are instructed that the deceased would be negligent in not examining said bridge before he drove upon it.²³

22—*Bratfish v. Township of Mason*, 120 Mich. 323. 566, distinguished in *Nelson v. City of Rockford*, 186 Ill. App. 288.

23—*Seyfer v. Otoe County*, 66 Neb.

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§ 1200. — Pennsylvania.

The court instructs the jury that if the plaintiff knew of the existence of the obstruction, the plank on the bridge, or saw it before she reached it, or was careless in not observing it, and then carelessly or imprudently ran into it or on it and the accident resulted from such carelessness and imprudence, then she cannot recover. She must show you that she was reasonably careful and prudent as she rode across that bridge at the point of the accident. She must satisfy you of that first. If she has, then you may proceed to the second question.²⁴

§ 1201. Actions for injuries—Questions for jury—Necessity of guard rails.

The court instructs the jury that it was the duty of defendant, in erecting and constructing the bridge in question, over and across a public street in a city, to so erect and construct said bridge as to make the same reasonably safe for travel and use, for all persons over the same on foot or otherwise, as well in the night as in the daytime; and, if the jury believe from the evidence that a railing or other guard was necessary on the sides of the bridge, to protect foot passengers by day or by night from the danger of a fall from the bridge, then it was the duty of defendant to cause to be provided and constructed on the side of the bridge such railing or other sufficient guard, to give protections against such danger or fall from the bridge; and the court instructs the jury, that the question whether such railing, or other guard, was necessary, is not a question for the court to decide, but a question for the sole finding and determination of the jury; and unless the jury find from the evidence that such railing or guard was so necessary for the reasonable safety of persons passing over the bridge, and that defendant failed to provide the same, plaintiff is not entitled to recover in this action. But if the jury find from the evidence that such railing or guard on the sides of the bridge was necessary for the reasonable safety of passengers, by night or by day, and that defendant failed and neglected to provide the same; and further find that plaintiff, on

24—Strader v. Monroe, 202 Pa. 626.

the night of the ———, was passing along a public street of said city, leading to or over said bridge, observing and using ordinary and reasonable care to pass and go over said bridge safely, when, through the fault and negligence of defendant in failing to have such railing or other guard along the side of said bridge, he stepped or fell from said bridge into the ——— below, and was thus hurt and injured,—in such a case the jury will find for plaintiff (the amount sued for).²⁵

§ 1202. Same—Same—Character of use to which bridge put.

The court instructs the jury that in maintaining a bridge for public use the county is not limited in its duty by the ordinary business use of the structure, nor is it bound to provide for the support of extraordinary or unreasonably heavy loads, but it is only required to provide what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which from time to time may be pursued in the locality where the bridge is situated. Whether or not the load which the deceased, A, drove on the bridge in question was an extraordinary or unreasonably heavy load is a question for you to determine from the evidence before you.²⁶

25—Loewer v. Sedalia, 77 Mo. 431.

566, distinguished in Nelson v. City of

26—Seyfer v. Otoe County, 66 Neb.

Rockford, 186 Ill. App. 288.

CHAPTER LXXV.

BROKERS.

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§ 1280. Notice of broker's agency.

§ 1281. Payment to broker.

Cross-References.

See AGENCY; BOARDS OF TRADE; FACTORS.

I. EMPLOYMENT.

§ 1203. Existence of relation in general.

The court instructs the jury that this suit was brought by plaintiffs to recover the price of a car of iron sold to defendant and that defendant admits the liability for the iron but pleads a counterclaim for damages for an alleged failure on the part of plaintiffs to punch the iron in question in accordance with direction furnished to T, who the defendant says was the agent of the plaintiffs. Plaintiffs claim that T was the agent of defendant and that they punched the iron as directed by T. The court instructs the jury that if they find in this case that the defendant first employed the broker, T, or first set him in motion on the business involved in this controversy, you are instructed that he was and remained the agent of the defendant so far as any agency resulted from the above facts, and that any mistakes which he may have made in conveying to plaintiff the directions of the defendant as to the manner of punching these rails, are mistakes of defendant's own agent and plaintiffs are not responsible therefor.¹

II. DUTIES AND LIABILITIES TO PRINCIPAL.

§ 1204. Care and diligence.

The court instructs the jury that if they believe from the evidence that defendants (were employed as custom-house brokers by the plaintiff to enter imported goods as alleged in the declaration, and that the day before an increased duty came into effect, the custom house was to be kept open until ——— instead of closing at — p. m. as was usual, to permit of the entry of goods

1—Schlesinger v. Texas, etc., R. Co., 87 Mo. 149.

then in port or arriving during the day, and if the jury believe from the evidence that plaintiff's goods were in port on such day, and that by the exercise of reasonable care the defendants could have ascertained that the custom house was to be kept open until ———, but failed to ascertain such fact and so lost the opportunity to enter the goods at the lower rate of duty, then the defendants will be liable in damages for the excess of duties which plaintiff was obliged to pay because of defendants' failure to ascertain the fact that the custom house was to be kept open until ———, if the jury believe from the evidence that plaintiff was obliged to pay more duty because of defendant's failure to ascertain such fact).²

§ 1205. Acting for adverse party.

The court instructs the jury that, if you shall find from the evidence, that J, as agent of the plaintiff, agreed with the defendants, that they should take and sell for plaintiff certain of the lots then being offered for sale by plaintiff, for a certain and definite price fixed and agreed upon by and between the defendants and said J, for which the defendants were to take and receive an agreed commission, viz., — per cent. on the purchase price, and that this agreement was made within the scope of J's authority, as agent of the plaintiff, and that defendants have sold said lots for the agreed price, and have fully accounted to plaintiff for the proceeds received therefor, less the stipulated commission, then they are not liable to plaintiff in this action, although they may have received from the purchasers of said lots a sum for conducting the negotiations, receiving and paying out the notes and money, and superintending the transactions, and receiving the deeds and other papers for them.³

§ 1206. Fraud.

The court instructs the jury that if they find from the evidence that on ———, 19—, the plaintiff authorized the defendants to buy wheat for him in quantities of (——) bushels at a time whenever they bought at the same time and price (——) bushels

2—*Vernier v. Knauth*, 7 App. Div. (N. Y.) 57.

3—*Alexander v. Northwestern Christian University*, 57 Ind. 466.

for themselves, and not otherwise; and that plaintiff agreed to pay to defendants a commission of — of one per cent. per bushel for all wheat so bought for him by them, and that defendants undertook and agreed that they would not buy (—) bushels for plaintiff unless they at the same time and price bought (—) bushels for themselves; and shall further find that defendants did thereafter on —, 19—, and —, 19—, respectively, buy for plaintiff (—) bushels of wheat and charged the same to plaintiff, and that they represented to plaintiff that they had on each of said occasions bought (—) bushels for themselves at the same time and price as that at which they bought for plaintiff; and shall find that the plaintiff, on the faith of such representation (should the jury find it to have been made) and in the belief that defendants had bought (—) bushels for themselves as aforesaid, paid to defendants on account of the purchase of and of the depreciation, when sold, in the value of said wheat bought as aforesaid for him (should the jury so find) the moneys testified to by plaintiff to have been paid; and shall further find that in fact the defendants did not upon either of the said occasions buy (—) bushels for themselves, then the plaintiff is entitled to recover the moneys so paid.⁴

§ 1207. Loans.

The court instructs the jury that a broker who takes collaterals for a loan of his principal's money, made by him without making inquiries or taking precautions which he could have taken to ascertain the genuineness or validity of the collaterals, is negligent.⁵

§ 1208. Margin transactions.

§ 1209. — Maryland.

The court instructs the jury that if they find that the plaintiff sent to the defendants, as margin on his contract with them, —, and that defendants objected to receive such — as margin, and that plaintiff thereupon promised to replace said

4—Burt v. Myer, 71 Md. 467.

5—Isham v. Post, 54 N. Y. St. 232,
71 Hun (N. Y.) 184.

——— with money and failed to do so before the ——— of ———, that after such failure the plaintiff is not entitled to require the defendants to treat such ——— as available margin provided the jury find the usage as to margins set forth in the defendants' instructions.⁶

§ 1210. — New York.

The court instructs the jury that if they believe from the evidence that defendant was employed as stockbroker by the plaintiff as alleged in the declaration, and that defendant in the course of such employment purchased stock on account of the plaintiff, and that the defendant advanced the sum stated in the declaration above the margin furnished by the plaintiff, and that the stocks were declining in the market, and that there was a deficiency, and if the jury believe from the evidence that plaintiff failed to furnish the requisite margins to make up the deficiency when called on by defendant, then defendant was warranted in selling the stock on due notice.⁷

The court instructs the jury that if they believe from the evidence that the defendant was a stockbroker as alleged in the declaration and sold stock short for plaintiff and made a contract with plaintiff, which required the plaintiff to keep on deposit with the defendant — per cent. of the amount necessary to make good the short sale, according to the state of the stock market from time to time and to pay interest at the usual rates upon periodical balances stated, that then the defendant was bound to give to plaintiff reasonable notice of want of sufficient margin, and of an intention to buy in the stock and cover the short account if there was a short account, if the margins were not made good.⁸

§ 1211. Individual interest in transactions—Sale by broker to employee.

The court instructs the jury that a broker employed to sell lands cannot sell to himself, and if the jury believe from the

6—Appleman v. Fisher, 34 Md. 540. 43 N. Y. St. 918; Lazare v. Allen, 20

7—Stewart v. Drake, 46 N. Y. 449. App. Div. (N. Y.) 616.

8—Rogers v. Wiley, 131 N. Y. 527,

evidence that the plaintiff was employed by the defendant to sell the lands described in the declaration as alleged in the declaration, and that the plaintiff so employed sold the lands to his own clerk, who was employed in the affairs of the defendant relating to the land and who had by his employment acquired special knowledge concerning the land, then the sale cannot be sustained although the price was adequate.⁹

§ 1212. Same—Purchase by broker, employed to buy, from himself.

The court instructs the jury that the law does not permit brokers employed to purchase, to buy of themselves, and if the jury believe from the evidence that the plaintiff was employed by the defendant to purchase goods, and that the plaintiff in good faith and because plaintiff believed he could give the defendant a better bargain than by buying elsewhere sold to the defendant his own goods, the defendant may refuse to be bound by the transaction.¹⁰

§ 1213. Actions by principal against broker—Questions for jury.

The court instructs the jury that if they believe from the evidence that the defendant as stock-broker was carrying stocks for the plaintiff as alleged in the declaration under an agreement by which in case of a fall in the price, the plaintiff was to advance more margins to cover any deficiency, and that the defendant gave notice to the plaintiff that a further margin would be required, and that within two hours after giving the notice the defendant sold the stock for a deficiency of margin, and if the jury believe from the evidence that no time was specified in the agreement between plaintiff and defendant for compliance with the request for further margins then it is for the jury to decide whether reasonable time for performance by the plaintiff was given.¹¹

9—Gardner v. Ogden, 22 N. Y. 327,
78 Am. Dec. 192n.

10—Levy v. Loeb, 85 N. Y. 365;
Taussig v. Hart, 58 N. Y. 425.

11—Hanks v. Drake, 49 Barb. (N.
Y.) 186.

• III. COMPENSATION.

§ 1214. Right to compensation in general.

§ 1215. — Colorado.

The court instructs the jury that although they may find and believe from the evidence that the defendant did employ the plaintiff to assist him in securing the title to said lode claims, and did agree to pay the plaintiff — per cent. on the purchase price at which said lode claims should be taken into a consolidated company, and that plaintiff did render services in an attempt to procure said lode claims to be put into said consolidated company, yet if you further find and believe from the evidence that plaintiff and defendant were unable to agree with A and B in the purchase of said claims, and that other persons not co-operating with defendant, thereafter initiated negotiations with said A and B for the purchase of said lode claims and put them into a consolidated company, you will return a verdict for the defendant, even though you may further find and believe from the evidence that the defendant on request, contributed to the purchase of said lode claims.¹²

The court instructs the jury that although they may find from the evidence that the defendant employed the plaintiff to assist him in procuring title to the A and B mining properties for the purposes of consolidation, still if you further find from the evidence that the titles to such properties were acquired by some one other than the defendant herein, and that the defendant did not actively participate, or take part in acquiring the title to such properties, then your verdict must be for the defendant.¹³

The court instructs the jury that if they find and believe by the preponderance or greater weight of the evidence that the defendant, in the summer of 19— did employ the plaintiff to assist him in procuring the title to said A and B lode claims for the purpose of putting said claims with others, into a consolidation, and agreed to pay plaintiff — per centum on the amount at which said claims might be purchased, that plaintiff agreed

12—Bailey v. Carlton, 43 Colo. 4, 95 Pac. 542.

13—Bailey v. Carlton, 43 Colo. 4, 95 Pac. 542.

thereto, and immediately thereupon and thereafter did assist the defendant in procuring the title to said claims, and that defendant about ———, 19—, while plaintiff was so assisting him, did secure from C and D, the owners of said lode claims, the title thereto, at a consideration of \$——— paid, and did put said claims into a consolidation with other contiguous claims, then the jury will find for the plaintiff and assess his damages at \$———, together with ——— per cent. per annum interest thereon from the time plaintiff made demand upon defendant for the payment of said sum to this date; otherwise you will return a verdict for the defendant.¹⁴

§ 1216. — Kentucky.

The court instructs the jury that if they believe from the evidence that the plaintiff, A, doing business as A & Co., procured or was the means of procuring a purchaser for certain property of the defendant on ——— street in the city of ———, or was the means of bringing such purchaser and seller together, and that a reasonable commission for such services was ——— per cent. on the purchase price, which purchase price was ——— dollars (\$——) and that said defendant, B, agreed to pay the plaintiff for his services a reasonable commission for such service, or permitted the plaintiff to render such services, if they were rendered, under such circumstances as would lead a reasonably prudent man to believe that the plaintiff expected compensation therefor, then the jury will find a verdict for the plaintiff in the sum of ——— dollars (\$——), with interest from ———, 19—; otherwise, you will find a verdict for the defendant.¹⁵

§ 1217. — Texas.

The court instructs the jury that, if they find that plaintiff aided and assisted defendant A in his negotiations with B and his associates, they will find for plaintiff.¹⁶

14—Bailey v. Carlton, 43 Colo. 4, 95 Pac. 542.

15—Bullock v. Menninger (Ky.), 125 S. W. 256.

16—Alexander v. Wakefield (Tex. Civ. App.), 69 S. W. 77.

§ 1218. Contract of broker with principal—In general.

The court instructs the jury that one of the essential elements of a contract is an agreement or meeting of the minds of the parties by an offer on the one hand and an acceptance on the other. This necessary element must be present in an implied contract as well as in an expressed contract. If it is absent in either no obligation is created, and if there was no meeting of the minds of the plaintiff and the defendant, that the plaintiff should sell the property and the defendant would pay a commission to plaintiff for making a sale, his efforts to sell said property would be voluntary, and in that event the defendant would owe plaintiff nothing, though he might have found a purchaser ready, willing, and able to buy. In this connection you are instructed that if the commission for making said sale was not particularly stated or referred to, if the services of the plaintiff in making said sale were requested by the defendant, compensation will be presumed unless the agreement is between near relatives, when the law requires an express promise to pay, although the amount may not be stated.¹⁷

§ 1219. Same—Necessity.**§ 1220. — Colorado.**

The court instructs the jury that, when any real estate broker asks and obtains from an owner the price at which he is willing to sell or lease the same, this, without more, does not establish the relation of principal and agent, nor will the fact that the defendant subsequently consummated a bargain with a party introduced by plaintiff create a liability.¹⁸

§ 1221. — New York.

The court instructs the jury that if they believe from the evidence that plaintiff (was employed by a smelting company as agent, to procure contracts for smelting ore as alleged in the declaration, and that plaintiff induced the smelting company to smelt and refine the ore of the defendant and to buy the refined

17—Carl v. Wolcott, — Tex. Civ. App. —, 156 S. W. 334.

18—Duncan v. Borden, 13 Colo. App. 481, 59 Pac. 60.

product from the defendant, and that the plaintiff acted solely in the interest of the smelting company by advising the smelting company how to obtain the refined product at the lowest price, and if the jury believe from the evidence that there was no employment of the plaintiff by defendant, then the plaintiff cannot recover commissions from the defendant on account of the sale of the ore).¹⁹

§ 1222. Same—Implied contract.

The court instructs the jury that defendants are liable for plaintiff's services if of such character and rendered under such circumstances as would indicate to an ordinarily intelligent business man that they were not performed gratuitously, and that compensation was expected therefor.²⁰

§ 1223. Revocation of agency—In general.

The court instructs the jury that if the defendant employed plaintiff as a real estate agent to sell his lands, and agreed to pay plaintiff a certain commission, and that later, on the — day of —, 19—, and before a purchaser ready, willing and able to purchase had been produced to defendant, or a written contract secured by plaintiff for said sale, this defendant notified plaintiff that he would after —, 19—, take said lands from his list, and that he need make no further effort to sell same, then you must find for the defendant.²¹

The court instructs the jury that if the defendant agreed to pay plaintiff a commission of — per cent. for selling his farm of — acres at \$ — per acre; that plaintiff, as defendant's agent, entered into a verbal contract with A and B about the — day of —, 19—, to sell them the land at said price, on the terms agreed upon by plaintiff and defendant, and that afterwards, on the — day of —, 19—, the said A and B entered into a written contract with plain-

19—Harnickell v. Parrot Silver & Copper Co., 117 N. Y. 644, 27 N. Y. St. 697.

20—Miller v. Early, 22 Ky. L. Rep. 825.

21—Kesterson v. Cheuvront (Mo. App.), 70 S. W. 1091.

tiff to buy the land at said price on said terms; and that the said A and B were financially able to execute said contract,—then the jury will find for the plaintiff in the sum of \$———, although the jury may further believe from the evidence that between the time of making said verbal contract, if any was made, the defendant notified the plaintiff that he had terminated his agency.²²

§ 1224. Same—Notice.

The court instructs the jury that if they believe from the evidence in the cause that the defendant, A, employed the plaintiff, B, to sell his farm for him and agreed with him if he would sell it for \$——— per acre he would give him a commission of —— per cent on the total amount of the sale, then said B would have been entitled to reasonable notice taking into consideration the condition and situation of the parties, of the revocation of said agency, and it would be too late for the defendant, A, to revoke it, or terminate it after the negotiations with the purchaser had begun, which were finally consummated, if you so believe they were.²³

§ 1225. Procuring cause of offer or of contract by third person.

§ 1226. — Illinois.

The court instructs the jury that if they believe, from the evidence, that D., as the representative, broker or agent of the defendant, opened negotiations with M. for the sale to him of the property in question, with the knowledge and permission of the defendant, and that the plaintiffs, being advised of D.'s employment and action, afterwards having authority from the defendant to find a purchaser for the same property, endeavored to make a sale thereof to said M., but were not instrumental in so doing, then the plaintiffs are not entitled to compensation for their services in endeavoring to make said sale, even though the jury may further believe from the evidence that the defendant, through the instrumentality of D., acting independently of said

22—Kesterson v. Cheuvront (Mo. App.), 70 S. W. 1091.

23—Sallee v. McMurry, 113 Mo. App. 253.

plaintiffs, afterwards succeeded in selling said property to said M. One claiming a commission for the sale of real estate cannot rightfully claim the benefit of introducing to the defendant a purchaser for his property who had already been introduced to him as such by another party, with and through whom negotiations were already in progress and were continued to a consummation of the sale.²⁴

§ 1227. — Iowa.

The court instructs the jury that if you find that said purchasers went to — county, —, by reason of the introduction to A, and for the purpose of examining the lands which the said A had for sale, and for the purpose of dealing with him, and if you find the said A participated in the conduct of the business resulting in the sales, then you will find said sales were made by A within the terms and meaning of the contract.²⁵

§ 1228. — Maryland.

The court instructs the jury that if they shall find from the evidence that the plaintiffs were employed by the defendant as real estate brokers to sell for the defendant his house situated on the — in — city and if the jury shall find from the evidence, that there was a custom among the brokers in — city, by which, if a real estate broker is employed to sell property, he undertakes to introduce to the seller a prospective purchaser and if the prospective purchaser subsequently purchases the property at a price acceptable to the seller, and the purchase is induced by the introduction of the purchaser by the broker to the seller, then the broker becomes entitled to his commissions, and if the jury shall find from the evidence that the defendant at the time of said employment, had been largely engaged in buying and selling real estate and had bought and sold through the agency of real estate brokers and that plaintiffs after their said employment, if the jury shall find that they were employed, brought together the said defendant and one C., and that C., afterwards within a reasonable time actually purchased

24—Fessenden v. Doane, 188 Ill. 228.

25—Murphy v. Hiltibridge, 132 Iowa 114.

the said property from the defendant and that the procuring cause of the purchase by C., was the introduction of C., to the defendant by plaintiff, then plaintiffs are entitled to recover such commissions as the said jury shall find usual and customary with interest in their discretion from the date of the commencement of said sale and it is immaterial whether or not the services of plaintiff so rendered were actually beneficial to said defendant and it is immaterial at what price the property was actually sold except in calculating the amount of commissions.²⁶

§ 1229. — Massachusetts.

The court instructs the jury that if the sale was due to the interposition of A and it would not have taken place except for him, and he brought it about, then the plaintiff would not be entitled to recover; but that if his employment with reference to B had not been terminated, they would be justified in finding that he was the efficient cause of the sale if they were satisfied that it was in consequence of what he did chiefly and principally, though not absolutely and entirely, that the sale was made.²⁷

§ 1230. — Missouri.

The court instructs the jury that it was not necessary, that the plaintiff, A, should have negotiated the terms of said sale with the purchaser, nor need he actually produce the purchaser in person, if he was the procuring cause of the purchaser being produced to the defendant, and if you believe the purchaser so produced was able and willing to take the land and pay for it at the price and sum of \$—— per acre, then said A was entitled to commission provided the defendant contracted with him as set forth in above instructions.²⁸

§ 1231. — New York.

The court instructs the jury that the mere fact that the broker obtains a more advantageous offer than the one finally accepted by his employer, does not entitle him to commissions, and that if the jury believe from the evidence that (the plaintiff was

26—Blake v. Stump, 73 Md. 160,
10 L. R. A. 103n.

28—Sallee v. McMurry, 113 Mo.
App. 253.

27—Woods v. Lowe, 207 Mass. 1.

employed by the defendant as alleged in the declaration to sell the goods described in the declaration, and the defendant fixed a price at which the goods were to be sold, and that plaintiff obtained an offer of a price lower than that fixed by the defendant, and that meanwhile defendant accepted an offer lower still from another person, plaintiff is not entitled to commissions).²⁹

The court instructs the jury that to entitle a real estate broker to commissions, he must be the procuring cause of the sale. The broker may devote his time and labor and expend his money, he may have introduced parties to each other who otherwise would never have met, he may have created impressions which under later and more favorable circumstances, materially assist in the consummation of the sale, and yet not be entitled to commissions, if his principal has acted in good faith and (if you believe from the evidence that the plaintiff was employed by the defendant to sell the property described in the declaration as alleged in the declaration and that the plaintiff listed the property on his books and told a friend or acquaintance who the owner was and if you further believe from the evidence that the friend in turn imparted the information received from the plaintiff to an intending purchaser, who thereupon went directly to the defendant and purchased the property without ever having seen or communicated with the plaintiff, then you are instructed that this alone is not sufficient to entitle the plaintiff to a commission).³⁰

The court instructs the jury that where a broker is employed to sell or exchange real estate and brings a buyer to the seller who is willing and ready to enter into an agreement with the seller for the purchase of his property, on the terms which the seller has fixed, and the seller is satisfied to accept the proposed buyer as a purchaser then the broker has earned his commission.³¹

§ 1232. — Washington.

The court instructs the jury that in order for the plaintiff to recover in this case, he must prove to your satisfaction by a fair

29—*Jacobs v. Kolff*, 2 Hilt. (N. Y.) 133.

30—*Colwell v. Tompkins*, 158 N. Y. 690, 6 App. Div. (N. Y.) 93.

31—*Kalley v. Baker*, 132 N. Y. 1, 28 Am. St. Rep. 542n, 42 N. Y. St.

762.

preponderance of the evidence that he was employed to procure a purchaser for the property in question, and that, pursuant thereto, he did find a purchaser ready, able, and willing to purchase, and brought such purchaser and defendants together. And in this connection you are instructed that, if you believe from the evidence that the plaintiff was employed to find a purchaser for the property of the defendants, and pursuant thereto, did find a purchaser who, through the efforts of the plaintiff, purchased defendants' property upon the terms specified in the listing contract, or as subsequently modified, or upon different terms agreed to between the defendants and such purchaser, and that the plaintiff was the procuring cause of the sale, then your verdict will be for the plaintiff.³²

§ 1233. Dealings by principal through other agent—In general.

§ 1234. — Illinois.

The court instructs the jury that if they believe from the evidence that the defendant placed his property in the hands of the plaintiff for sale at a stipulated price, and the plaintiff introduced the defendant to A and that A made a proposition to exchange property in P for defendant's property, which was declined by the defendant, and that negotiations between A and defendant were then ended and definitely abandoned by the parties, and that the defendant, through the efforts of B, took in exchange for his land, land in T belonging to C, and that C took property in P belonging to A in exchange for the T land, the fact that the deed was made from the defendant to A would not entitle the plaintiff to recover and you should find for the defendant, unless you further believe the plaintiff was the efficient cause of the trade.³³

§ 1235. — Missouri.

The court instructs the jury that if the jury find from the evidence that plaintiff's agency was the procuring cause of the negotiations between the defendant and A which finally resulted in the sale of defendant's property to A, then the plaintiff is

³²—*Bagley v. Foley*, 82 Wash. 222,
144 Pac. 25.

³³—*Hinds v. McIntire*, 89 Ill. App.
611.

entitled to recover, even though the jury may further find that the negotiations were consummated through another agent, and even though said other agent has been paid by defendant.³⁴

The court instructs the jury that if you believe that A went to B as C's representative, and concluded a sale at a lower price than C had offered through plaintiff, this fact would not of itself deprive plaintiff of his right to recover, if you believe from the evidence and instructions given you that plaintiff is entitled to recover.³⁵

§ 1236. — New York.

The court instructs the jury that if they believe from the evidence that plaintiff was employed by the defendant to sell the land described in the declaration as alleged in the declaration and that plaintiff's services resulted in a sale of the land to A, then you will find that plaintiff is entitled to commissions although you may further believe from the evidence that another broker on information derived from A, negotiated a contract of sale for the same land from the defendant to the representative of A, and that A acquired the land by an assignment of the contract from his representative, and although you may further believe from the evidence that such other broker received his commissions upon the sale from the defendant, who paid him in ignorance of the facts, but without making any inquiry.³⁶

The court instructs the jury that if they believe from the evidence that the plaintiff was employed by the defendant to effect a sale of the property described in the declaration and that the plaintiff was allowed a reasonable time within which to procure a buyer and that the plaintiff failed to effect the sale within the reasonable time allowed him and that the defendant in good faith terminated the agency and employed other agents by means of which the sale was consummated, then you are instructed that the plaintiff is not entitled to commissions, although you may further believe from the evidence that the sale was in some degree

34—McCormack v. Henderson, 100 Mo. App. 647.

36—Winans v. Jaques, 10 Daly (N. Y.) 487.

35—McCormack v. Henderson, 100 Mo. App. 647.

aided by the previous unsuccessful efforts of the plaintiff and that the purchaser was the one whom the plaintiff had introduced.³⁷

§ 1237. — Washington.

The court instructs the jury that a seller is not obliged to pay two commissioners where two brokers are engaged in selling his property, unless, after one has procured a purchaser ready, able and willing to purchase upon terms acceptable to him, he deals through another, or in some way colludes with him to deprive the other broker of the fruits of his labor, and in this case, if you find that the plaintiff produced a purchaser ready, able and willing to purchase upon terms satisfactory to the defendants, and that a sale was made which you believe the plaintiff was the procuring cause thereof, the fact that the defendants may have dealt through another broker and paid him a commission does not take away the right of the plaintiff to recover in this case.³⁸

§ 1238. Dealings by principal directly with third person—In general.

§ 1239. — Kansas.

The court instructs the jury that one may become an agent of another by acting as such agent with the knowledge of the other, if such other person by his conduct and acts adopts or ratifies the agency. In this case the defendants had the right to disavow and repudiate plaintiff's authority to find them a customer for their land, but they could not knowingly adopt and approve his efforts to act for them and procure a purchaser, and, when he had done so, repudiate his authority and deal directly with the customer of plaintiff and deprive him of his commission.³⁹

§ 1240. — New York.

The court instructs the jury that a bargain procured by the broker must be conformable to the terms of the employment, and that if the jury believe from the evidence that the plaintiff (was

37—Sibbald v. Bethlehem Iron Co.,
83 N. Y. 378, 38 Am. Rep. 441.

39—Culbertson v. Sheridan, 93 Kan.
268, 144 Pac. 268.

38—Bagley v. Foley, 82 Wash. 222,
144 Pac. 25.

employed by the defendant as broker as alleged in the declaration to effect a lease, and that A with whom plaintiff negotiated for the lease of defendant's property failed to agree to the defendant's terms, but submitted a counter offer which the defendant rejected, and if the jury believe from the evidence that the defendant upon the rejection of the counter offer announced to plaintiff in good faith that the negotiation was closed and that afterward a lease was effected to A on different terms from those contained in the original agreement of the plaintiff, then the jury should find in favor of defendant).⁴⁰

The court instructs the jury that the fact that after the broker employed by the purchaser has presented a vendor, the purchaser takes charge of the negotiations and concludes them upon the terms proposed by the broker, does not defeat the broker's claim for compensation.⁴¹

The court instructs the jury that to entitle a real estate broker to commissions on the sale of property, it is essential that he shall be the procuring cause of the identical contract of sale, for which commissions are claimed, and if you believe from the evidence (that plaintiff was employed by the defendant to sell the property described in the declaration and that no power was given to the plaintiff to finally transfer the property and that an offer to purchase was procured by the plaintiff, and submitted to the defendant who rejected the offer, then you are instructed that plaintiff is not entitled to commissions though the sale was afterwards consummated between the defendant and the person who made the offer on different terms).⁴²

The court instructs the jury that if you believe from the evidence that plaintiff was employed by the defendant to sell the lands described in the declaration, and that a purchaser was obtained through the plaintiff's services, then you may find a verdict for the plaintiff, though you may also believe from the evidence that the purchaser was unknown to the plaintiff and

40—Alden v. Earle, 121 N. Y. 688, 31 N. Y. St. 375. See Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441.

41—Baer v. Koch, 51 N. Y. St. 427, 2 Misc. (N. Y.) 334.

42—White v. Twitchings, 26 Hun (N. Y.) 503.

that the transaction of the sale was completed directly between defendant and the purchaser.⁴³

The court instructs the jury that a broker need not negotiate or participate in negotiating a final transaction between the parties, and that if the jury believe from the evidence that (plaintiff was employed as broker as alleged in the declaration for the sale of the real estate of the defendant as described in the declaration and that plaintiff first brought notice of the fact that defendant's property was for sale to A, and if the jury believe from the evidence that A after being informed of the terms of the sale, dealt with the defendant and purchased the property, then the fact that plaintiff was not present at the time the contract of sale was executed will not deprive plaintiff of his commissions).⁴⁴

The court instructs the jury that if a broker has made efforts to sell property of his principal in pursuance of his employment and his services have resulted in procuring a purchaser, he may be entitled to commissions, though the purchaser is unknown to the broker and dealt directly with the principal, and if the jury believe from the evidence (that the plaintiff was employed to make a sale of the real property described in the declaration as alleged therein and that the plaintiff advertised the property for sale, by which means a purchaser's attention was called to the land and that the purchaser submitted an offer to a subagent who communicated the offer to the defendant and thereafter negotiations were continued without interruption between the purchaser and the defendant personally until a sale was consummated, then you are instructed that the efforts of the plaintiff were the procuring cause of the sale and plaintiff is entitled to commissions.⁴⁵

§ 1241. Same—Abandonment of negotiations by broker.

§ 1242. — Massachusetts.

The court instructs the jury that if the plaintiff said that he would have no more to do with A the defendant had a right to

43—*Sussdorf v. Schmidt*, 55 N. Y. 319.

45—*Doran v. Bussard*, 18 App. Div. (N. Y.) 36.

44—*Lloyd v. Matthews*, 51 N. Y. 124; *Bickart v. Hoffmann*, 46 N. Y. St. 886.

take him at his word and to employ another broker and to sell the property, if he could, to A, and that under such circumstances the plaintiff would not be entitled to a commission on the sale.⁴⁶

§ 1243. — Mississippi.

The court instructs the jury on behalf of the plaintiff, that if they believe from the evidence that the trade made to A by B resulted from the bringing together of these parties by the plaintiff, C, the plaintiff is entitled to recover from defendant the reasonable value of his services in connection with such sale, and they will find a verdict accordingly, awarding plaintiff such sum as they believe from the evidence that his said services were reasonably worth, unless they further believe from the evidence that prior to said sale plaintiff had abandoned his connection therewith, or had made statements which might reasonably lead defendant to believe he had so abandoned his connection therewith.⁴⁷

The court instructs the jury that if they believe from the evidence that the defendant put his property in the hands of the plaintiff for sale at \$—— net to the defendant, and that the plaintiff tried to sell it at that price and could not, and that he (plaintiff) told A to go in and trade with defendant, who, relying on this statement, then sold the lot to A, excluding —— feet off the —— side thereof, for \$——, the jury will find for the defendant.⁴⁸

§ 1244. — New York.

The court instructs the jury that one who has employed a broker to sell property, may himself sell it to a purchaser procured without aid from the broker and that to entitle the broker to commissions the sale must result from his efforts and if you believe from the evidence that the plaintiff (was employed by the defendant to sell the property described in the declaration and that the plaintiff opened negotiations with a customer, but failed to enter into an agreement with him and abandoned the negotia-

46—Woods v. Lowe, 207 Mass. 1.

48*—Enochs v. Paxton, 87 Miss. 660.

47—Enochs v. Paxton, 87 Miss. 660.

tions and that the defendant subsequently sold to such customer, then you are instructed that plaintiff was not entitled to commissions).⁴⁹

§ 1245. Failure of principal to accept offer or perform contract—

In general.

§ 1246. — Colorado.

The court instructs the jury that when an agent or broker in good faith has produced a purchaser who is acceptable to the owner, and able and willing to purchase on terms satisfactory to the owner, or as offered by the owner, he has performed his duty; and if, from any failure of the owner to enter into a binding contract, the sale is not completed, the agent may recover his commission.⁵⁰

§ 1247. — Illinois.

The court instructs the jury that where a principal contracts with an agent or broker to sell lands for or on behalf of the principal, and the broker performs his part of the agreement by finding and introducing a purchaser therefor, which purchaser negotiates with the principal, and comes to an agreement with him respecting the price and terms of sale, and which purchaser is ready, able and willing to carry out such agreement with the principal, then in such case the principal cannot evade payment of commissions to the agent by refusing to make conveyance to such purchaser. And this would be true even though the principal's title were defective, and even though he had no title at all. It would also be true even though the agent had agreed to take his commissions out of the purchase money and even though he agreed to charge no commissions unless a sale were actually made, for it is the law that a principal in such a case has no right to, himself, arbitrarily or wrongfully refuse to consummate such sale, and then say for that reason he will not pay commissions to the agent.⁵¹

49—*Satterthwaite v. Vreeland*, 3 Hun (N. Y.) 152, 5 Thomps. & C. (N. Y.) 363. 51—*Swigart v. Hawley*, 140 Ill. 186.

50—*Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817.

§ 1248. — Kansas.

The court instructs the jury that where an owner has listed and placed land in the hands of a real estate agent for sale, and in so doing has reserved the right to take the land off the market or to change the price without notice to the agent, such owner has the right to withdraw the land from the market or change the price thereof without notice to the agent, at any time before the agent has procured a purchaser who is willing and able to purchase the land at the price and upon the terms which the owner has authorized the agent to sell, or at a price and upon terms which the owner is willing to accept; but you are further instructed that the owner in such a case does not have the right to withdraw the land from the market or to change the price for the purpose of avoiding liability for the commission of the agent after the agent has procured a purchaser with notice to, or the knowledge of, the owner who is willing and able to take and purchase the land at the price and upon the terms which the owner has authorized the agent to sell the same, or at a price and upon terms which the owner is willing to accept.⁵²

§ 1249. — Maryland.

The court instructs the jury that if they find from the evidence that specific instructions were given by the defendant to the plaintiff on the — of —, 19—, that in the event of the purchase of the stock in the evidence mentioned, the plaintiff should immediately communicate the fact of purchase to the defendant, and informed the plaintiff where to send the notice; and if they shall further find that the said stock was purchased on the said — of — by the plaintiff, and that the plaintiff did not communicate the fact of purchase immediately to the defendant, according to the order and instructions of the defendant, then the defendant was not required to take said stock.⁵³

The court instructs the jury that if the jury shall find that the defendant resided near R in — county and the plaintiff in

52—Culbertson v. Sheridan, 93 Kan. 268, 144 Pac. 268.

53—Worthington v. Tormey, 34 Md. 182.

B city, and that there was a daily mail from B to R, which was the proper postoffice of the defendant and that the plaintiff deposited in the postoffice in B on the ——— of ———, a letter containing the notice mentioned in the ——— instruction, then the said notice was sufficient notwithstanding the fact that it was not received by the defendant until the ——— of ———, 19—, and after the sale.⁵⁴

§ 1250. — Missouri.

The court instructs the jury that if you find from the evidence in this cause that the defendant contracted and agreed with the plaintiff A that if he would sell his farm at \$—— an acre he would give him a commission of ——— per cent on the amount of the sale; and if you believe that said A did so furnish a purchaser ready, able, and willing to take said land at said price then it was not necessary that said A should negotiate the terms of said sale; it was sufficient that he produce a man who was able and willing to comply with the terms that the defendant imposed; and if you find that he absolutely refused to make the sale, then said A was entitled to his commission and your findings should be for the plaintiffs.⁵⁵

The court instructs the jury that if the contract of agency was entered into, and the plaintiff found two purchasers who were ready, willing, and able to purchase the defendant's lands at the price authorized, and the defendant refused to accept the purchasers and execute a deed, the plaintiff was entitled to recover, unless the defendant had taken the sale of the lands out of the hands of the plaintiff before he had found a purchaser who was ready, willing, and able to purchase at the authorized price, in which case the plaintiff was not entitled to recover.⁵⁶

The court instructs the jury that if they believe from the evidence in this cause that the defendant, A, contracted and agreed with the plaintiff, B, that if he would sell his land for the price and sum of \$—— per acre he would pay to him the sum of ——

54—Worthington v. Tormey, 34 Md. 182.

56—Kesterson v. Cheuvront (Mo. App.), 70 S. W. 1091.

55—Sallee v. McMurry, 113 Mo. App. 253.

per cent commission on the total amount of the sale, and if you further believe that the plaintiff, B, produced to him a purchaser or was the cause of one being produced who was ready,¹ able and willing to take the land at said price, but the defendant, A, refused to perfect said sale, and if you further believe that this coplaintiff is the one-half owner of the said commission then you should find for the plaintiffs, as though said sale had been made the full amount of said — per cent commission on said purchase price.⁵⁷

§ 1251. — New York.

The court instructs the jury that in ordinary cases, the law is well settled where a broker is employed in reference to a sale of real estate, that when he brings a buyer to the seller who is willing and ready to enter into an agreement with the seller for the purchase of his property on the terms that the seller has fixed, and the seller is satisfied to accept him as a purchaser, then the broker has earned his commission. The earning of it is not dependent, in such cases, on the question as to whether the buyer carries out the contract, or as to whether the seller is able to complete his contract. Therefore, in the absence of any express agreement to the contrary, the law is that the broker is entitled to his commissions when the vendor accepts, when he (the broker) brings to the vendor a party ready and willing to accept the terms fixed by the vendor, and the party is satisfactory to the vendor, and he enters into a contract with him. The contention is that there was a different agreement here. That question is for you to determine. If you find that this was an ordinary contract, made without any conditions, the broker employed in the usual way, and that there was no bargain entered into between the plaintiff and the defendant, B, that he was only to be paid his commission in case this sale went through, then plaintiff is entitled to recover. If, however, the bargain agreed upon between plaintiff and defendant was that commission was only to be paid in case this whole transaction went through, as provided by the terms of the contract of sale, the plaintiff is not entitled to recover

⁵⁷—*Sallee v. McMurry*, 113 Mo. App. 253.

unless you are satisfied from the evidence here that the defendant capriciously refused to carry out the contract.⁵⁸

The court instructs the jury that the principal cannot escape liability to a broker who has negotiated a sale by afterwards insisting upon a condition to which the purchaser refuses to accede and if you believe from the evidence (that plaintiff was employed by the defendant to sell the property described in the declaration and that plaintiff obtained a purchaser and that defendant and the proposed purchaser made an oral contract, the minds of the parties agreeing, then you are instructed that the plaintiff is entitled to commissions though you may further believe from the evidence that the defendant afterwards insisted on incorporating into the formal written contract a condition not in the oral agreement and that the transaction fell through because of this insistence).⁵⁹

The court instructs the jury that a broker who has found a party ready and willing to carry out an exchange of real property upon the terms fixed by his principal, cannot be defeated in his claim for commissions because his principal has been able to make a more advantageous bargain.⁶⁰

The court instructs the jury that the principal cannot escape liability by refusing to complete a transaction and if you believe from the evidence that plaintiff procured a purchaser in pursuance of his contract of employment by the defendant and that the defendant made an agreement with the purchaser for a sale, which was subsequently abandoned because defendant insisted upon the full cash payment instead of a mortgage for part as was agreed by the contract of sale, then you are instructed that plaintiff was entitled to commissions.⁶¹

The court instructs the jury that if they believe from the evidence that (the plaintiff was employed by the defendant to sell the land described in the declaration, and that plaintiff brought the defendant and ——— together, and that defendant

58—*Kalley v. Baker*, 132 N. Y. 1, 28 Am. St. Rep. 542n.

59—*Halprin v. Schachne*, 27 Misc. (N. Y.) 195.

60—*Moses v. Helmke*, 18 Misc. (N. Y.) 357.

61—*Levy v. Ruff*, 53 N. Y. St. 174, 4 Misc. (N. Y.) 180.

and ——— came to an agreement as to the sale of the land; and that thereafter the oral agreement was reduced to writing with a clause that the agreement was to be subject to the approval of the defendant's attorneys, and that no mention of the approval of attorneys had been made prior to the execution of the written contract, and if the jury believe from the evidence that ——— made a partial payment and stood ready to consummate the purchase and to execute any formal contract embodying the terms agreed on in the oral agreement, but that the defendant sought to impose new conditions and by his acts defeated the completion of the transaction, then the jury are instructed that the plaintiff is entitled to his commissions).⁶²

§ 1252. Bad faith, fraud or misconduct of broker—In general.

§ 1253. — New York.

The court instructs the jury that an agent is held to the most perfect faith in the dealings with his principal, and if he acts adversely to his employer in any part of the transaction or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services.⁶³

§ 1254. — Oklahoma.

The court instructs the jury that if you find from the evidence that the plaintiffs in any way were interested in the consideration of the transaction involved, to an extent that their interests came in conflict with the interests of the defendant in the transaction, then you should find for the defendant.⁶⁴

§ 1255. Same—Acting for adverse party.

§ 1256. — Massachusetts.

The court instructs the jury that if the plaintiff acted as agent for A, without disclosing the fact that he was such agent to the defendant, he cannot recover a commission from the defendant.⁶⁵

62—Halprin v. Schachne, 27 Misc. (N. Y.) 195.

63—Murray v. Beard, 102 N. Y. 505.

64—Heath v. Chowning, 43 Okla. 274, 142 Pac. 1108.

65—Carpenter v. Fisher, 175 Mass. 9.

§ 1257. — New York.

The court instructs the jury that a real estate broker who is merely employed to find a purchaser of property upon terms and conditions to be determined by the seller when he meets the purchaser, and who is a mere middleman not vested with discretion respecting the price and terms of sale may accept a similar employment from a proposed purchaser and may be entitled to commissions from each party on the bargain being struck, although he has not informed either of his employment by the other.⁶⁶

§ 1258. — Oklahoma.

The court instructs the jury that a real estate agent, acting for both parties, can recover compensation from neither.⁶⁷

§ 1259. Same—Concealment of offer.

The court instructs the jury that if there was a bona fide offer of \$—— made to the plaintiff by A which the plaintiff wrongfully failed to communicate to the defendant and the defendant was thereby injured, then the plaintiff would have failed in the performance of his duty, and would not be entitled to recover.⁶⁸

§ 1260. Same—Attempt to induce principal to accept amount less than that offered.

The court instructs the jury that if you believe from the evidence that plaintiff was employed by the defendant to sell the property described in the declaration, and that the plaintiff procured a purchaser on the terms proposed by the defendant and that the plaintiff attempted to induce defendant to take less than the price which was offered by the prospective purchaser, then plaintiff is not entitled to compensation.⁶⁹

§ 1261. Same—Alteration of contract.

The court instructs the jury that, if the plaintiff caused the change to be made in the duplicate contract which was to be

66—Knauss v. Gottfried Krueger Brewing Co., 142 N. Y. 70, 58 N. Y. St. 316, 31 Abb. N. Cas. (N. Y.) 454; Haviland v. Price, 56 N. Y. St. 402, 6 Misc. (N. Y.) 372.

67—Heath v. Chowning, 43 Okla. 274, 142 Pac. 1108.

68—Woods v. Lowe, 207 Mass. 1.

69—Martin v. Bliss, 32 N. Y. St. 930, 57 Hun (N. Y.) 157.

given to the defendant, believing that he would see the change when the contract was delivered to him, then the defense of fraud would not be sufficiently established to defeat the plaintiff's claim for commission.⁷⁰

The court instructs the jury that the contract for the sale of the land executed by the defendant and delivered to the plaintiff for the purchaser's signature contained the terms of the sale and the authority of the plaintiff, and that he had no right to sell the land upon any other terms; that, if he changed the contract left with A without the knowledge or consent of the defendant by striking out the rate of interest to be paid, it was a material alteration thereof, and that the sale was not made upon the terms authorized, and would not bind the defendant, or entitle the plaintiff to his commission, unless it was shown that the defendant consented to such change before the execution and delivery of a deed of the land.⁷¹

§ 1262. Ratification by principal—Departure from instructions.

The court instructs the jury that it is not essential to entitle a broker to his commissions that he should have procured a purchaser upon the precise terms named by his principal at the time of employment. If he procures a purchaser and negotiations are continued without a withdrawal of either party and culminate in a sale though for a sum less than that originally demanded and upon different terms, the principal thereby ratifies the departure from his instructions and is liable for the commissions.⁷²

§ 1263. Estoppel of broker—To allege agency of third person.

The court instructs the jury that if you find from the evidence given to you in this cause that the defendant employed plaintiff as a real estate broker to sell his farm, and that the plaintiff, for the purpose of aiding and assisting him in selling said farm, and for the purpose of procuring a purchaser therefor, took into

70—Robertson v. Vasey, 125 Iowa 526.

71—Robertson v. Vasey, 125 Iowa 526.

72—Levy v. Coogan, 30 N. Y. St. 553, 16 Daly (N. Y.) 137.

his employ and service one W and if you further find that said W, aiding and assisting said plaintiff in the sale of said farm, took to this defendant one L as a probable purchaser for said farm, and if you further find that in the presence of said W the said L inquired of this defendant the selling price of said farm and then and there informed the defendant that he desired to purchase direct from the owner, and that he had never seen or been introduced to the plaintiff, and that he would not purchase of commission men, and you further find that the defendant did not know that the sale was being made by the plaintiff, and if said W stood by and did not inform this defendant that the sale was being made by the plaintiff, the plaintiff would now be estopped from claiming that the said W was acting for and on his behalf in the sale of said farm, and you should find for the defendant.⁷³

§ 1264. Reimbursement for advances and losses.

§ 1265. — Maryland.

The court instructs the jury that if they shall find from the evidence that the plaintiff was a stock broker in B and that the defendant, on ———, 19—, authorized him to purchase on his account — shares of the ——— stock and shall find that the place where said stock was ordinarily bought and sold was at the ——— in ——— and shall further find that the plaintiff therefore actually purchased — shares of said stock through his subagents ———, stock brokers in ———, and at a price not exceeding the price limited by the defendant and that the defendant did not supply the plaintiff with funds to make said purchase and that the plaintiff had funds and credit with his subagents, which were applied by them in making said purchase; and if they shall further find that the defendant on the next day after the purchase was informed of said purchase and that the plaintiff notified the defendant on ———, 19—, by letter addressed to him at his proper postoffice, that he was ready to deliver to him — shares of ——— stock so purchased on his account, and

⁷³—Mullen v. Bower, 22 Ind. App.

that unless he came forward and paid for it, he, the plaintiff on or after ———, 19—, would sell said stock at the risk and cost of the defendant; and they shall further find, that the plaintiff had ready for delivery to the defendant such stock and that he did sell on ———, 19—, at the — in ——— — shares of said stock for and at the risk of said defendant and that after applying the whole proceeds of said sale, there was a loss upon the said original purchase, which said loss the plaintiff did pay to his subagents, then the plaintiff is entitled to recover the amount of said loss or the difference in price, together with his reasonable commission for the purchase and the expense of said resale.⁷⁴

§ 1266. — New York.

The court instructs the jury that if they believe from the evidence, that the plaintiff purchased the property described in the declaration, without disclosing to the vendor of the property the name of defendant for whom it is alleged he acted as broker, and that plaintiff was obliged to pay the amount of the purchase price to the vendor, and if the jury believe from the evidence that defendant had authorized the plaintiff to purchase the property and that plaintiff acted as broker for defendant in making the purchase, then plaintiff may recover the purchase price so paid from the defendant.⁷⁵

§ 1267. Actions—Parties—Plaintiff.

The court instructs the jury that if, in making the agreement for a commission, the plaintiff was acting for or representing his father, then plaintiff can not recover, and in such case the verdict should be for the defendant.⁷⁶

§ 1268. Same—Issues and proof.

§ 1269. — Colorado.

The court instructs the jury that if the principal rejects a purchaser and the broker claims his commission, he (the broker)

74—Worthington v. Tormey, 34 Md. 182.

76—Snyder v. Fidler, 125 Iowa 378.

75—Knapp v. Simon, 96 N. Y. 284, 6 N. Y. Civ. Proc. (Browne) 1.

must show that the person furnished by him (the broker) to make the purchase was willing to accept the offer precisely as made by the principal, that he was an eligible purchaser and such a one as the principal was bound in good faith, as between himself and the broker, to accept.⁷⁷

The court instructs the jury that to entitle the broker to commissions for his services, he must make it appear, by a fair preponderance of evidence, that the services were rendered under an employment and retainer by the principal, or that the latter accepted his agency and ratified or adopted his acts. If he rendered the service as a mere volunteer, without any employment, express or implied, he cannot recover commissions.⁷⁸

§ 1270. — Kansas.

The court instructs the jury that, if the plaintiffs agreed and undertook to sell the defendant's farm for a commission upon the price realized, then in order to earn their said commission, it must appear by a preponderance of the evidence that they effected a sale of the farm to a party ready, willing and able to perform the conditions of the sale. The mere procuring of a person to enter into a contract to purchase the land, unless such purchaser was ready, willing and able to make the cash payments named in the contract, and to make the mortgage therein named for the deferred payments, would not be sufficient to entitle the plaintiffs to their commission.⁷⁹

§ 1271. — Maryland.

The court instructs the jury that the plaintiffs cannot recover in this case upon the dealings in grain between them and the defendant unless the jury shall find from the evidence all the following facts: 1st. That the defendant authorized said dealings. 2nd. That the purchase and sales authorized by him were actually and bona fide made. 3rd. That the grain directed by

77—*Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817.

78—*Duncan v. Borden*, 13 Colo. App. 481, 59 Pac. 60.

79—*Stewart v. Fowler*, 37 Kan. 677, 15 Pac. 918.

him to be bought was in fact bought by the authorized agent or agents of the plaintiffs in _____ and was in fact delivered by the seller or sellers to and accepted by said authorized agent or agents. 4th. That the grain directed by the defendant to be sold was in fact sold by the authorized agent or agents of the plaintiff in _____ and was in fact delivered by such authorized agent or agents to the purchasers thereof.⁸⁰

§ 1272. — Nebraska.

The court instructs the jury that where the owner of personal property authorizes or employs several agents to sell the same, but gives neither an exclusive agency, the agent or broker who actually effects the sale is entitled to a commission. The agent under such contract who negotiates with the purchaser, but does not effect the sale, cannot recover a commission; and, before the plaintiff in this cause can recover, he must show you by a preponderance of the testimony that he actually effected the sale of the automobile, and if he has failed to do so, he cannot recover.⁸¹

§ 1273. — New York.

The court instructs the jury that the person procured as a purchaser must be able to complete the transaction, and that to entitle a broker to commissions for effecting an exchange of property, he must show through his efforts not only a valid contract was entered into by persons competent to make the same, upon terms and conditions agreeable to the principals, but also that the proposed purchaser was able as well as willing to carry out the contract made, and that the trade fell through by reason of the inability or capriciousness of his employer to consummate it.⁸²

§ 1274. — United States.

The court instructs the jury that it is not necessary, however, for the plaintiff to prove that the influence exerted by him was the sole influence, but it is necessary for him to show that by

80—Stewart v. Schall, 65 Md. 289,
57 Am. Rep. 327.

82—Moskowitz v. Hornberger, 20
Misc. (N. Y.) 558.

81—Goodwin v. Haller, 97 Neb. 209,

reason of something that he did an influence was brought to bear upon the ———— syndicate, or upon their representative, which in whole or in part induced the making of the contract which was entered into between the ———— Company and A and his associates.⁸³

§ 1275. Same—Presumptions and burden of proof—In general.

The court instructs the jury that they must find what the plaintiff did, if anything, under this contract, which induced the making of this contract. The burden of proof is upon the plaintiff to show that by his conduct subsequent to the — of ———, or subsequent to his letter of the — of ———, which made the contract, he did something that influenced the ——— syndicate to enter into the contract that was subsequently made.⁸⁴

The court instructs the jury that the burden of proof is upon the plaintiff to prove and show to the satisfaction of the jury by a preponderance of all the evidence that the defendant agreed to give him \$—— to sell his residence for him, and that he did sell it, or render services which enabled defendant himself to sell it; and unless he has proven these facts to the satisfaction of the jury by a preponderance of all the evidence the jury must find for the defendant.⁸⁵

§ 1276. Same—Same—Fraud.

The court instructs the jury that a broker may recover commissions where title is taken by a stranger to the negotiations for the purpose of defeating his commissions, but that while this is so, bad faith must be shown and if you find from the evidence that (the plaintiff was approached by A, who wished to buy a house and requested him to make exertions in that direction and that the plaintiff introduced A to the defendant and informed the defendant that if A purchased, the defendant must pay commissions, and if you find from the evidence that the negotiations failed to result in an agreement and that afterwards defendant

83—Walker Mfg. Co. v. Knox, 69
C. C. A. 160, 136 Fed. 334.

84—Walker Mfg. Co. v. Knox, 69
C. C. A. 160, 136 Fed. 334.

85—Enochs v. Paxton, 87 Miss. 660.

conveyed his house to his brother and that subsequently A bought of the brother, then you are instructed that plaintiff was not entitled to commissions, unless you further find that the transfer to the brother was in bad faith).⁸⁶

§ 1277. Same—Measure of recovery.

§ 1278. — Iowa.

The court instructs the jury that if they find for plaintiff they should allow him the customary charges for such services, to wit, — per cent. on the first thousand, and — per cent. on the balance of the purchase price.⁸⁷

§ 1279. — Maryland.

The court instructs the jury that if they find from the evidence that plaintiff was engaged in the business of a property broker in the city of B and that the defendant offered certain property for sale to the park commissioners of said city and that he employed the plaintiff to aid and assist him in effecting said sale, either by previous authority or the acceptance of the plaintiff's agency and the adoption of his acts, and that the plaintiff did diligently and faithfully occupy his time and render services in so aiding him to effect said sale and a sale of said property to said commissioners was in a short time made and effected and that said services were of advantage and value to the defendant in effecting the said sale, then the plaintiff is entitled to recover such sum as the jury may find from the evidence to be a reasonable remuneration to the plaintiff for said services, and in ascertaining what is a reasonable remuneration, the jury may consider the rate of compensation, which they may find from the evidence was usual and customary in the said city for services of a like kind.⁸⁸

The court instructs the jury that if they find from the evidence that the defendant employed the plaintiff to procure a purchaser for the property spoken of by the witnesses and the plaintiff did procure a purchaser for said property and the said

86—Bennett v. Kidder, 5 Daly (N. Y.) 512.

87—Sample v. Rand, 112 Iowa 616.

88—Walker v. Rogers, 24 Md. 237.

property was sold by the defendant to the purchaser procured by the plaintiff, then the plaintiff is entitled to recover such compensation as they may find usual and customary.⁸⁹

IV. RIGHTS AND LIABILITIES OF THIRD PERSONS.

§ 1280. Notice of broker's agency.

The court instructs the jury that if you find that plaintiff at the time he bought the goods of defendant had no other reason to suppose that defendant was acting for another than the mere knowledge that defendant's business was that of a commission merchant then you will find for the plaintiff.⁹⁰

§ 1281. Payment to broker.

The court instructs the jury that if they believe from the evidence that A was a broker, and apparently had the general charge of plaintiff's office, and that A negotiated a sale of the plaintiff's goods as alleged in the declaration to the defendant without disclosing that he acted as broker only, and the sale was made openly and in the presence of other parties in plaintiff's office, and if the jury believe from the evidence that A subsequently had the possession of the evidences of the title to the property so sold, and that A's acts up to the time for payment of the price had been apparently ratified by the plaintiff, then the jury may find that defendant was justified in giving to A a check drawn to plaintiff's order for the goods so purchased.⁹¹

89—Jones v. Adler, 34 Md. 440.

91—Talmage v. Nevius, 32 N. Y.

90—Bliss v. Bliss, 7 Bosw. (N. Y.)

Super. Ct. (2 Sweeny) 38.

339; Hogan v. Shorb, 24 Wend. (N. Y.) 458.

CHAPTER LXXVI.

BUILDING AND CONSTRUCTION CONTRACTS.

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§ 1328. — Illinois.

§ 1329. — New York.

Cross-Reference.

Matters pertaining to law of contracts in general, see CONTRACTS.

I. EXISTENCE.

§ 1282. Qualified acceptance of offer.

The court instructs the jury that if you believe from the evidence that after the ———— Iron Works made its bid to the defendant, A, to do certain work in connection with the improvements at the ———— Building for a certain specified price, there was an acceptance of that offer by the defendant A, then the law of this case is for the plaintiff, and you should so find, unless the acceptance was made with the understanding between the parties that the work was to be done in a certain

stipulated time, or that after the acceptance a contract between them should be put in writing and signed by the parties, or a bond should be executed by the Iron Works to A. Now, if you believe any of those stipulations or terms were understood and agreed to between the parties, and the plaintiff, the _____ Iron Works failed to do those things or any one of them if it had agreed to it, then the law of this case is for the defendant, and you should so find.¹

§ 1283. Implied contract.

The court instructs the jury that if they shall believe from the evidence that the defendant, A, after being advised by the plaintiff B, that it would be best to begin boring in a new place, sent for a man to locate said new place, that the man sent for did locate said new place, at the defendant's instance and request, and that the plaintiff, acting upon defendant's conduct, bored or drilled a second well at said new place, with defendant's knowledge and consent, even though said consent be implied from the defendant's conduct, you will find for the plaintiff.²

II. CONSTRUCTION AND OPERATION.

§ 1284. Ready for occupancy.

The court instructs the jury that the question of the proper construction and interpretation of a contract is one of law for the court to decide. The alleged contract here sued on provides that the plaintiff shall finish a house for defendant "ready for occupancy" and then proceeds to state the details as to a portion of the work. As far as the manner of doing the work and kind of work is specified, the work must be done as thus specified, and the only difficulty arises as to the work not specified, but which is required to be done by that provision of the contract which says that the house must be finished "ready for occupancy." The court cannot as a matter of law give you the details which the parties have omitted but instructs you that

1—*Lynch v. Snead Architectural Iron Works*, 132 Ky. 241, 21 L. R. A. (N. S.) 852n.

2—*Mansfield v. Morgan*, 140 Ala. 567.

plaintiff would under this provision of the contract be bound to do all things that would be reasonably necessary and proper to make a house ready for occupancy, taking into consideration, in determining what should be done, the character of the house he was to finish; and if the jury find that he omitted anything specified in the contract or omitted any other thing that was reasonably required to have such house as is referred to and described in the contract, ready for occupancy, then he has not performed his contract and cannot recover upon it.³

§ 1285. Price to be paid for excavation work.

The court instructs the jury that by the terms of the written contract sued upon, which are as follows: "If the coal vein should become of a less thickness than four feet, exclusive of slates and coal not usually mined in run of mine coal in adjoining collieries, this will entitle the contractor to the price of \$3.50 per cubic yard for the entire section of the tunnel instead of the price of \$1.75 per cubic yard,"—the parties had reference to the rectangle, as shown on the blue print, nineteen feet high, above subgrade, which may have been fixed at a point not exceeding two feet below the bottom of the No. 3 coal bed, as opened at each portal; and if the jury believe from the evidence that the said coal vein became of less thickness than four feet in said rectangle, then the plaintiff is entitled to the price of \$3.50 per cubic yard for the space in which it was less than four feet thick, unless the jury believe that the parties placed a different construction upon said contract, or changed said contract by agreement. And the court further instructs the jury that, though they may believe from the evidence that, when it became apparent that the coal vein disappeared from said rectangle by a dip or deflection in the vein, that the plaintiff assented to a change in the mode of doing the work contemplated, by agreeing to excavate the coal bed in its entire length, to the Western portal, before taking down the top of the tunnel, and that, when said agreement was made for the change in the mode of the work,

3—Cunningham v. Washburn, 119
Mass. 224.

if nothing was said in reference to the price of the work to be done (provided they believe such change in the mode of doing the work did not necessarily contemplate a change in the price also), then the terms mentioned in the written contract, as to the price, would prevail, and the plaintiff would be entitled to the price of \$3.50 per cubic yard for the part of the work in dispute, unless the jury believe from the evidence that the defendant so construed the contract at the time the change in the mode of the work was agreed upon, and while the work was being performed, as to entitle the plaintiff to demand and receive only the sum of \$1.75 per cubic yard for said work, and that the plaintiff, with full knowledge of the defendant's construction of the said contract, acquiesced in the said construction.⁴

§ 1286. Acquiescence in construction placed upon contract by other party.

The court instructs the jury to disregard all evidence of the construction put upon this contract by A at the time this contract was entered into, unless the jury believe that the said construction was communicated by said A to B & C, and was acquiesced in by them, or unless the said B & C put the same construction on said contract at said time; and though they may believe from the evidence that, immediately prior to and about the time the contract was written and signed by the plaintiffs, the probability was discussed between A, and the plaintiffs as to the "petering out" of the coal vein in the mountain, yet such discussion cannot be considered by the jury as sufficient to change, modify, or add to the provisions and terms of said written contract, but only for the purpose of ascertaining the circumstance, connected with the subject-matter of the contract at the time it was made, and the object and purpose of the parties as avowed at the time they entered into the contract; but the terms of said contract are to be construed as directed by the court in instruction No. —.⁵

4—Norfolk & W. R. Co. v. Mills,
91 Va. 613.

5—Norfolk & W. R. Co. v. Mills,
91 Va. 613.

The court instructs the jury that the plaintiff entered into a contract with the defendant for the construction of _____ and plaintiff contends in this suit that he is entitled to more than _____, the amount of money which defendant paid plaintiff for the work done and which defendant claims is all the plaintiff is entitled to and the court instructs the jury that in determining the question whether or not plaintiff acquiesced in the construction of the contract on the part of the defendant by which the defendant paid and plaintiff received _____ dollars per _____ for the material in the _____ in dispute, they are to look to all the circumstances of the case and plaintiff will not be considered as acquiescing in defendant's construction of the contract, unless the plaintiff neglected to assert his own construction thereof, to the defendant or its agents for such length of time as to warrant the defendant in believing that he had waived or abandoned his right to demand more than _____ dollars per _____.⁶

III. PERFORMANCE OR BREACH.

§ 1287. Sufficiency of performance in general.

The court instructs the jury that you must consider the condition of the parties and the circumstances surrounding the matter; the size of the farm; the probable needs of such a farm; the ordinary uses that a farm requires a well for in this neighborhood,—to determine what was in the minds of the parties, what they contemplated when this well should be put there.⁷

The court instructs the jury that the defendant was entitled to a well that would supply a reasonable and sufficient quantity of water for the wants and needs of himself and of a farm of that character in that neighborhood.⁸

§ 1288. Part performance.

The court instructs the jury that if they believe from the evidence that plaintiff entered into a contract with the defendant to (dig a well _____ number of feet deep unless the

6—Norfolk & W. R. Co. v. Mills,
91 Va. 613.

7—Richison v. Mead, 11 S. D. 639.
8—Richison v. Mead, 11 S. D. 639.

plaintiff should strike water at a less depth, and that the plaintiff made efforts to find water and failed, and that plaintiff did not dig the well to the depth designated by the contract), then the jury are instructed that plaintiff cannot recover for his services.⁹

§ 1289. Substantial performance—In general.

§ 1290. — Illinois.

The court instructs the jury that under the written contract in evidence, the defendant was entitled to have erected such a building as was called for by the terms of the contract, and, though the jury may believe that there has been a substantial performance of the terms of the contract by the plaintiffs, yet nevertheless if the jury believe that the terms have not been fully complied with, the jury should allow to the defendant such sum or sums as from the evidence they may believe are reasonable and proper to enable the defendant to complete the building in the manner stipulated for in the contract.¹⁰

§ 1291. — Iowa.

The court instructs the jury that if they find that the plaintiff has constructed the ditch in a reasonably workmanlike manner and substantially in accordance with his contract and profiles furnished by the engineer in charge, then he will be entitled to recover whatever balance appears from the evidence to be due upon the contract price.¹¹

The court instructs the jury that plaintiff in this case sues to recover under a contract by which he was to furnish to defendant a monument, the cap of which monument should be the same as that upon a monument erected upon the grave of one T. It appears from the evidence that the monument erected by plaintiff for defendant in this case was a smaller monument than the one erected on the grave of T. The court instructs the jury that to entitle plaintiff to recover, it is not necessary that the cap on

9—Lawrence v. Van Deventer, 51 N. Y. 676.

10—Keeler v. Herr, 157 Ill. 57, aff'g 54 Ill. App. 468.

11—Gorton v. Moeller Bros., 151 Iowa 729.

the monument in question should be of the exact proportion and size as that upon the T monument. It is sufficient if it be shown to be substantially the same in style and finish and of such proportions as to present the same general appearance as that upon the monument of T, and so to be of such proportions as to properly correspond with the monument on which it is placed, and if from the evidence, the jury shall find that plaintiff has thus substantially complied with his contract, you will find for plaintiff. If you do not so find, you will find for defendant.¹²

§ 1292. — Texas.

The court instructs the jury that in deciding whether or not plaintiff was proceeding with said building in compliance with the contract, you are instructed that there must have been a substantial compliance in every material particular in each item as called for by a fair, reasonable and practical construction of the contract, and plans and specifications, taken together and where there is a conflict, if any, in these, this should be reconciled in a practical, workmanlike manner, so as to arrive at the fair and reasonable intention of the same.¹³

The court instructs the jury that the contract sued on provides that the electric light plant in question should be subjected to an examination by, and that the same should be subject to the approval of, the electrician of the ——— Survey and Rating Bureau. If the plaintiff made an effort in good faith to get the electrician of said ——— Survey and Rating Bureau to examine said plant, then this clause of the contract would be substantially complied with; but if you find, from the evidence, that the plaintiff did not in good faith make an effort to secure said examination of said electric plant by said electrician aforesaid, and if you find that same was not examined by said electrician of the ——— Survey and Rating Bureau, then you are instructed that this would constitute a complete defense to the action of the plaintiff on the contract; and if you so find you

12—Prior v. Schmeiser, 100 Iowa 299.

13—Linch v. Paris Lumber & Grain Elevator Co., 80 Tex. 23.

will return a verdict as against plaintiff, as to any recovery on the contract sued on.¹⁴

§ 1293. Same—Deviations from contract.

§ 1294. — Maryland.

The court instructs the jury that, if they find for the plaintiffs, there should be no deduction made from the balance, if any, due under the contract price for deviations, if any, from the provisions of the contract, which were made by the plaintiffs in consequence of directions from the defendants or their duly authorized agents.¹⁵

§ 1295. — New York.

The court instructs the jury that substantial performance, as applied to a building contract, permits only such omissions or deviations from the contract as are inadvertent or unintentional, are not due to bad faith, do not impair the structure as a whole, are remediable without doing material damages to other parts of the building in reconstructing and may without injustice be compensated for by deductions from the contract price.¹⁶

The court instructs the jury that there may be a recovery without a literal or exact performance, as where a builder has in good faith intended to comply with the contract and has substantially done so, although there may be slight defects caused by inadvertence or unintentional omissions and (if the jury believe from the evidence that the plaintiff entered into a contract with the defendant to construct for defendant the building described in the declaration, and that there was a deviation from the plans constituting a part of the contract, by which the attic was made five inches lower than that called for by the plans and if the jury believe from the evidence that this error was caused by a mistake in measurement not detected by either party or by the architect until the building was completed, and that the deviation did not

14—A. J. Anderson Elec. Co. v. Cleburne Water, Ice & Lighting Co. (Tex. Civ. App.), 44 S. W. 929.

15—Iron Clad Mfg. Co. v. Thomas B. Stanfield & Son, 112 Md. 360.

16—Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Spence v. Ham, 27 App. Div. (N. Y.) 379.

affect the exterior appearance of the building or its usefulness or value in any respect, then the jury may find that there has been a substantial performance and in such case they will render a verdict for the plaintiff for the contract price less the damages, if any, which they may find to have resulted from the defect.¹⁷

§ 1296. Time for performance.

The court instructs the jury that if they find that the plaintiffs completed the building by ———, 19—, except as to the loading platform, and that the construction of said platform was postponed by request of the defendants, and was afterwards erected promptly upon request, and in the manner directed by the witness A, acting under instructions from the defendants, then the jury may find that the building was completed ———, 19—, within the meaning of the contract.¹⁸

The court instructs the jury that the plaintiff in this case sues on a contract by which plaintiff undertook to construct water-wheels for defendant, which with their appurtenances and fixtures should be able, when employed by defendants in running their mill to work up to — horse power; that they should be capable of effecting a saving of — per cent. of water over the wheel previously in use, and that the wheel should be completed by ———, unless the plaintiffs were prevented from completing the same on or before said ——— by circumstances over which plaintiff had no control, and the court instructs the jury that even if they shall find from the evidence that the wheels as constructed by plaintiff with their appurtenances and fixtures were able to work up to — horse power and were capable of effecting a saving of — per cent. of water, but shall also find that said work was not completed on or before the ——— day of ——— and that the plaintiffs were not prevented from completing said wheels on or before said day by circumstances over which they had no control, then the defendant is entitled to a credit of ——— dollars for each and every day during which

17—Oberlies v. Bullinger, 132 N. Y. 598.

18—Iron Clad Mfg. Co. v. Thomas B. Stanfield & Son, 112 Md. 360.

said work remained uncompleted after said _____ day of _____,¹⁹

§ 1297. Exercise of reasonable economy.

The court instructs the jury that it was the duty of the plaintiff, in the completion of the construction of the substructure of the bridge described in the plaintiff's petition, to use ordinary care to the end that said work should be prosecuted and conducted with reasonable skill and dispatch, and that reasonable economy should be exercised as to the employment of labor, the purchase of material, and the incurring of other expenses reasonably and properly incident thereto.²⁰

§ 1298. Satisfaction of engineer.

The court instructs the jury that if they believe from the evidence that the plaintiff in this case entered into a contract with defendant for the construction of _____ and that the plaintiff completed the _____ in a workmanlike and substantial manner and to the satisfaction of the engineer of the _____ company and that the _____ was accepted by the defendant company, then the plaintiff is entitled to recover any sum that may be due him for said work under the contract here sued on, although the jury may believe from the evidence that the defendant company directed a change in the method of doing the work.²¹

§ 1299. Prevention of performance by other party to contract.

Under the contract it was not the duty of the plaintiffs to procure the right of way; and if you find from the evidence that the plaintiffs entered upon the performance of their part of the contract by grubbing, clearing, grading, etc., as therein stipulated, and that they were prevented from completing their part of the contract because the right of way had not been obtained from the owners of the land through which the road ran, and where the work was to be done, who forbade and refused to permit the

19—Conner v. Mount Vernon Co.,
25 Md. 55.

20—El Paso Bridge & Iron Co. v.
Dunham, — Tex. Civ. App. —, 152
S. W. 1131.

21—Norfolk & W. R. Co. v. Mills,
91 Va. 613.

plaintiffs to enter and do the work, this would be a sufficient excuse for the failure of the plaintiffs to perform the work, where such right of way had not been obtained.²²

§ 1300. Refusal to make payment due.

If you believe from the evidence that the plaintiffs entered upon the performance of their part of the said contract and performed work under it, according to its terms, and if you further find that the ——— made out monthly proximate estimates of the work done by plaintiff at the end of each month which were returned and brought to the notice of the defendant, and that the defendant, upon the request of the plaintiffs, after the expiration of ——— days from the return of any such estimate refused and neglected to pay plaintiffs the amount due according to the amount in such estimate, such failure or refusal of the defendant to pay was a breach of his part of the contract, and the plaintiffs were not bound to go on and complete all the work, but might suspend or quit the work until payment was made, and if you find that payment has not been made and the work has been suspended, the plaintiffs will be entitled to recover in this suit for all work done under said contract at the rates therein stipulated.²³

§ 1301. Subletting portion of work.

Although you may believe from the evidence that plaintiffs did sublet a portion of the work and that a part of the work sued for was done by subcontractors under such subletting, yet, if such subletting was done with the knowledge and consent of the defendant by his express promise to hasten the work, the plaintiffs are entitled to recover for all work done under said contract, so far as any defense is concerned, based upon the fact of such subletting, and especially if the plaintiffs were to and did give the work their personal attention and oversight; and whether the defendant assented to such subletting or not, should be determined from all the evidence, facts and circumstances in the case, and you

22—Bean v. Miller, 69 Mo. 384.

23—Bean v. Miller, 69 Mo. 384.

are the sole judges of the evidence and credibility of the witness, and may give to each such credit as you may deem proper.²⁴

§ 1302. Waiver—In general.

The court instructs the jury that plaintiff entered into a contract with defendant for the construction of ——— and that the plaintiff claims that he has not received all the money to which he is entitled under the contract for work done by him, and the court instructs the jury that if they believe from the evidence, that plaintiff received from the defendant company compensation for ——— at the rate of \$——— and that at the time of receiving such payments from the defendant, he was told by defendant's agent that the defendant would adjust everything to the plaintiff's satisfaction, if anything more was due to plaintiff for the work done by him, and that plaintiff relied upon his ability to adjust the matter satisfactorily with the defendant and that plaintiff had the right reasonably to so rely, then the acceptance of such payment is not to be taken as a waiver of plaintiff's rights under the contract or as acquiescing in the construction placed upon the contract by the defendant, and the jury must determine from all the facts and circumstances of the case whether plaintiff has by his conduct waived any of the rights under said contract or has acquiesced in the construction placed upon the contract by the defendant.²⁵

§ 1303. Same—Time provision.

The court instructs the jury that the parties to an agreement for the construction of a building may by their conduct waive the provisions contained in it and may extend the time of its performance and (if they believe from the evidence that plaintiff entered into a contract for the construction of the building described in the declaration, the building to be constructed in a certain time and that extra work was done by the plaintiff not called for by the contract, at the request of the defendant, and if the jury believe from the evidence that the work called for

24—*Bean v. Miller*, 69 Mo. 384.

25—*Norfolk & W. R. Co. v. Mills*,

91 Va. 613.

by the contract would have been done in time if it had not been for the extra work, then the jury are instructed that the defendant cannot insist on the performance of the contract in the time specified in the contract as being absolutely essential).²⁶

The court instructs the jury that although where by the terms of a contract time is made of the essence, the failure of the contractor to complete the work within the time limited will defeat his right to recover anything under the agreement, yet if the jury believe from the evidence (that plaintiff entered into a contract with defendant to excavate on the property described in the declaration, time to be of the essence, and that the plaintiff did not finish the excavation within the time specified, but defendant permitted plaintiff to continue and finish the work after the time stipulated, then defendant cannot insist upon the delay as a defense to this suit to recover the price of the work).²⁷

IV. ESTIMATE OR CERTIFICATE OF ARCHITECT OR ENGINEER.

§ 1304. Necessity.

§ 1305. — Missouri.

The court instructs the jury that if you find from the evidence that the defendant's engineer or his assistant only made approximate estimates of the work as stated in the petition, such estimates would not limit the recovery of the plaintiffs to the amount of the work so approximately estimated. But, if you find the plaintiffs, not being in fault themselves, were prevented from performing the work by the default of the defendant in paying for the work which was in consequence suspended or abandoned, and that no final estimate was made of all the work done, then, and in that case, the plaintiffs can recover for the whole amount of work done by them, whether estimated or not.²⁸

§ 1306. — New York.

The court instructs the jury that if they believe from the evidence that the plaintiff made a contract with the defendant

²⁶—Van Buskirk v. Stow, 42 Barb. (N. Y.) 9.

²⁸—Bean v. Miller, 69 Mo. 384.

²⁷—Dunn v. Steubing, 120 N. Y. 232, 30 N. Y. St. 653.

for the erection of the building described in the declaration, and that the contract provided that the plaintiff should erect the building in accordance with the plans and specifications of the architect in a good and workman-like manner to the satisfaction, and under the direction of the architect, to be testified by a certificate under the hands of the architect, and if the jury believe from the evidence that before any payments were to be made to plaintiff by defendant, plaintiff should obtain a certificate from the architect, then the jury are instructed that the mere fact that plaintiff completed the contract according to its terms, will not entitle him to recover payment, but that he must produce the architect's certificate of compliance with the terms of the contract unless he can show fraud, collusion or bad faith, and that it is not sufficient to excuse the production of the certificate that the architect unreasonably withheld it.²⁹

§ 1307. Conclusiveness—In general.

The court instructs the jury that under the terms of the contract sued on in this case, the monthly estimates, in order to be valid, must be accompanied by the certificates of the chief engineer of the ——— Company approving the same, and declaring that the work done and materials furnished, as therein stated, are according to the contract, and that the charges for the same are according to the contract and without such certificate no payment could be demanded by the plaintiffs, and in all questions connected with such estimates, and the amounts payable thereby and thereunder, the decision of the said engineer is final and conclusive on both parties. And the court further instructs the jury, that if they believe from the evidence that the price fixed for the ——— mentioned in the plaintiffs' declaration was fixed in the monthly estimates provided for in said contract, and that said estimates were afterwards approved by the said engineer, and his certificates appended thereto, as provided in said contract, then the price so fixed for all the work included in said

²⁹—Schenke v. Rowell, 7 Daly (N. Y.) 286.

estimates must be considered by the jury as the correct prices, unless the jury further believe from the evidence that, in approving said estimates and in making his decision in reference thereto, and in giving the certificate approving the same, the said engineer was guilty of intentional fraud, or of such gross mistake as to necessarily imply bad faith on his part.³⁰

§ 1308. Same—Fraud.

The court instructs the jury that if they believe from the evidence that there was no change in the contract sued on, or no construction of it by the parties different from the construction given by the court; and if the jury further believe that the coal bed became of less thickness than — feet, exclusive of the slates and coal not usually mined in run of mine coal in adjoining collieries, in the rectangle — feet wide and — feet high, and described in the written contract, for the space of — lineal feet, which is equal to — cubic yards; and if the jury further believe that the engineer of the ——— Railroad Company in his estimates for said work allowed the said A \$—— per cubic yard,—then these estimates are not in accordance with the terms of the contract sued on, but in making the said estimates the engineer committed a mistake so gross as to amount to a fraud upon the plaintiff, and neither the said monthly or final estimates are binding or conclusive upon the said plaintiff, but he is entitled to \$—— per cubic yard for the aforesaid — cubic yards, subject to any proper credits.³¹

The court instructs the jury that if they believe from the evidence that there was no change in the contract sued on, and no construction of it by the parties different from that placed upon it by the court; and if they further believe that the coal bed became of a less thickness than — feet, exclusive of the slates and coal not usually mined in run of coal in adjoining collieries, in the rectangle — feet wide and — feet high, described in the written contract, for the space of — lineal feet, which is equal to — cubic yards; and if the jury further believe that

30—Norfolk & W. R. Co. v. Mills,
91 Va. 613.

31—Norfolk & W. R. Co. v. Mills,
91 Va. 613.

the engineer of the ——— Railroad Company knew the said coal vein became of less thickness than — feet, as aforesaid, in the rectangle aforesaid, at the time of his making the monthly and final estimates, and the said engineer allowed the said A \$—— per cubic yard for said material in said estimates, instead of \$—— per cubic yard,—then these estimates are not in accordance with the terms of the contract sued on, and this conduct on the part of the engineer is a fraud upon the rights of said plaintiff, and neither the said monthly or final estimates are binding and conclusive upon the said plaintiff, but he is entitled to recover \$—— per cubic yard for the aforesaid — cubic yards, subject to any proper credits.³²

§ 1309. Refusal.

The court instructs the jury that if they believe from the evidence that plaintiff entered into a contract with defendant to construct a building for defendant as alleged in the declaration and that by the terms of the contract plaintiff was not to receive payment until the architect should have given a certificate of performance, and if the jury believe from the evidence that plaintiff substantially fulfilled his contract, though unintentionally he was guilty of slight defects in the performance and that he has acted in good faith and to the best of his ability in carrying out the contract, and if the jury believe that the architect refused to give the certificate of performance, then the jury are instructed that such refusal was unreasonable, and plaintiff may recover notwithstanding such refusal.³³

The court instructs the jury that if they believe from the evidence that plaintiff entered into a contract with the defendant for the construction of the building described in the complaint, payment to be made by the defendant to the complainant upon production of a certificate of performance by the architect and if the jury believe from the evidence that plaintiff applied to the architect for the certificate of performance in accordance with

³²—Norfolk & W. R. Co. v. Mills, 648; Demarest v. Haide, 52 N. Y. 91 Va. 613.

Super. Ct. (20 Jones & S.) 398.

³³—Nolan v. Whitney, 88 N. Y.

the contract and that the architect refused to give it, not on the ground of non-performance by the plaintiff, but because defendant had told the architect not to give the certificates and that if the jury believe from the evidence that plaintiff had fulfilled his agreement, then the jury are instructed that plaintiff can recover notwithstanding the refusal or failure of the architect to deliver the certificates, if they find that the architect did refuse or fail to give the certificates.³⁴

V. ABANDONMENT OF WORK.

§ 1310. In general.

The court instructs the jury that if they believe from the evidence that plaintiff willfully abandoned the work sued for in this case leaving the house which he contracted with defendant to build not finished according to the contract, then plaintiff cannot recover in this action. But if a party in good faith proceeds under a special contract, doing what he reasonably supposes is required and substantially completes it and the other party accepts the benefit of the work, although the contractor may not have done all that was really his duty or in the exact manner required, still the contractor may maintain an action to recover the value of his labor and materials, but he will not necessarily recover the cost of his materials or the ordinary price of the labor. The party for whom the work is done is entitled to have deducted from the contract price, the difference between the value of the work as done and its value, if it had been done in accordance with the contract.³⁵

VI. ACTIONS BY CONTRACTOR.

§ 1311. Right of action—Effect of parol guaranty.

The court instructs the jury that if they believe from the evidence that the plaintiff, either himself or through others employed by him, constructed the building in the agreement in the declaration mentioned, in accordance with the specifications in said agreement set forth, and relying upon the contract in the declaration

34—Anderson v. Meislahn, 12 Daly (N. Y.) 149.

35—Cunningham v. Washburn, 119 Mass. 224.

mentioned, then the jury shall find for the plaintiff the price therefor in said agreement stipulated to be paid by defendant to the plaintiff, although from the evidence the jury may believe that outside parties, by parol agreement, guaranteed that the plaintiff should lose nothing by his construction of said building under said agreement, and actually advanced to the plaintiff the money necessary to pay for the materials and labor employed in the construction of the said building.³⁶

§ 1312. Conditions precedent—Tender of release.

The court instructs the jury that if the jury believe that the estimates provided for in the contract were proper, and show the correct amounts due the plaintiffs, then, before the plaintiffs could institute suit to recover the reserved percentage, they were bound to tender to the defendant the release stipulated for in the contract. But if the jury believe that the estimates were not proper because fraudulent, then the tender of such release was not necessary in order to give the plaintiffs the right to sue.³⁷

§ 1313. Reconvention.

The court instructs the jury as to the claim for damages in defendant's plea in reconvention for the rental value of said building as follows: If you shall believe from the evidence that at the time the said plaintiff A assumed to carry out the said contract, as hereinbefore explained, within a period of — days from the — day of —, 19—, the defendant B agreed with the said A to waive any and all claim for damages that he might have had against the said — Iron Works for its failure to carry out and complete said contract, then you are instructed that defendant, B, cannot recover anything for the rental value of said building by reason of the fact that the same was not completed within time prescribed in said contract, and, if you so find the facts to be, you will find against the defendant B on his plea in reconvention for the rental value of said building, and so state by your verdict in so many words; on the other hand, if you shall believe from the evidence that at the time

36—Ferguson's Adm'r v. Wills, 88 Va. 136.

37—Norfolk & W. R. Co. v. Mills, 91 Va. 613.

said A assumed to carry out and perform said contract within said — days the said defendant, B, agreed to waive said claim for damages in the event only that the said A should carry out and complete said contract within — days after the same had been assumed by him, then you will proceed to further consider whether the defendant, B, is entitled to recover anything on his claim for the rental value of said building under the following instructions. If you believe from the evidence that at the time the said — Iron Works entered into said contract of —, 19—, it had knowledge of the fact that one C had entered into a contract with the said B for the erection and completion of his said building by the — day of —, 19—, then you are instructed that the defendant, B, will be entitled to recover the reasonable rental value of said building from the time that the — Iron Works should have performed and completed its said contract with the defendant, B, up to the time that the said building was in fact turned over to the said C for completion by him, but you cannot allow the defendant B any amount for the rental value of said building after the time that the said building was turned over to said C for completion by him. But in this connection you are further instructed that if there were any delays caused to the said — Iron Works on account of wrong measurements for material to be furnished by said iron works or on account of delay in procuring extra material for the said B, if any, on account of any delay on the part of any transportation company, if any, in delivering the material to be used on said contract, then any and all such delays, if any, cannot be chargeable to the plaintiff herein in computing the time for the rental value of said building, for the reason that neither the — Iron Works nor the plaintiff would be chargeable with such delays, if any.³⁸

§ 1314. Evidence—Burden of proof—Misrepresentations.

The court instructs the jury that under the contract between the plaintiff and the defendant in issue in this case, the defendant

38—Feigelson v. Brown, — Tex.
Civ. App. —, 126 S. W. 17.

had the absolute right to stop the plaintiff from boring the well at any time he saw fit to do so. And, if the defendant claims that he would have exercised this right and stopped the plaintiff, but for a representation made to him by the plaintiff, the burden is on the defendant to prove by a preponderance of the evidence to the satisfaction of the jury that such representation was as a matter of fact untrue, and that the defendant relied upon and was misled by such representation. Unless the defendant has proven both of these facts by a preponderance of the evidence to the satisfaction of the jury, the jury must find a verdict in favor of the plaintiff.³⁹

§ 1315. Same—Same—Performance.

The court instructs the jury that by the terms of the contract offered in evidence the plaintiffs cannot recover, unless the jury shall find from all the evidence in the case that the ———— constructed by the plaintiffs with their appurtenances and fixtures as arranged by the plaintiffs were able when employed by defendants in running and driving their ———— to work up to ———— horse power, with a full head of water and were capable of effecting a saving of ———— per cent. of water over the ———— wheel that was previously in use and that the burden of proof is on the plaintiffs to establish said facts.⁴⁰

§ 1316. Damages—In general.

§ 1317. — Maryland.

The court instructs the jury that if they find from the evidence the facts set forth in plaintiff's first prayer and shall further find that any portions of said ———— were built by the plaintiffs for the defendant, according to the said original plans and specifications, and said articles of agreement, and that said defendant has not paid for the same, then the plaintiffs are entitled to recover for such portions at the rates of compensation named in said agreement.⁴¹

39—Geasty v. Lindsay, 107 Va. 428.

41—Annapolis & B. Short Line R.

40—Conner v. Mount Vernon Co., Co. v. Ross, 68 Md. 310.

25 Md. 55.

§ 1318. — Texas.

The court instructs the jury that if you believe that the contract sued on has not been complied with by the plaintiff, in substantial accordance with the terms of the same, and that the requirements of the same have not been substantially kept by the plaintiff, then you will consider, under the evidence, what damages, if any, by reason of the failure of plaintiff to comply with its said contract; and in considering this question you are instructed that, if plaintiff failed to furnish and deliver to defendant the electric light plant in substantial accordance with the terms, requirements, and conditions of its said contract, and to comply with the terms of same, and that this was without any fault on the part of defendant, then the defendant would be entitled to recover as damages from plaintiff the difference, if any, between the value of the electric plant contracted to be completed, if the same had been completed in all respects in substantial compliance with the terms of the same, and the amount of the contract price therefor, as agreed on and fixed by said contract; and if you find that said electric light plant has not been completed in accordance with the contract, and that by reason thereof defendant is entitled to recover damages, then the form of your verdict will be: "We, the jury, find that the plaintiff is not entitled to recover of defendant on the contract, and we find damages for defendant against plaintiff in the sum of —— dollars."⁴²

§ 1319. Same—Deduction for damage to wall of building.

The court instructs the jury that no deduction or abatement should be allowed the defendants for any damage to the wall of the factory erected by the plaintiffs for the defendants under the contracts in suit, if the jury find that such damage occurred to said wall by reason of any excavations made near to said wall for the installation of the railroad switch referred to in the testimony in this case.⁴³

42—A. J. Anderson Elec. Co. v. Water, Ice & Lighting Co., 23 Tex. Civ. App. 328.
 43—Iron Clad Mfg. Co. v. Thomas B. Stanfield & Son, 112 Md. 360.

§ 1320. Same—Extras.**§ 1321. — Connecticut.**

The court instructs the jury that if the plaintiff was ordered by the defendant to do the work, and judging that extras were included in the defendant's orders, notified the defendant that he should require pay for extras, and the defendant made no reply to the notices, but continued to give orders including extras, the natural consequences of defendant's conduct would be to influence the plaintiff to expend his money on the extra labor, which he might not have done, had the defendant, upon notice, refused to pay for extra labor; and if defendant's conduct, such as has been above supposed, in fact did induce the plaintiff to believe it, and to make expense which he would not otherwise have done, the defendant is chargeable with an intent to induce the plaintiff to do the extra work, and ought to pay for it.

If you find that the defendant had previously ordered part of the work claimed to be extra done, and pending the doing of the work ordered received plaintiff's letter (Exhibit —), and continued, after said notice, to order the rest of the said work done, and that this work was needed by and useful to the defendant, and the plaintiff was, before said notice, expending money in doing this work, and continued, after said notice, so to spend therein, in the belief that the defendant would pay for extra work, and the defendant was taking and continued to take the benefit of said labor, and has ever since held and enjoyed the benefit, it was the duty of the defendant on receiving plaintiff's notice (Exhibit —) to inform him whether it would pay him for such labor as he had furnished or should furnish upon the order of their engineer, and which should prove to be extra, or else, if defendant kept silent, and by its silence led the plaintiff to believe that it would pay for extra work, and so induce the plaintiff to do extra work, it was defendant's duty to pay for such work as should be extra; and the plaintiff had a right to expect that defendant would pay him for such part of the labor

furnished by him upon the order of A as should prove to be extra, and to recover a reasonable price for the same.⁴⁴

§ 1322. — Indiana.

The court instructs the jury that if they should find from the evidence that the plaintiff [subcontractor] and the defendants [principal contractors] made and entered into the contract which is filed with the complaint marked exhibit —, and you should further find that the provisions of such contract marked exhibit — and the specifications marked exhibit — were not modified or changed by the school trustees and the said A & Son, then the court instructs you that in order for the plaintiff to recover anything for extra work or extra material, he must show by a preponderance of the evidence that change in writing was ordered and made by the school trustees, in the plans and specifications, which required extra work or extra materials, and if you should find that said school trustees did not order or make in writing any change in such specifications, requiring extra work or extra materials, there can be no recovery in this action for any claim for extra work or extra materials, and as to any claim for such extra work or extra materials, except on the score of crooked walls, you should find for the defendants.⁴⁵

§ 1323. — Maryland.

The court instructs the jury that if they find from the evidence that the defendant submitted or caused to be submitted to the plaintiffs the plan of the — to be built at the —, as contained in the document which was given in evidence, indorsed “—,” and the specifications of the — to be built at — as contained in said document, and that the plaintiffs undertook and agreed with the defendant to build said — in accordance with the said plans and specifications and upon the terms set forth in the articles of agreement, dated —, also in evidence; and shall further find that after the commencement of the work in question, it was found impracticable to build said — in

44—McCaffrey v. Groton & S. St. R. Co., 85 Conn. 584.

45—Brown v. Langner, 25 Ind. App. 538.

accordance with said plans and specifications and that the defendant changed the character of the _____ from a _____ to a _____ and required the plaintiffs to use _____ in the construction of the _____ not called for by the specifications, as contained in said plan, or by said articles of agreement, and of a greater length than the _____ called for by said papers, and that the plaintiffs built said _____ for the defendant in accordance with said changes and that the defendant accepted said _____ when finished and has not paid for the same; and shall further find that in consequence of said changes, the quantity and character of materials, and the amount of labor required to be furnished and done by the plaintiffs in the construction of said _____ was greatly increased and the plaintiffs suffered loss from delays in consequence of said changes, so that the plaintiffs were put to a greater expense in constructing said _____ as finally constructed, than they would have been, if said _____ had been built according to the said original plans and specifications, then the plaintiffs are entitled to recover such sum as the jury may estimate such increase of labor and materials and such loss to amount to; in making such estimate the jury will be guided by the price named in said original contract, so far as the same may be applicable to the work and materials as done and furnished.⁴⁶

§ 1324. — Texas.

The court instructs the jury that the plaintiff, A, alleges in his petition that he at an additional expense over and above the said contract price as originally made between said _____ Iron Works and said B, at the special instance and request of the said B, furnished to the said B extra material used for extra girders which were not contemplated in the original plans, of the additional value of \$_____. And, as to this item, you are instructed that if you shall believe from the evidence that such extra material for said girders was so furnished to the said B, and you shall further believe that the same was not included and con-

⁴⁶—Annapolis & B. Short Line R.
Co. v. Ross, 68 Md. 310.

templated by said contract when read in the light of said plans and specifications, in addition to the amount that you shall allow the said plaintiff on the original contract price of said material, you will add the reasonable value of such extra material which was not so contemplated and included in said original contract; but, if you believe from the evidence that such material was in fact contemplated to be used according to the terms of the original contract between the said ———— Iron Works and the said defendant B, when read in the light of the plans and specifications of said building, then you will not allow any additional sum to said contract price for said material.⁴⁷

§ 1325. — Virginia.

The court instructs the jury that under the terms of the contract sued on in this case, the ———— could be changed in any manner at any time, if the engineer of the defendant company considered such change necessary or expedient and that in case of any such change, no claim of an increase of price for the ———— on the part of plaintiff on that account would be valid or be required to be considered by the defendant, unless such claim should be made in writing before the work, under the plans as altered, should be commenced.⁴⁸

§ 1326. Same—Overpayment.

The court instructs the jury that the plaintiff sues for a balance he alleges to be due him from the defendant for material and labor furnished by plaintiff in the completion of the building of the defendant. The defendant denies any indebtedness to plaintiff, and avers that instead of there being a balance due the plaintiff for the work and material, as claimed by plaintiff, the plaintiff was overpaid by the defendant, and he asks a return of the money so overpaid. The defendant claims also that said work and materials were also furnished by plaintiff at certain stipulated rates and prices, and that the amount claimed by plaintiff is in excess of the amount stipulated. Now, the court instructs the jury that, if you find from the evidence that the

47—Feigelson v. Brown, — Tex. Civ. App. —, 126 S. W. 17.

48—Norfolk & W. R. Co. v. Mills, 91 Va. 613.

payments made by defendant exceed the amount of \$——, then you will find for the defendant the amount so overpaid. So, also, if you believe from the evidence that there was a contract made between the plaintiff and the defendant for the ———, and in said contract the plaintiff agreed and guaranteed that the cost of the ——— should not exceed the sum of \$——; then the plaintiff cannot recover for said work and materials more than the \$——.⁴⁹

VII. ACTIONS BY OWNER.

§ 1327. Damages—In general.

§ 1328. — Illinois.

The court instructs the jury that the measure of the damages is the difference between the value of the building as constructed and the value of the building as it would have been constructed, if it had been constructed according to the plans and specifications except in so far as any of the provisions of the plans and specifications may have been waived by the plaintiffs herein, if any such waiver has been shown by the evidence.⁵⁰

§ 1329. — New York.

The court instructs the jury that if they believe from the evidence that the contract was made as alleged in the declaration by the defendant to build the house described in the declaration for plaintiff and that defendant did not follow the specifications contained in the contract but departed therefrom in building the house, then the measure of damages of plaintiff will be the difference in the value between the house as it was in fact finished by the defendant and as it would have been if he had accurately carried out the provisions of the contract and the plaintiff cannot recover such an amount as would be necessary to make the building conform to what the specifications required.⁵¹

49—Maverick v. Maury, 79 Tex. 435.

50—McBride v. Seney, 192 Ill. App. 18.

51—Morton v. Harrison, 52 N. Y. Super. Ct. (20 Jones & S.) 305.

CHAPTER LXXVII.

BUILDING AND LOAN ASSOCIATIONS.

§ 1330. Actions—Right of action in general.

§ 1331. Same—Defenses.

§ 1332. Same—Issues and proof.

§ 1330. Actions—Right of action in general.

The court instructs the jury that if they believe from the evidence that A had no authority to make a loan of money, and further believe from the evidence that the plaintiff had no notice of any statements or promises by A to the Bs, if he made any, that he was lending them money under the guise of a building contract; then you will find for the plaintiff.¹

§ 1331. Same—Defenses.

The court instructs the jury that the defendant in addition to its claim that it was an estimated period instead of a definite limited period sets up the further defense, that if it had undertaken to make a contract of the character that the plaintiff claims, that is a definite, fixed number of payments, that it would have been acting beyond its powers as a corporation under the laws that existed; and that, therefore, such an act on its part would have been void—that such a contract would have been void as being in excess of the powers it possessed to make. The supreme court in considering this case has laid down the principle that where the act that is alleged to be beyond the power of a corporation is not an immoral act, nor expressly forbidden by some law then the court will not allow the corporation to claim that it was ultra vires, or beyond its powers. So the principle of ultra vires cannot enter into this case.²

The court instructs the jury that defendant's remaining defense

1—Texas Building & Loan Ass'n v. & Loan Ass'n of Syracuse, N. Y., 62 Norwood (Tex. Civ. App.), 46 S. W. S. C. 330, aff'd 189 U. S. 122, 47 L. 404. Ed. 735.

2—Williamson v. Eastern Building

is that the plaintiff waived the provisions of the contract when he entered into a subsequent contract by which he made a loan with the association. So that by the defendant's contention, if you should conclude that the plaintiff did have a definite contract with the defendant by which after the plaintiff had made ———— payments he would be entitled to receive \$——, still, if you should also conclude that he entered into the loan contract, the contention of the defendant is that he waived his rights under the original contract and became bound by whatever changes had been made in the by-laws of the association subsequent to the making of the original contract and up to the time of the making of this loan contract. A person may waive the right which he has, especially a right arising out of contract. And so, the plaintiff, even though he had the defendant bound by this original contract which he alleges, had the power and right if he chose to waive the benefits accruing to him or the rights growing in his favor out of the original contract, and so release the defendant from the performance of it. A defendant relying on such a defense is bound to establish the facts necessary to show the truth of the defense by a preponderance of the evidence that the plaintiff did cast aside his rights and benefits which had accrued to him already under the contract and thereby release the defendant from its performance. If the defendant has offered evidence, satisfactory to your mind, of a waiver, it constitutes a good defense to the plaintiff's recovery in this case. The plaintiff is not bound to show anything with reference to that matter unless in reply to anything which the defendant may show as going to establish the waiver. I charge you that where a man has a valid claim against another, he may afterwards pledge that claim to the other party in any transaction—any subsequent transaction—and yet by that act of pledging not waive any right which he may have had under the original transaction. The mere act of pledging the shares of stock does not amount to a waiver of any right which the plaintiff had under the original contract.³

3—Williamson v. Eastern Building & Loan Ass'n of Syracuse, N. Y., 62 S. C. 390, aff'd 189 U. S. 122, 47 L. Ed. 735.

§ 1332. Same—Issues and proof.

The court instructs the jury that the plaintiff alleges that he became in due process the owner of certain shares of stock in the defendant building and loan association on condition that he was to pay an admission fee of a certain amount, and then pay installments on his stock for _____ months. He alleges that the defendant building and loan association agreed with him, that upon the payment by him of these _____ installments together with the membership fee, it would then repay to him the full amount of \$_____ upon each and every of the said shares of stock. Under that arrangement he took _____ shares of the stock. He alleges that he performed all the conditions and terms of the contract on his part, and that the _____ months have elapsed, the _____ payments have been made, and that he is entitled to his \$_____ — that is to say, \$_____ for each and every share of stock so held by him. He sets up in the complaint, that some years subsequent to the time of entering into this contract, he borrowed under a distinct and definite agreement with the defendant building and loan association a certain amount of money, and that he pledged as security for the loan which he thus obtained from the defendant, the shares of stock he already held in the association, and that he was bound by the loan to do certain things—that is, to pay the interest and premiums, and that he did pay these charges; and now admits that the defendant is entitled to offset this loan which he procured from it against the amount due on his original contract, to wit: the sum of \$_____; and only claims that the defendant is bound to pay him the balance, after deducting the amount of his loan from the amount of the original contract. The amount of the loan being \$_____, and deducting that amount from \$_____, which he claims to be due on his original contract, leaves the sum of \$_____, which he claims is now due him from the defendant; and for this he brings his suit, together with the interest from the time he alleges it became due and payable and was refused payment.⁴

4—Williamson v. Eastern Building & Loan Ass'n of Syracuse, N. Y., 62 S. C. 390, aff'd 189 U. S. 122, 47 L. Ed. 735.

The court instructs the jury that the defendant does not deny that there was a contract between the plaintiff and defendant; does not deny that he is a stockholder or member of the defendant association, but it sets forth a different contract from that which the plaintiff sets forth. It alleges that instead of the period of ——— months and ——— monthly payments being limited as completing the performance of the contract by the plaintiff, that the contract was that he became a member of the defendant building and loan association, subject to all of its by-laws and rules and regulations, its charter and everything else governing the association; and claims further that under that arrangement he was bound to pay not only a definite, limited number of ——— payments, but was bound to pay any additional payment which would be necessary, taken together with the profits on his payments, to mature his stock to the par value of \$——— for each share.⁵

The court instructs the jury that the point at issue between the two parties is whether or not the contract was a definite, limited contract—limited to the payment of ——— installments by the plaintiff, and the absolute obligation of the defendant arising thereon to pay him \$——— a share; or whether it was, on the other hand, a contract by which the plaintiff was to keep on paying until by the books of the association or in some other way—whatever way they arrived at such conclusion—until his shares would arrive at the value of \$——— each. The certificate of stock and the other matters that enter into the contract, as specifically set forth in the certificate, are to be taken in connection with whatever representations the defendant actually made at the time the contract was entered into; and if it did make any representations in addition to those matters which led to the making of a different contract from that expressed by its by-laws and its articles of incorporation, that special contract governs rather than the general contract which would result from its by-laws and articles of incorporation in connection with the certificate of stock. It is for you to determine in the first

5—Williamson v. Eastern Building S. C. 390, aff'd 189 U. S. 122, 47 L. & Loan Ass'n of Syracuse, N. Y., 62 Ed. 735.

instance, whether or not this defendant did induce the plaintiff by literature, by written or printed representations, or by verbal representations in addition to those contained in its certificate of stock and by-laws and other matters mentioned in the certificate to enter into this contract; whether it induced him to believe that it was a contract for a limited number of payments, and that upon the completion of those payments it would be a fulfillment by the plaintiff of his side of the contract, and an absolute obligation on the part of the defendant to pay the amount of \$—— a share. And if the evidence in the case satisfies you that the defendant did hold out such representations, then those representations are binding on the defendant and fix the terms of the contract.⁶

The court instructs the jury that if you believe from the evidence that the plaintiff has established his contract, and it does not appear to be an unreasonable or immoral contract, in which case the court would not allow him to set it up, he is entitled to recover on it, unless the defendant has shown something that would defeat it; and it only remains for you to determine whether or not he has established his contract. He is bound to prove it by the preponderance of the evidence; and if he has so established it, then it remains for you to determine what your verdict will be in his favor, unless the defendant may have shown some matter which goes to defeat his right. The plaintiff is suing on a specific, definite claim, which must be the amount which he claims or nothing at all. He claims that his stock is paid-up stock, that he is not suing to recover from the defendant an amount due on stock which was not paid up. He claims that his stock was fully matured or paid up, and that he is entitled on the terms of the contract to have the full amount due on his contract—less the offset of the loan which you have heard mentioned. So your verdict must be in favor of the plaintiff for the full amount he claims, or else in favor of the defendant. There is no ground for you to give a compromise verdict, to give him

6—Williamson v. Eastern Building & Loan Ass'n of Syracuse, N. Y., 62 S. C. 390, aff'd 189 U. S. 122, 47 L. Ed. 735.

a few hundred or a greater number of dollars, but you must either give the plaintiff the full amount he claims or give a verdict in favor of the defendant.⁷

⁷—Williamson v. Eastern Building & Loan Ass'n of Syracuse, N. Y., 62 S. C. 390, aff'd 189 U. S. 122, 47 L. Ed. 735.

CHAPTER LXXVIII.

BURGLARY.

I. NATURE AND ELEMENTS.

- § 1333. In general.
- § 1334. — Missouri.
- § 1335. — North Carolina.
- § 1336. — Texas.
- § 1337. Intent—Necessity of felonious intent.
- § 1338. — Illinois.
- § 1339. — New York.
- § 1340. — Texas.
- § 1341. Same—Criminal capacity.
- § 1342. Same—Belief of ownership of property.
- § 1343. Same—Intent to restore property to owner.
- § 1344. Same—Necessity of execution.
- § 1345. Same—Time of intent—At breaking and entering.
- § 1346. Premises—Character—One end of room partially divided by partition.
- § 1347. Breaking and entering—In general.
- § 1348. Same—Necessity for.
- § 1349. Breaking—What constitutes—Actual fracturing not necessary.
- § 1350. Same—Same—Entry through open door.
- § 1351. Same—Same—Entry through open window.
- § 1352. Same—Same—Unlocking or opening door.
- § 1353. — Iowa.
- § 1354. — Missouri.
- § 1355. Same—Same—Entering public building by usual method.
- § 1356. Same—Same—By employee out of hours of duty.
- § 1357. Entry—Necessity for.
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II. DEGREES AND INCLUDED OFFENSES.

- § 1359. Degrees—Burglary in first degree.
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III. PERSONS LIABLE.

- § 1361. Persons acting in concert.
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- § 1363. — Georgia.
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IV. DEFENSES.

- § 1365. Innocent acquisition of property from another.
- § 1366. Consent of owner.
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V. PARTIES DEFENDANT.

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- § 1371. Entry.
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VII. EVIDENCE.

- § 1376. Intent—Inference from evidence as a whole.
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- § 1381. — Illinois.
- § 1382. — Iowa.
- § 1383. Same—Burden of proof of identity of property.
- § 1384. Same—Explanation—Burden.
- § 1385. Same—Effect of explanation.
- § 1386. Same—Doubt as to manner of acquisition—Effect.
- § 1387. Same—Breaking and larceny concomitant—Effect.
- § 1388. Same—Burglary and larceny.
- § 1389. Other offenses.
- § 1390. Testimony of accomplices.
- § 1391. Admissions and confessions.

VIII. VERDICT.

- § 1392. Requisites—Specification of degree.

IX. PROSECUTION FOR POSSESSION OF BURGLAR'S TOOLS.

- § 1393. Evidence—What constitutes possession.

Cross-Reference.

Matters pertaining to law of crime in general, see CRIMINAL LAW.

I. NATURE AND ELEMENTS.

§ 1333. In general.

§ 1334. — Missouri.

The court instructs the jury that if you believe and find from the evidence that the defendant, at and in the county of ——— and state of ———, on the night of the — day of ———, —, did wilfully and unlawfully break into and enter a certain storehouse, and if the said storehouse was at the time and place aforesaid in the possession of the ——— Company, a corporation organized under the laws of the state of ———, and if said defendant broke into and entered the said store building, at the time and place aforesaid, with the intent then and there to take, steal, and carry away, and convert to his own use, and deprive the owners of the use thereof, any valuable goods, wares, and merchandise situate, kept and deposited in the said building, then you will find him guilty of burglary and assess his punishment at imprisonment in the penitentiary for a term not less than — years.¹

§ 1335. — North Carolina.

The court instructs the jury that before defendant can be convicted of burglary, the state must prove (1st) the breaking (2nd) the entering (3rd) that the house broken and entered into was a dwelling house (4th) that the breaking and entering was in the nighttime (5th) that the breaking and entering was with the intent to commit a felony. In all these particulars, there must be proof satisfactory to the minds of the jury, and if the state fails upon any one point, the defendant is entitled to acquittal.²

§ 1336. — Texas.

The court instructs the jury that the offense of burglary in the nighttime is constituted by entering a house by force in the nighttime with the intent of committing the crime of theft.³

1—State v. Sprague, 149 Mo. 409.

3—Phillips v. State (Tex. Cr.

2—State v. Whit, 4 Jones (N. C.) App.) 45 S. W. 709.

§ 1337. Intent—Necessity of felonious intent.**§ 1338. — Illinois.**

The court instructs that though the jury believe from the evidence that defendant broke into and entered the dwelling house mentioned in the indictment in the nighttime, and that such breaking and entry were unlawful, he is not guilty of burglary, unless at the time of such breaking and entry, he entertained an intention to commit a felony in such dwelling house.⁴

§ 1339. — New York.

The court instructs that the felonious intent to commit a crime within a building is a separate element of the offense and in order to convict of a burglary there must be proof of some fact or circumstance or some act or declaration of the defendant in addition to the proof of a mere breaking and entering from which the jury can find such an intention.⁵

§ 1340. — Texas.

The court instructs the jury that if you believe from the evidence that the defendant entered said house with the intention of getting a drink of water, or if you believe from the evidence that the doors to said house were open when he entered said house, if he did enter the same, or if you believe from the evidence that at the time the defendant entered said house, if he did enter it, he did not have the specified intent to commit the crime of theft, or, if you have a reasonable doubt thereof, then you will acquit the defendant and return a verdict of not guilty.⁶

§ 1341. Same—Criminal capacity.

The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendants did, in _____ county, _____, on or about the _____ day of _____, _____, by force or breaking at night, or by breaking in daytime, enter a house occupied by A, with the intent fraudulently to take corporeal personal property situated in said house and belonging

4—Price v. People, 109 Ill. 109.

6—Overstreet v. State, — Tex. Cr.

5—People v. Marks, 4 Park Cr. (N. Y.) 153. App. —, 150 S. W. 899.

to said A, from his (A's) possession, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of themselves, the defendants, and that defendants, at the time of the commission of such act, had discretion sufficient to understand the nature and illegality of such act, then you will find the defendants guilty as charged in the indictment. Otherwise, if you do not find each and all said facts to be so established, you will acquit the defendants.⁷

§ 1342. Same—Belief of ownership of property.

The court instructs the jury that, in order to obtain at your hands a verdict of guilty, the state must establish by competent evidence to your satisfaction beyond a reasonable doubt every essential element of the crime of burglary. One of the essential elements of the crime of burglary, as charged in this indictment, is that, after breaking by force the car described in the indictment, under circumstances such as would constitute a burglarious breaking under the instructions already given you, the defendant entered into such car with intent to steal the coal therein contained. This intent to steal thus required to be established by the state to your satisfaction beyond a reasonable doubt on the part of the defendant at the time of breaking and entering the car must have been the intent on the part of the defendant to take, steal, and carry away the coal in said car contained, without the consent of the owner, and with the intent to deprive him thereof; such taking, stealing, and carrying away to be accomplished by fraud and stealth. If, therefore, the defendant's intent at the time of entering said car, or at the time of forcibly breaking the same, if you find he did so forcibly break the car under the instructions already given you, was not to steal the coal therein contained, but that such entry was made under the belief that he had a right to take the coal, or if you have a reasonable doubt that it was his intent to steal the coal, then your verdict must be not guilty.⁸

⁷—Ragsdale v. State, 61 Tex. Cr. App. 145. Burglary by minors.

⁸—State v. Tough, 12 N. D. 425.

§ 1343. Same—Intent to restore property to owner.

The court instructs the jury that if the door was open when defendant entered the house, he would not be guilty, and in that event you will acquit him. And you are further instructed that, if defendant picked up the property described and testified to, and did not enter the house, whether opened or closed, for the purpose of theft, but to return the property to the house, he would not be guilty of burglary.⁹

§ 1344. Same—Necessity of execution.

The court instructs the jury that to constitute the crime of burglary, it is necessary that the breaking and entering should be with the intent to commit a felony within the building, but it is not necessary that such intent should be carried out, and if the jury are convinced by the evidence that defendant did break and enter into the dwelling house mentioned in the indictment, and that he then and there entertained an intent to commit a felony therein, the jury should convict, though as a matter of fact, no crime of any kind was actually committed by defendant within such dwelling.¹⁰

§ 1345. Same—Time of intent—At breaking and entering.

The court instructs that in order to constitute burglary, both the breaking and the entering must have been made with the intention to commit a crime, and though the jury believe that defendant unlawfully broke and entered a dwelling house in the nighttime, and that at the same time during said breaking and entering, he entertained a design to commit a felony within such dwelling house, or even if he actually did commit such felony, the offense is not burglary, if such design was not formed until after he had broken into and entered the house or if he committed the breaking without any such design, and thereafter with such design entered through the breach which he had previously made.¹¹

9—Fields v. State (Tex. Cr. App.),
74 S. W. 309.

10—Harvick v. State, 49 Ark. 514.

11—State v. Moore, 12 N. H. 42.

§ 1346. Premises—Character—One end of room partially divided by partition.

The court instructs the jury that if such room has a door at each end of it by which it may be entered, but there is an obstruction across the room such as hay or other substance of such height and reaching so near the roof as to make it necessary to climb or crawl over it in order to pass from one of the rooms to the other, then each end of such room is in law a separate "house" within the meaning of the law, and the entry into such room by breaking or prizing open the door which gave immediate entrance thereto would, without the consent of the person having the occupancy of same, and with intent to commit theft of property therein, be burglary.¹²

§ 1347. Breaking and entering—In general.

The court instructs the jury that if they believe from the evidence that the warehouse of A was a room of the same building in which the warehouse of B was situate, and that said rooms were separated by a board partition, and if you further believe that the outer doors of said building were closed and locked, and if you further believe that the defendants entered said building by means of opening either outside door of said building, with the intent to take, steal, and carry away any of the goods, wares, and merchandise in said building stored, such entrance would constitute burglary, whether it was directly in or to that part occupied by A, or whether the entrance was first made through the part occupied by B.¹³

§ 1348. Same—Necessity for.

The court instructs the jury that even if they should believe from the evidence, beyond a reasonable doubt, that the defendants feloniously took and carried away the property described in the indictment, and that such property was the property of the ——— Company, such facts alone could not authorize a conviction under the first count of the indictment. In order to

12—Kinney v. State, — Tex. Cr. App. —, 148 S. W. 783.

13—State v. Peebles, 178 Mo. 475.

constitute the offense of burglary, as defined in that count, there must be the wilful, malicious and forcible breaking and entering the car with intent to steal, as defined in the instructions on the part of the people.¹⁴

§ 1349. Breaking—What constitutes—Actual fracturing not necessary.

The court instructs the jury that when it is said that a breaking of a dwelling house is necessary to constitute burglary, the word "breaking" is used in a technical rather than a literal sense and it is not necessary that any part of the dwelling house be actually fractured to constitute a breaking, but the removal or putting aside of some part of the house which is relied upon as security against intrusion, as by the opening of a closed door which is not locked or by the removal of a netting from an open window, is sufficient.¹⁵

§ 1350. Same—Same—Entry through open door.

The court instructs the jury that even if from the testimony you should find that defendant took the property as charged in the indictment, and you further find that said property was taken without and against the consent of ———, yet if you find and believe from the testimony that the door of the granary was open, and defendant made the entry through the open door, or if you have a reasonable doubt as to whether the door was open and the entry was made, then in any event, you should acquit defendant.¹⁶

§ 1351. Same—Same—Entry through open window.

The court instructs the jury that to constitute burglary, there must be an entry effected by means of a breaking of the dwelling house itself, and an unlawful entry through an open door or window, does not constitute burglary.¹⁷

14—Lyons v. People, 68 Ill. 271.

16—Duke v. State, 42 Tex. Cr.

15—Com. v. Stevenson, 8 Pick.

App. 3.

(Mass.) 354; Dennis v. People, 27 Mich. 151.

17—McGrath v. State, 25 Neb. 780.

§ 1352. Same—Same—Unlocking or opening door.**§ 1353. — Iowa.**

The court instructs the jury that where the outer door of a building was open and a screen door was closed, but not fastened, the pushing open of such screen door, whereby entry into the house was effected, is a sufficient breaking to constitute the entry a burglarious one, if it was made with the intention required by law.¹⁸

§ 1354. — Missouri.

The jury are instructed that the mere unlocking or opening of a door is a breaking, within the meaning of the statute.¹⁹

§ 1355. Same—Same—Entering public building by usual method.

The court instructs that if the defendant had a right to enter the building, as where he was one of the occupants thereof, or where the building was one open to the general use of the public, it is not a burglarious breaking for him to enter such building in a usual and ordinary manner, though the entry was made with an intention then entertained to commit a crime in such building, and not for any legitimate purpose.²⁰

§ 1356. Same—Same—By employee out of hours of duty.

The court instructs that though defendant was employed during the daytime, at the building, with the entry of which he is charged, and had during the day in the course of his employment, the full right to enter there, if he had during the nighttime no duties about the building, and was not called upon or authorized in the course of his employment to enter in the nighttime, his entry during the nighttime with the intent to commit a crime would be a burglarious entry, though it was effected by means of a key intrusted to him in the course of his employment.²¹

18—State v. Conners, 95 Iowa 485.

21—Lowder v. State, 67 Ala. 39.

19—State v. Tutt, 63 Mo. 595.

20—State v. Moore, 12 N. H. 42;

Clark v. Com., 25 Gratt. (Va.) 908.

§ 1357. Entry—Necessity for.

The court instructs that to constitute the crime of burglary, there must be not only a breaking, but an actual entry into the building.²²

§ 1358. Same—What constitutes—Entry of part of body.

The court instructs that to constitute an entry it is not necessary that the defendant should have brought his entire body within the building, but if any part of his body, even a finger, be brought within the interior of the building, it is sufficient to satisfy the requirements of the law.²³

II. DEGREES AND INCLUDED OFFENSES.**§ 1359. Degrees—Burglary in first degree.**

The court instructs the jury that if the defendant entered the building in question in the nighttime—that is, between sunset of one day and sunrise of another day—with the intent to commit larceny, the jury will find him guilty of burglary in the first degree.²⁴

The court instructs the jury that if they are satisfied from the evidence herein beyond a reasonable doubt that the defendant committed the crime charged in the information herein, in the manner and form therein charged, and that he entered the said house and building with the felonious intent as charged, in the nighttime, during the period between sunset and sunrise, then your verdict should be burglary of the first degree.²⁵

§ 1360. Included offenses—Larceny.

The court instructs the jury that under an information for burglary, the accused may be found guilty of larceny; and if, in this case the jury are not satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the burglary as charged in the information, still, if the jury believe from the

22—State v. McCall, 4 Ala. 643, 39 Am. Dec. 314.

23—Com. v. Glover, 111 Mass. 395.

24—People v. Perry, 144 Cal. 748, 78 Pac. 284.

25—People v. Higgins, 9 Cal. App. 267, 98 Pac. 683.

evidence, beyond a reasonable doubt, that the defendant did steal the goods described in the information from the possession of the said ———, then the jury may, under this information, find the defendant guilty of larceny.²⁶

III. PERSONS LIABLE.

§ 1361. Persons acting in concert.

The court instructs the jury that where two or more defendants are charged jointly with the commission of a crime, it is not necessary that it be shown that both of the defendants, or either one of them, when tried alone, actually broke and entered the building or took the property. It is sufficient if it be shown that the joint defendants were acting together for that purpose, and if either one of them, while so acting together for that purpose, actually broke and entered the building with the intention of stealing therein, then all of the said defendants would be guilty of the crime, and either one of them may be prosecuted alone therefor.²⁷

§ 1362. Persons aiding and abetting.

§ 1363. — Georgia.

The court instructs the jury that the accused might be convicted if it appeared either that he actually broke and entered the place of business with intent to steal, or that he was present aiding and abetting some one else in the breaking and entering with like intent.²⁸

§ 1364. — Texas.

The court instructs the jury that if you should believe from the evidence that A's house was burglarized at the time and place and in the manner alleged in the indictment, and if you should further believe that B acted as a principal in committing such burglary, if any was committed, then I instruct you that you cannot convict defendant, unless you further believe, beyond a reason-

26—Ferguson v. State, 52 Neb. 432,
66 Am. St. Rep. 512.

28—August v. State, 11 Ga. App.
798.

27—State v. Tucker, 36 Ore. 291,
51 L. R. A. 246, 61 Pac. 894.

able doubt, that defendant was present and knew the unlawful intent of B, and aided, encouraged, and advised him or agreed with him to commit such burglary.²⁹

IV. DEFENSES.

§ 1365. Innocent acquisition of property from another.

The court instructs the jury that if the defendant was not present when and where the house was broken and the property was taken, if you find it was so broken, but he got the same from some other person, he would not be guilty, and if you so find, or if you have a reasonable doubt thereof, find him not guilty.³⁰

§ 1366. Consent of owner.

The court instructs the jury that mere knowledge by the owner that the building was to be burglarized, without taking steps to prevent the same, would not be a consent to the commission of the offense, but that if the building was burglarized by the procurement and consent of the owner the defendant would not be guilty.³¹

§ 1367. Entry by consent of watchman.

The court instructs the jury that if defendant was admitted to the house by the watchman, or any other person in authority, and he by reason of the permission and consent of said watchman entered said house, he would not be guilty as charged; and if you so find, or if you have a reasonable doubt thereof, find the defendant not guilty.³²

§ 1368. Building inadequately secured against intrusion.

The court instructs that if the jury believe from the evidence that defendant entered the building mentioned in the indictment by breaking into the same, as breaking has been defined to you by the court, the fact that the owner or his servants might by the use of reasonable care have so secured the building with its fastenings that no such breaking or entry would have been possible, and that defendant's entry was made possible only by the

29—Glenn v. State (Tex. Cr. App.),
76 S. W. 757.

30—Scott v. State, 53 Tex. Cr. App.
332.

31—State v. Currie, 13 N. D. 655,
69 L. R. A. 405, 112 Am. St. Rep. 687.

32—Shelton v. State, 52 Tex. Cr.
App. 611.

carelessness of the owner in failing to fasten his doors, is no defense.³³

§ 1369. Entrapment.

The court instructs the jury, for the state, that if they believe from the evidence in this case beyond every reasonable doubt that the defendants, either alone or in conjunction with A, broke and entered B's, and the defendants, upon the turning on of the light, were in the act of wilfully taking, stealing, and carrying away the goods mentioned in the testimony, they are guilty as charged, regardless of who actually broke open the store, and regardless of the fact that B had agreed to pay A for assisting in the detection and apprehension of the defendants.³⁴

V. PARTIES DEFENDANT.

§ 1370. In general.

The court instructs the jury that if you find from the evidence that there were others connected with or participated in the burglary jointly with the defendant, then you would be warranted in finding the defendant guilty. The evidence must satisfy you that the defendant is guilty individually or in conjunction with others, and that there is no other reasonable hypothesis that any other person or persons committed the crime.³⁵

VI. ISSUES AND PROOF.

§ 1371. Entry.

The court instructs the jury that if one having the right to do so goes into a building, that would not be breaking and entering, no matter what his object was in going into the building. One's right to enter a building may be general or limited. If general, then, he may go into the building at any time or for any purpose and the entry would not be wrongful; but if the right is limited, then an entry would be wrongful unless made for a purpose for which he had been given the right. It will be your duty to determine from the evidence in this case whether the right which the defendant had in going into the building was general or

33—Lyons v. People, 68 Ill. 271.

35—Johnson v. State, 53 Neb. 103.

34—Dees v. State, 89 Miss. 754.

limited. If you find that the defendant's right to enter was general, that is, not restricted to purposes of his employment, then he could not be found guilty of burglary, no matter what his object may have been in going into the building. In order to prove the defendant guilty as charged in the information, it will be necessary for the state to show that the entry was wrongful by the evidence, and beyond a reasonable doubt, and to show that it was wrongful the state must show that the defendant's right to enter the building was not a general and unrestricted right, but one that was limited; and they must further show that the defendant entered the store on ———, for some purpose other than that for which he had a right to enter.³⁶

§ 1372. Place and time of offense.

The court instructs the jury that you must find from the evidence, beyond a reasonable doubt, that the offense was committed in ——— county, —, within — years prior to the filing of the information.³⁷

§ 1373. Identity of property stolen.

§ 1374. — Texas.

The court instructs the jury that if there was a reasonable doubt whether the property charged to have been stolen, and that said to have been found in the house where the defendant lived, was the property of A, they should acquit the defendant, or if they had a reasonable doubt whether he got the property from B or from anybody else, other than the A residence, then they should acquit.³⁸

§ 1375. — West Virginia.

The court instructs the jury that one of the essential questions involved in this case is the identity of the wool alleged in the indictment to have been stolen; and, before the jury can convict the prisoner, the identity of the wool must be proved beyond all reasonable doubt.³⁹

36—State v. Corcoran, 82 Wash. 44, 143 Pac. 453.

37—Presley v. State, 63 Fla. 37.

38—Hines v. State (Tex. Cr. App.), 42 S. W. 299.

39—State v. Belknap, 39 W. Va. 427.

VII. EVIDENCE.

§ 1376. Intent—Inference from evidence as a whole.

The intent with which an act is committed being but a mental state of the party accused, direct proof of it is not required, but it is generally derived from and established by the attendant facts and circumstances as shown by the evidence; so in this case the intent with which defendant entered the dwelling house of G if you find that he did enter it, must be determined by you from all the evidence in the case.⁴⁰

§ 1377. Same—Inference from fact of entry and absence of lawful motive.

The court instructs that though the intent to commit a felony within a dwelling house entered is an essential of the offense, existence of such intention may be and usually must be inferred from the circumstances and from the conduct of the person making the entry. The commission of an offense is strong but not conclusive evidence that the entry was for that purpose, and on the other hand an intention to commit an offense may be inferred from the circumstances of the entry and from the absence of other motives therefor, though no felony was in fact committed.⁴¹

§ 1378. Possession of property stolen—Effect.**§ 1379. — California.**

The court instructs the jury that they might consider as a circumstance, if unexplained, tending to prove guilt, the possession of the stolen property by the defendant recently after the alleged commission of the offense, if you find any such property to have been in his possession.⁴²

§ 1380. — Georgia.

The court instructs the jury that if it be shown by the evidence in this case, beyond a reasonable doubt that some one

40—State v. Maxwell, 42 Iowa 210.

42—People v. O'Donnell, 16 Cal.

41—Steadman v. State, 81 Ga. 736;

App. 716, 117 Pac. 933.

Com. v. Hope, 22 Pick. (Mass.) 1;

State v. Boon, 13 Ired. (N. C.) 244,

57 Am. Dec. 555.

did break and enter the pressing-club house of ———, in this county, and about the time charged in this bill of indictment, and it was his place of business, and you believe that there were valuable goods contained in that house at the time, and that this breaking and entering was done with intent to steal, or if, after breaking and entering, the parties did steal therefrom goods of the value as here charged and as here described, and if it be shown that recently thereafter this defendant was found in possession of those goods, or a portion thereof, so stolen from the house, if there were any stolen, then, that would be a circumstance from which you would be authorized to find him guilty of the offense of burglary, unless he made an explanation of his possession of those goods consistent with his innocence in your opinion of all of which you are to be the judges.⁴³

§ 1381. — Illinois.

The court instructs the jury that possession of stolen property recently after a larceny has been committed is *prima facie* evidence that the party in whose possession the same is found committed the larceny, and if a burglary was committed at the same time and in connection with the larceny such possession is also *prima facie* evidence that the party in possession committed the burglary, and that such possession, if unexplained, would warrant a conviction.⁴⁴

§ 1382. — Iowa.

The court instructs the jury that if you find from the evidence, beyond a reasonable doubt, that on or about the ——— of ———, ———, a building belonging to or in the possession or occupancy of A, and situated in ——— county, ———, was broken into and entered, and that personal property was stolen therefrom, and you further find that within a few hours thereafter the property stolen was in the possession of the defendants, you will, in such case, be warranted in concluding and finding that such property was stolen by the defendants from said building by breaking and entering the same, unless the

43—McElroy v. State, 125 Ga. 37.

44—People v. Everett, 242 Ill. 628.

facts and circumstances disclosed or the evidence introduced by the state or the defendants, raises in your mind a reasonable doubt as to whether the defendants did not come honestly into the possession of such property. If such reasonable doubt has been raised in your minds by the testimony and facts and circumstances introduced and appearing in the case, then you should not act upon said presumption in convicting the defendants, and should not convict the defendants, unless their guilt has otherwise been proven, as you are directed it must be.⁴⁵

§ 1383. Same—Burden of proof of identity of property.

The court instructs the jury that if parties are found in possession of goods recently stolen by breaking into a building, and which have been stolen by breaking into a building, it causes a presumption that such parties have stolen such goods by breaking into a building. This presumption may be rebutted by the defendant's explaining such possession. The burden is on the state to prove, and it must prove, that such goods were stolen from a building, before such presumption exists. If you find from the evidence beyond a reasonable doubt that in the month of _____, _____, a building belonging to _____, and situated in _____ county, was broken into, and that property was stolen therefrom, and you further find that within a few hours thereafter the property so stolen was found in the possession of the defendant, you will, in such a case, be warranted in concluding that the property was stolen by defendant from said building by breaking and entering the same, unless the facts and circumstances disclosed by the evidence raise in your minds a reasonable doubt as to whether he did not come honestly into such possession.⁴⁶

§ 1384. Same—Explanation—Burden.

The court instructs the jury that the exclusive and unexplained possession of stolen property recently after a burglary, in the commission of which a theft was perpetrated, may raise

45—State v. Ryan, 113 Iowa 536.

46—State v. LaGrange, 94 Iowa 60.

See State v. Rivers, 68 Iowa 611.

a presumption of fact that the party in possession is the burglar, where the burglary has been established beyond a reasonable doubt; and the burden would be upon the person in whose recent possession the goods, if stolen, were found, to explain such possession. It is a presumption arising out of fact, and is therefore a matter for the jury; what would be recent possession is a matter for the jury, as is the satisfactoriness of the explanation. The presumption being one of fact, before it arises, the state must have established the facts from which the inference is drawn beyond a reasonable doubt; and whilst the burden is upon the defendant, if such facts have been established beyond a reasonable doubt, to explain the possession to the jury, such explanation may be drawn from any evidence in the case which demonstrates it, or from the statement of the defendant, if such statement satisfies the jury upon that point.⁴⁷

§ 1385. Same—Effect of explanation.

The court instructs the jury that the mere fact of the defendant having in his possession and disposing of the property alleged to have been stolen; that is, if you are satisfied beyond a reasonable doubt that he had in his possession the property alleged to have been stolen, and attempted to dispose of it—I say that those facts are only circumstances tending to show guilt, but they are not of themselves sufficient to prove that he committed the burglary. And if the defendant has explained satisfactorily how he came into possession of the alleged stolen property, and from such explanation you believe that he did not participate in the burglary, and there is no other evidence connecting him with the crime, then you will return a verdict of not guilty.⁴⁸

§ 1386. Same—Doubt as to manner of acquisition—Effect.

The court instructs the jury that if you find from the evidence, beyond a reasonable doubt, that on or about the _____ of _____, _____, a building belonging to or in the possession or occupancy of _____, and situated in _____ county, _____, was broken into and entered, and that personal

⁴⁷—August v. State, 11 Ga. App. 798.

⁴⁸—People v. Lang, 142 Cal. 482, 76 Pac. 232.

property was stolen therefrom, and you further find that within a few hours thereafter the property so stolen was in the possession of the defendants, you will, in such case, be warranted in concluding and finding that such property was stolen by the defendants from said building by breaking and entering the same, unless the facts and circumstances disclosed, or the evidence introduced by the state on the defendants, raises in your mind a reasonable doubt as to whether the defendants did not come honestly into the possession of such property. If such reasonable doubt has been raised in your minds by the testimony and facts and circumstances introduced and appearing in the case, then you should not act upon such presumption in convicting the defendants, and should not convict the defendants, unless their guilt has otherwise been proven, as you are directed it must be.⁴⁹

§ 1387. Same—Breaking and larceny concomitant—Effect.

The court instructs the jury that possession of goods recently stolen does not in itself create presumption or amount to prima facie proof that the possessor is guilty of breaking and entering the building in which the goods were kept; but if other evidence in the case shows beyond a reasonable doubt that the building was broken and entered by some one, that the theft of the goods was accomplished at the time and by means of the breaking and entering, proof of possession unexplained, or in the absence of circumstances raising a reasonable doubt as to whether the possession of the goods had been acquired otherwise than by the crime charged, is sufficient to warrant a conviction.⁵⁰

§ 1388. Same—Burglary and larceny.

The court instructs the jury that the recent possession of stolen property raises the presumption that the person in possession is guilty, and throws upon him the burden of rebutting this presumption, and explaining his possession in one of the modes

49—State v. Ryan, 113 Iowa 536.

50—State v. Donavan, 125 Iowa

hereafter declared; otherwise, this presumption becomes conclusive. And in this case, if you believe from the evidence that the store of A, within the time and at the place specified, was entered under such circumstances as constituted burglary, as before defined; that certain of A's goods were then stolen and carried away therefrom; and that recently thereafter (and, determining whether the time was recent, you will have regard to the nature, character, and situation of the goods) that the goods, or any part thereof, were found in the possession of the defendant,—the law presumes him guilty of both the burglary and the larceny, and casts upon him the burden of accounting for such possession to the satisfaction of the jury, that he was not the guilty party, or by the evidence of the attending circumstances, or by evidence of the character and habits of life of the defendant, or by evidence which satisfactorily explains such possession on one or the other of these modes, you should find him guilty of the burglary charged, and may also, in addition thereto, find him guilty of the larceny, if the goods found in his possession were any of those described in the indictment. . . . You are also instructed that, in determining the guilt or innocence of the defendant, you should take into consideration all of the facts and circumstances detailed in the evidence in reference to his possession of the said goods, and also all the other facts and circumstances shown in evidence, and if, from all the evidence, you believe him guilty beyond a reasonable doubt, as afterwards explained, you should so find. . . . Though you may believe from the evidence that the defendant was found in the recent possession of stolen goods, after the time of the alleged burglary and larceny, the law does not from that fact alone presume him conclusively guilty. It only raises a presumption of guilt, which becomes conclusive if unexplained by the defendant by evidence showing that he was not the guilty party, or by all the attending circumstances accompanying his possession, or by evidence of his good character and habits of life, or by any other facts or circumstances which satisfactorily explain his possession, or show he could not be the guilty party. And in this case, if you believe, from the evidence, A's store was entered, and certain goods stolen

and carried away, and that certain of these goods were recently thereafter found in the possession of the defendant, yet, if you believe either one of the following facts has been shown by the evidence, you will find the defendant not guilty, notwithstanding such recent possession of the stolen property by him: First. That, at the time of the commission of the burglary and larceny (if you believe it was committed by some one), he was not present, either assisting, aiding, or abetting, but that he was elsewhere; that is, if he has established what is termed in law an "alibi." Second. If you believe, from all of the evidence in the case of the attending circumstances surrounding and attending his possession, such possession has been explained. Third. By evidence of the good character and habits of life of the accused, if you believe from the evidence he has established the same. Fourth. Or if the other evidence in the case satisfactorily explains to you such possession. Evidence of good character is no excuse for the commission of crime, if you believe that, notwithstanding such character, the defendant is the guilty party; but, in determining the question of whether or not he is guilty, it is proper for you to consider such evidence. As to the defense of an alibi—that is, that the defendant was elsewhere, and did not participate in the commission of the offense,—you are told it is as legitimate and valid as any other defense, and, in the very nature of things, is the only possible defense that an innocent person can often make. Nor is the defendant bound to establish this defense beyond a reasonable doubt; but if, from the whole evidence, you have a reasonable doubt of his presence at the commission of the offense, as before explained, you must give him the benefit of that doubt and acquit.⁵¹

§ 1389. Other offenses.

The court instructs the jury that we have permitted to be introduced into this case, testimony of other offenses alleged to be committed; they were not admitted for the purpose of proving the offense or offenses in this case which are burglary and larceny, but for the purpose of establishing identity; of showing

51—State v. Bryant, 134 Mo. 246.

that the act charged was intentional and willful, and not accidental; of proving motive; of showing guilty knowledge and purpose and to rebut any inference of mistake.⁵²

§ 1390. Testimony of accomplices.

The court instructs the jury that a conviction cannot be had upon the testimony of an accomplice, even though fully believed to be true, and fully proving guilt, unless corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient, if it merely shows the commission of the offense. An accomplice, as the word is here used, means any one connected with the crime committed, either as principal offender, as an accomplice, as an accessory, or otherwise. It includes all persons who are connected with the crime by unlawful act or omission on their part, transpiring either before, at the time, or after the commission of the offense, and whether or not he was present and participated in the commission of the crime. If the offense was committed, A was an accomplice, and, if B knew the goods left at her house had been stolen and concealed the same, then she was an accomplice, and in such case her testimony cannot be received as in any wise corroborating that of A, but you will wholly disregard her testimony. If you find that she was not an accomplice, you will take her evidence for what you may deem it worth. If the testimony of A is not corroborated by other evidence tending to show that defendant was at the store and agreed to the entry therein, you must acquit.⁵³

§ 1391. Admissions and confessions.

The court instructs the jury for the defendant that a conviction of said defendant will not be warranted alone on the confession or admission of the defendant of having stolen the gun. It devolves on the state to show by satisfactory testimony beyond every reasonable doubt to the jury, not only that a crime of burglary was committed, but also the state must connect the

⁵²—Com. v. Griffin, 42 Pa. Super. Ct. 597.

⁵³—Criner v. State, 53 Tex. Cr. App. 174.

defendant by sufficient evidence with the commission of the crime.⁵⁴

VIII. VERDICT.

§ 1392. Requisites—Specification of degree.

The court instructs the jury that although you cannot, under the information, find the defendants, or either of them, guilty of any offense other than burglary, it would be somewhat difficult to furnish you with the complete form of every possible verdict at which, according to your view of the evidence, you may arrive. The court will therefore furnish you mere blank forms. Upon one of such forms you will formulate your verdict, and your foreman will sign it. You will be careful to dispose of the whole case, observing that there are two defendants, and if you find either or both of them guilty of burglary you will specify whether in the first or second degree. With proper care, you will probably be able to frame a verdict, but, should you need further instruction, you may request the officer in charge of you to return you to the court room for such instruction.⁵⁵

IX. PROSECUTION FOR POSSESSION OF BURGLAR'S TOOLS.

§ 1393. Evidence—What constitutes possession.

The court instructs the jury that the government must show that each one of the defendants had possession of these instruments. That doesn't mean that the government must show that each man had his hand on them; it doesn't mean that. It does not mean that each man had them in his own room, the special room that he occupied for that lodging; it doesn't mean that. But if these men were all living here, occupying this apartment in this house that was their home, and the articles were found in the house, in the home where all the men lived, that would be sufficient possession within the meaning of the indictment.⁵⁶

54—Richardson v. State, 80 Miss. 115.

56—Com. v. Johnson, 199 Mass. 55.

55—People v. Brady (Cal.), 65 Pac. 823.

CHAPTER LXXIX.

CANCELLATION OF INSTRUMENTS.

§ 1394. Right to relief—Fraudulent procurement of possession of deed.

§ 1395. Conditions precedent—Offer to restore defendant to status quo.

§ 1396. Relief awarded—Cancellation and recovery of consideration.

§ 1394. Right to relief—Fraudulent procurement of possession of deed.

The court instructs the jury that if they believe from the evidence before them that plaintiff, A, executed the deed described in her petition, and that she placed the same in possession of B to be placed with other papers and documents belonging to plaintiff in the _____ Bank of _____ for safe-keeping, and that at the time she placed said deed in the custody of B she did not intend to surrender control and dominion over said deed, and that defendant C obtained possession of said deed without the knowledge or consent of plaintiff, then they should find a verdict for plaintiff.¹

§ 1395. Conditions precedent—Offer to restore defendant to status quo.

The court instructs the jury that in order to warrant the plaintiff to rescind, he must have acted promptly upon the discovery of the misrepresentations, if any, so made, and should thereupon have tendered and offered to reconvey the land back to the defendants, and offered to restore them to the same position they were in before the sale of the land to the plaintiff. If you find that he did not offer to restore the land upon discovering the land was not in the condition as represented, if in fact it was not as represented, or if you shall find that there were misrepre-

1—Gatt v. Shive (Tex. Civ. App.),
82 S. W. 303.

sentations as to its quality and kind, made to plaintiff by A when he sold the land to plaintiff, and upon learning of such misrepresentations the plaintiff did not, within a reasonable time, offer to restore the same and reconvey, then you should find against the plaintiff on the question of rescinding the sale, unless you shall find that the defendant refused to do anything with reference to accepting back the land or possession thereof; and in case you so find, under such circumstances, then plaintiff was not required to make such tender.²

§ 1396. Relief awarded—Cancellation and recovery of consideration.

The court instructs the jury that if you find that plaintiff, under the facts and charge given you, is entitled to a rescission, then you should return a verdict for the plaintiff for a rescission, cancelling all the notes executed by him, and for the cash consideration paid by him, as against A and B, as executrix of the will of C, with — per cent. interest per annum from date of such payment.³

²—Hagelstein v. Blaschke, — Tex. Civ. App. —, 149 S. W. 718.

³—Hagelstein v. Blaschke, — Tex. Civ. App. —, 149 S. W. 718.

